

**Indigenous Difference, Indigenous Rights and
Decolonising the Australian Nation-State
The Case for UNDRIP-informed Tripartite Treaties with
First Nations**

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Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university. To the best of the author's knowledge, it contains no material previously published or written by another person, except where due reference is made in the text.

Richard Wong Maning

July 2021

Acknowledgements

I acknowledge the First Nations of Australia, the traditional owners of the Australian continent.¹ First Nations peoples are the descendants of peoples, who, at the time British settler-colonisation of the Australian continent began, were the owners and occupiers of the continent. Those ancestors were in occupation of the entire Australian continent for millennia before the arrival of the British settler-colonisers in 1788. The ancestors exercised sovereign authority over persons and territory; they were self-determining and self-governing peoples. First Nations peoples are the inheritors of their ancestors' sovereign authority. First Nations peoples insist that, despite being blanketed by settler colonialism, they have never ceded their inherited sovereign authority. They demand recognition of their Indigenous difference and Indigenous rights. They seek to be free from the shackles of colonisation. I pay my respects to their elders, past, present and future.

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¹ In the land where I was born and raised, I belong to an indigenous ethnic minority (the Kadazan of Penampang, Sabah, Malaysia). Sabah was previously called North Borneo – a British colony – before joining Malaya, Singapore, and Sarawak to form the federated nation-state of Malaysia on 16 September 1963.

Abstract

Australian First Nations have been pursuing the decolonisation of the Australian nation-state in the judicial and political arenas since the last century. I contend that the most effective way for First Nations peoples to achieve a decolonised relationship with (and within) the Australian nation-state is to negotiate comprehensive political settlements – by way of tripartite treaties – with the Commonwealth and the relevant State/Territory. I favour the political realm because concerted efforts to pursue First Nations’ decolonisation agenda to date via judicial adjudication on key aspects of First Nations’ rights have been hampered by judicial constraints or settler-colonial impositions. I argue that these tripartite treaties should be premised upon the rights affirmed in the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).² By recognising First Nations peoples’ Indigenous difference and Indigenous rights, UNDRIP constitutes a direct challenge to settler colonialism, settler-colonial impositions, and the assimilationist forces of settler nationalism. UNDRIP, notably for instance, recognises First Nations peoples’ inherent rights to self-determination and self-government. In making this argument, I distinguish my research from much contemporary scholarship on Australia’s First Nations’ struggle to be free from settler colonialism, which has either not foregrounded UNDRIP as a supportive platform for decolonising the Australian nation-state or does so only in a limited way. Ultimately, my assessment of the utility of the judicial and political arenas as fora for decolonising the Australian nation-state is based on the ability of efforts in these arenas to satisfy the minimum rights affirmed to Indigenous peoples in UNDRIP.

Australia’s First Nations have continued to call for decolonisation of the Australian nation-state, asserting their Indigenous difference and Indigenous rights, in the face of settler colonialism. A brief historical overview reveals the long-standing nature of First Nations calls for Australia’s decolonisation.

To assess the utility of the judicial arena as a forum for decolonisation, I examine selected court cases focused on three dimensions of Indigenous difference: First Nations’ sovereignty, First Nations’ cultural heritage and First Nations’ Indigeneity. My examination of court cases focused upon these three dimensions shows that judicial adjudication can contribute to the maintenance of settler-colonial power relations, and supports my contention that the

² United Nations 2008a.

judicial arena is essentially an inappropriate forum for achieving First Nations' decolonisation objective. To assess the utility of the political arena, I examine selected calls for treaty by First Nations peoples in the political realm to provide for a comprehensive restructuring of political, social and economic relationships between Indigenous Australia and the Australian nation-state. My analysis demonstrates that the political arena provides the most promising space for realising First Nations' decolonisation objective and, specifically, that negotiation of UNDRIP-informed comprehensive tripartite political settlements with First Nations is the best route within this. To assist First Nations, the Commonwealth Government and State/Territory Governments in the negotiation of such agreements, I put forward a proforma tripartite treaty with minimum content premised upon the provisions of UNDRIP, First Nations' treaty proposals in Australia, and the British Columbia contemporary treaty-making process in the hopes that it will help foster First Nations' decolonisation objectives.

List of Abbreviations

AAF	Aboriginal-Australian Fellowship
AAL	Australian Aborigines' League
AAPA	Australian Aboriginal Progressive Association
Aboriginal Heritage Committee	Lower Murray Aboriginal Heritage Committee
ADJR Act	<i>Administrative Decisions (Judicial Review) Act 1977</i> (Cth)
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALP	Australian Labor Party
ANTaR	Australians for Native Title and Reconciliation
APA	Aborigines Progressive Association
ATSIC	Aboriginal and Torres Strait Islander Commission
ATSIC Act	<i>Aboriginal and Torres Strait Islander Commission Act 1989</i>
BC	British Columbia
Bridge Act	<i>Hindmarsh Island Bridge Act 1997</i> (Cth)
CAR	Council for Aboriginal Reconciliation
CAR Act	<i>Council for Aboriginal Reconciliation Act 1991</i>
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CLC	comprehensive land claims
Cth	Commonwealth
COAG	Council of Australian Governments
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
FCAA	Federal Council for Aboriginal Advancement
FCAATSI	Federal Council for the Advancement of Aborigines and Torres Strait Islanders
GDP	Gross Domestic Product
Gove Land Rights Case	<i>Milirrpum v Nabalco Pty Ltd</i> (1971) 17 FLR 141
GST	Goods and Services Tax
Heritage Protection Act	<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i> (Cth)
HREOC	Human Rights and Equal Opportunity Commission (now Australian Human Rights Commission)
HWT	The Herald & Weekly Times Pty Ltd
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICJ	International Court of Justice
ICJ Advisory Opinion 1975	International Court of Justice's <i>Western Sahara Advisory Opinion</i>
ILA	International Law Association
ILO	International Labour Organization
ILUA	Indigenous Land Use Agreement
NAC	National Aboriginal Conference
NACC	National Aboriginal Consultative Committee
NFRC	National Federation Reform Council
NSW	New South Wales
RDA	<i>Racial Discrimination Act 1975</i> (Cth)
SAFA	Student Action for Aborigines
SOI	statement of intent
Treaty Process Act	<i>Advancing the Treaty Process with Aboriginal Victorians Act 2018</i> (Vic)
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNPO	Unrepresented Nations and Peoples Organization
WGIP	Working Group on Indigenous Populations

Legal cases

<i>Broome Crocodile Farm Case</i>	<i>Minister of Aboriginal and Torres Strait Islander Affairs v Malcolm McDonald Douglas</i>
<i>Chapman v Tickner</i>	<i>Thomas Lincoln Chapman v The Honourable Robert Tickner</i> [1995] FCA 1068
<i>Coe 1978</i>	<i>Coe v The Commonwealth and Another</i> (1978) 18 ALR 592
<i>Coe 1979</i>	<i>Coe v Commonwealth</i> [1979] HCA 68
<i>Coe 1993</i>	<i>Coe v Commonwealth</i> [1993] HCA 42
Gove Land Rights Case	<i>Milirrump v Nabalco Pty Ltd</i> (1971) 17 FLR 141
<i>Mabo (No 2)</i>	<i>Mabo v State of Queensland (No 2)</i> [1992] HCA 23
<i>Tickner v Chapman</i>	<i>The Honourable Robert Tickner v Thomas Lincoln Chapman</i>
<i>Tickner v Bropho</i>	<i>Robert Tickner v Robert Bropho</i>

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Chapter 1

Introduction:

Indigenous Difference, Indigenous Rights, Settler Colonialism, and Decolonisation

1 Introduction

The central issue that my thesis seeks to address is how Aboriginal and Torres Strait Islander peoples' struggle to be free from settler colonialism can best be achieved. In this thesis, I will refer to Aboriginal and Torres Strait Islander peoples as the "First Nations of Australia" or "First Nations" or "First Nations peoples", as the context requires, except when the term "Aboriginal", "Aborigines" or "Torres Strait Islander" appears in a quoted statement¹. First Nations peoples seek a comprehensive restructuring of their political, social, and economic relationships with the Australian nation-state. Most First Nations peoples seek to have their right to self-determination, including their right to self-government, recognised within the constitutional and governmental framework of the Australian nation-state.² In short, First Nations peoples seek to decolonise the Australian nation-state. Decolonisation in this sense does not preclude First Nations peoples from continuing to enjoy Australian citizenship rights. The struggle of First Nations peoples to be free from settler colonialism is exemplified by their persistence in asserting their Indigenous difference and Indigenous rights, and in their enduring and indomitable resistance to the forces of assimilationist settler-nationalism. The struggle of First Nations peoples to decolonise Australia has occurred in both the judicial and political arenas.

There are two fundamental questions that I seek to answer in this thesis. One, how could First Nations peoples' aspirations to enjoy/exercise their inherent right to self-determination, including their right to self-government, be met within the constitutional and governmental framework of a decolonised Australian nation-state? Two, what would be the most effective and preferable way of achieving the decolonisation of the Australian nation-state? My consideration of these questions is analytically informed by the concepts of "Indigenous difference", "Indigenous rights", "settler colonialism" and the associated notion of "settler-

¹ The use of the term "First Nations", to refer to Aboriginal and Torres Strait Islander peoples, has gained widespread usage only in recent years (Commonground [n.d.]). For consistency, I will also use the expressions "First Nations of Australia", "First Nations", or "First Nations peoples", as the context requires, even in situations before those terms were in general use or recognised.

² For contrary views, see, for example, Churchill 2011, Watson and Venne 2012.

colonial impositions”. I will argue that the most effective and preferable way for First Nations to achieve their decolonisation objective is through the coordinated negotiation and implementation of comprehensive modern tripartite treaties between First Nations and the Commonwealth/States/Territories.

Harry Hobbs and George Williams define a modern treaty with First Nations peoples to mean an agreement that satisfies three criteria (my numbering):³

- [1] [I]t must recognise Indigenous peoples as a polity, distinctive from other citizens of the State on the basis of their status as prior self-governing communities.
- [2] [T]he agreement must be reached by a fair negotiation process conducted in good faith and in a manner respectful of each participant’s standing as a polity.
- [3] [T]he agreement must contain more than mere symbolic recognition; it must recognise or establish some form of decision-making and control that amounts to at least a limited form of self-government.

A modern tripartite treaty would constitute an all-encompassing framework for bringing about a comprehensive restructuring of the social, economic and political relationships between Indigenous Australia and the Australian nation-state. Further, I will argue that the minimum content of a tripartite treaty should be premised on the provisions of the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).⁴ Such treaties would provide legal recognition of the Indigenous difference and Indigenous rights of First Nations peoples. They would enable First Nations peoples to exercise their right to self-determination, including their right to self-government, within the constitutional and governmental framework of the Australian nation-state. They would provide First Nations peoples with a protective legal structure against the assimilationist forces of settler colonialism and settler-colonial impositions.

As can be gathered from the modern treaty-making experience of Canada/British Columbia (BC) (examined in Chapter 7), the fundamental aims of a comprehensive modern treaty between a settler nation-state and its First Nations may be summarised as follows.⁵ A treaty seeks to signify the end of a conflict and a commitment to a new relationship based on

³ Hobbs and Williams 2018a: 14.

⁴ United Nations 2008a.

⁵ British Columbia 2019: 3-5 (Principles); 6-8 (Self-Determination and Jurisdiction). See also Borrows 2006.

peaceful, friendly and respectful coexistence.⁶ A treaty reconciles the pre-existing sovereignty of First Nations with the assumed sovereignty of the nation-state.⁷ A treaty reconciles the inherent titles of First Nations to their lands, territories and resources and the assumed Crown title of the nation-state.⁸ A treaty recognises and continues the inherent Indigenous rights of First Nations.⁹ A treaty recognises First Nations as polities, with authority and capacity to make binding agreements.¹⁰ A treaty recognises the coexistence of the governments, laws and legal systems of the nation-state and the governments, laws and legal systems of First Nations.¹¹ A treaty constitutes recognition by First Nations parties of the legitimacy of the settler nation-state.¹² Thus, a treaty between the Australian nation-state and its First Nations has political and legal values for both parties. Politically and legally such a treaty constitutes a recognition of a regime of peaceful, friendly and respectful coexistence between First Nations peoples and not only the descendants of the British settler-colonisers but also others who have come to make Australia their home.¹³

My thesis aims to critically analyse the decolonisation struggle of First Nations peoples of Australia in both the judicial and political arenas. To assess the utility of the judicial arena as a forum for decolonisation, I examine selected court cases concerning Indigenous rights in Chapters 3, 4 and 5. Chapter 5 deals with a case in which the First Nation applicant won her lawsuit. The case is a manifestation, in the judicial arena, of a contestation of the Indigenous identity of “fair skin” urban dwelling First Nations individuals against the assimilative forces of settler colonialism. It illustrates the strategic value of litigation, in appropriate circumstances, that Lisa Strelein speaks of (noted below).¹⁴ To assess the utility of the political arena, I examine selected decolonisation proposals by First Nations peoples in that arena in Chapter 6. Through

⁶ See also, for example, the treaty between the Canadian Government, British Columbia Government and the Nisga’a Nation (Nisga’a Final Agreement); Davis 2016b: 94-95; Williams and Hobbs 2020: 20.

⁷ See also Nisga’a Final Agreement; Tla’amin Final Agreement; Tsawwassen First Nation Final Agreement; Mansell 2016a: 129; Reid 2016: 159; Williams and Hobbs 2020: 138.

⁸ See also Nisga’a Final Agreement; Tla’amin Final Agreement; Tsawwassen First Nation Final Agreement; Mansell 2016a: 112-113; Williams and Hobbs 2020: 22-23.

⁹ See also Nisga’a Final Agreement; Tla’amin Final Agreement; Tsawwassen First Nation Final Agreement; Mansell 2016a: 128; Reid 2016: 159; Williams and Hobbs 2020: 22.

¹⁰ See also Nisga’a Final Agreement; Tla’amin Final Agreement; Tsawwassen First Nation Final Agreement; Mansell 2016a: 140; Lino 2018: 240; Hobbs and Williams 2019: 182-183; Williams and Hobbs 2020: 7, 23-24.

¹¹ See also Nisga’a Final Agreement; Tla’amin Final Agreement; Tsawwassen First Nation Final Agreement; Mansell 2016a: 115; Lino 2018: 240.

¹² Borrows 2006: 197-199.

¹³ See generally Mulgan 1998.

¹⁴ Strelein 2000.

the analysis of court cases and political initiatives, and having regard to the extensive literature on treaty making as a route to decolonisation, I demonstrate that the best way forward is to negotiate and implement tripartite treaties.

2 Literature on treaties and decolonisation of the Australian nation-state

I seek, by my thesis, to contribute to the literature and debate about the recognition of First Nations peoples' Indigenous difference and Indigenous rights, and the process of freeing Indigenous Australia from the shackles of internal colonialism. The novel contribution of my thesis is fourfold. One, it examines decolonisation struggles/proposals in the judicial and political arenas. Two, it scrutinises decolonisation proposals in the political realm in terms of the provisions of UNDRIP. Three, it examines ongoing State/Territory treaty-making processes. Four it proposes the minimum content of a proforma tripartite treaty premised upon the provisions of UNDRIP. Existing scholarship and approaches do not do this or do it in a more limited way.

In a pre-UNDRIP article, Marcia Langton noted that First Nations peoples "have neither a clear nor a just place within the ambit of the Australian [nation-state]."¹⁵ She pointed out:¹⁶

There is a persistent unwillingness to acknowledge that, in Australia, the rights of Indigenous people are inferior to those in the United States, Canada and New Zealand. ... The calls for a treaty go to the heart of the juridical denial, in Australian case law, of the existence of Aboriginal nations in Australia prior to the seizure of the land and consequent dispossession of Indigenous people by the British Crown. This denial has in effect accorded our nations the status of an anomaly among the settler colonial states. ... The monstrous injustice of the seizure of and establishment of dominion over Aboriginal lands by the Crown, and the lack of agreements or treaties, remains a stain on Australian history and the chief obstacle to constructing an honourable place for Indigenous Australians in the modern nation-state."

Langton says "in Australia, there has been an almost comprehensive rejection of the idea that Aboriginal peoples might be self-governing with the limits of Australian law."¹⁷ She argues that:¹⁸

¹⁵ Langton 2001: 13.

¹⁶ Ibid.

¹⁷ Ibid: 14-15.

¹⁸ Ibid: 15.

just as British sovereignty did not wipe away Aboriginal title [as found in *Mabo*¹⁹], neither did it wipe away Aboriginal jurisdiction. Aboriginal government under the full body of Aboriginal customary laws, must by the same logic as the discovery of native title at common law, survive the annexation of Australia by the Crown, even if in some qualified way.

Langton is of the view that treaties are suitable frameworks for according First Nations peoples “an honourable place”, as self-governing nations, within the Australian nation-state. She has not, however, provided a proforma treaty.

In a 2003 article, Langton and her co-writer, Lisa Palmer, explored what they called an “emerging culture of agreement making”, particularly under the provisions of the Commonwealth *Native Title Act 1993*.²⁰ They concluded that such agreement making:²¹

has developed as a surrogate instrument of engagement and governance in a context of denial of Aboriginal self-government. That is, in a settler nation state that coincides with a number of Aboriginal polities with their own customary law regimes, agreement making has evolved as a means of engaging rationally in dealings in land access and use, resource distribution and governance.

This process, they argued, constitutes a recognition of “Aboriginal polities as an integral part of the ongoing nation building dialectic”, and while it is “an inferior substitute for the rights of self-government found in Canada and United States”, it is laying down the foundation for treaty making.²²

In 2004, Langton co-edited (with Maureen Tehan, Lisa Palmer and Kathryn Shain) a book on essays about treaties and agreements with First Nations peoples.²³ As pointed out by Sir Anthony Mason, in the preface to the publication, the essays highlighted “the difference between treaty-making approach adopted in North America and New Zealand with the absence of such an approach in Australia.”²⁴ And, as noted by Mason, “One strong message conveyed by these essays is that the way forward to rectification of the injustice suffered by the Indigenous peoples is through the making of agreements.”²⁵ In their introduction, Langton, Tehan and Palmer said: “Whatever the possibilities and pathways for a treaty in Australia may

¹⁹ [1992] HCA 23.

²⁰ Langton and Palmer 2003a: 1.

²¹ Ibid: 25.

²² Ibid.

²³ Langton et al 2004.

²⁴ Ibid: vii.

²⁵ Ibid: vii-viii.

be, they inevitably involve the need to redress past injustice and to accord recognition and protection to the distinctive rights and special status of Aboriginal and Torres Strait Islander peoples based on prior occupation.”²⁶ The various articles in the book did not include proforma treaties.

In 2006, Langton co-edited (with Odette Mazel, Lisa Palmer, Kathryn Shain and Maureen Tehan) another book on articles dealing with modern treaty and agreement making with First Nations peoples.²⁷ The volume built on previous work contained in Langton et al 2004.²⁸ None of the articles include proforma treaties. In his foreword to the publication, Sir Gerard Brennan noted:²⁹

In Australia, Canada and New Zealand, colonisation has produced similar effects on the indigenous populations. Dispossession of land and loss of autonomy led to a depreciation of culture, poverty, a loss of dignity and a sense of alienation and despair. The resurgence of indigenous identity in the late 20th and early 21st centuries has been marked by movements to redress these disadvantages.

As to the forums for achieving First Nations peoples’ objectives in this regard, Brennan pointed out that “legal systems are limited in their capacity to fulfil all indigenous aspirations.”³⁰ He observed that the “book documents a number of processes designed to achieve the agenda of particular indigenous groups.”³¹ “It shows,” he said, “that less reliance is now placed on litigation than on negotiation to achieve the agenda.”³²

In their 2018 article³³ (noted in the introduction to this chapter for its stipulation of the essential criteria that an agreement with First Nations peoples must meet in order to be considered a treaty), Harry Hobbs and George Williams (building on the work of Marcia Langton on agreement making under the Commonwealth *Native Title Act 1993*) have argued that the so-called Noongar Settlement is Australia’s first treaty. The Settlement comprises six Indigenous Land Use Agreements (ILUAs) between the Noongar people and the Western

²⁶ Ibid: 26.

²⁷ Langton et al 2006.

²⁸ Ibid: ix.

²⁹ Ibid: v.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Hobbs and Williams 2018.

Australia Government under the *Native Title Act 1993*.³⁴ The six ILUAs were registered by the Registrar of the National Native Title Tribunal on 17 October 2018. Following the rejection of an application for a judicial review of the Registrar's decision, first by the Federal Court on 19 December 2019 and then by the High Court on 26 November 2020, the ILUAs were conclusively registered on 27 October 2021, and the Settlement took effect on 25 February 2021.³⁵ Hobbs and Williams describe the Settlement as "the largest and 'most comprehensive'³⁶ agreement to settle Aboriginal interests in land in Australian history, comprising 'the full and final resolution of all native title claims in the South West of Western Australia, ... in exchange for a comprehensive settlement package'³⁷." ³⁸ The total value of the package is \$1.3 billion.³⁹ The Settlement involves approximately 30,000 Noongar people and a land area of about 200,000 square kilometres.⁴⁰

According to Hobbs and Williams, the Noongar Settlement is a treaty for the following reasons (my numbering):

- [1] [The Settlement] recognises the Noongar as both traditional owners of the land and as a distinct polity, differentiated from other Western Australians.⁴¹
- [2] [T]he Settlement was agreed to via a political negotiation respectful of each party's equality of standing, evincing a commitment to secure a just relationship between Indigenous peoples and the State.⁴²
- [3] [The Settlement] contains more than mere symbolic recognition.⁴³ [It provides for] the recognition or establishment, and resourcing, of institutions and structures of culturally appropriate governance and means of decision-making and control [in the forms of the Central Services Corporation and the six Regional Corporations] that amount to at least a limited form of self-government.⁴⁴

³⁴ Ibid; Noongar [n.d.].

³⁵ Noongar [n.d.].

³⁶ Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 November 2015: 8903 (Colin Barnett, Premier).

³⁷ Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 2015, 7313 (Colin Barnett, Premier).

³⁸ Hobbs and Williams 2018: 31.

³⁹ Ibid.

⁴⁰ Ibid; Noongar [n.d.].

⁴¹ Hobbs and Williams 2018: 35.

⁴² Ibid: 36.

⁴³ Ibid.

⁴⁴ Ibid: 37.

However, as Hobbs and Williams have themselves pointed out, under the Settlement “There is no scope (at present) for a Noongar government, and the Noongar people are not entitled to pass legislation.”⁴⁵ In other words, the Settlement had not provided for full self-government rights similar to those provided, for example, in BC First Nations treaties (discussed in Chapter 7), and as contemplated in UNDRIP Article 4 (right to self-government, and flow-on rights that appertain to it). It is this thesis contention that to achieve a meaningful restructuring of the political, social and economic relationships between a First Nation and the Australian nation-state, the required treaty must accord that First Nation full self-government rights including the power to enact laws governing its territory and members. The Noongar Settlement has not done this for the Noongar Nation.

Writing in 2006, Megan Davis saw the draft UNDRIP⁴⁶ as a valuable source of standards for the contents of treaties between First Nations peoples and the Australian nation-state.⁴⁷ However, she did not set out – as I have done in Chapter 7 of this thesis – a proforma treaty. In a 2016 publication, Teela Reid called for a treaty based on the UNDRIP provisions.⁴⁸ She too did not put forward a proforma treaty.

In his 2016 book – *Treaty and Statehood: Aboriginal Self-determination*⁴⁹ – Michael Mansell presented his proposal for a treaty between the Commonwealth and Indigenous Australia.⁵⁰ He suggested the minimum content of such a treaty,⁵¹ but did not premise it on the provisions of UNDRIP. Mansell’s proposed treaty is one of the political initiatives that I explore in Chapter 6 of this thesis.

In an article in 2017⁵² and in his 2018 book,⁵³ Dylan Lino discussed First Nations peoples’ demands for what he described as ‘small-c’ constitutional recognition (as opposed to ‘big-C’ recognition, which requires amendment(s) to the Commonwealth Constitution).⁵⁴ A

⁴⁵ Ibid: 36.

⁴⁶ The draft UNDRIP was approved by the UN Human Rights Council on 26 June 2006 (Daes 2011: 34). Davis wrote her article following the Council’s approval. She was clearly anticipating the adoption of UNDRIP by the UN General Assembly.

⁴⁷ Davis 2006b: 131, 136.

⁴⁸ Reid 2016: 158-159.

⁴⁹ Mansell 2016a.

⁵⁰ Ibid: 97-154, 155-164.

⁵¹ Ibid: 133-145.

⁵² Lino 2017.

⁵³ Lino 2018.

⁵⁴ Ibid: 216-250.

small-c form of recognition is “concerned [with] questions of Indigenous self-determination, sovereignty and treaty.”⁵⁵ The sought-after “reforms are constitutional in that they raised fundamental questions about the distribution of public power within the Australian state, even though they may not [require amendment(s) to the Commonwealth Constitution].”⁵⁶ Lino says: “treaty making, as conceived by Aboriginal and Torres Strait Islander peoples, can be usefully understood to establish federal relationships of self-rule and shared rule between Indigenous and settler polities – relationships which constitutionally recognise Indigenous peoplehood.”⁵⁷ In his discussion of treaties,⁵⁸ Lino did not engage with UNDRIP, and he did not offer a proforma treaty.

Harry Hobbs has published two significant post-UNDRIP articles on the treaty process in Australia. In his 2018 article, he advocated treaties between First Nations peoples and the Australian nation-state as frameworks for accomplishing “a plural and substantively inclusive Australian citizenship on shared fate”.⁵⁹ He saw treaties, in this context, as making “room for Aboriginal and Torres Strait Islander peoples as co-sovereigns” within a decolonised Australian nation-state.⁶⁰ However, Hobbs did not go on to suggest a proforma treaty. In his 2019 article, Hobbs argued persuasively that “UNDRIP is a positive and productive instrument that has the potential to invigorate and strengthen Indigenous advocacy as well as inform the content of any treaty.”⁶¹ However, again, he did not set out a proforma treaty. In an article in 2019,⁶² Hobbs together with George Williams advocated the negotiation and adoption of tripartite Australian treaties, modelled upon the Canada/BC approach. They saw such treaties as overcoming problems associated with the distribution of constitutional powers within the Australian Federation, which an exclusively State or Commonwealth treaty would encounter.⁶³ They did not discuss UNDRIP nor did they present a proforma tripartite treaty.

In her 2019 book,⁶⁴ Sarah Maddison said: “For Aboriginal and Torres Strait Islander peoples, the negotiation of treaties remains important as a means of resisting the incorporation

⁵⁵ Ibid: 13.

⁵⁶ Ibid: 13.

⁵⁷ Ibid: 240.

⁵⁸ Ibid 2018: 236.

⁵⁹ Hobbs 2018: 185.

⁶⁰ Ibid: 188.

⁶¹ Hobbs 2019: 176.

⁶² Hobbs and Williams 2019.

⁶³ Ibid: 227-230.

⁶⁴ Maddison 2019.

inherent in settler colonialism, and for acknowledging the reality of their political experience.”⁶⁵ Therefore, “Despite the relentless pressures of settler colonialism, Aboriginal and Torres Strait Islander peoples remain committed to pursuing their political autonomy [that is, within the constitutional and governmental framework of the Australian nation-state].”⁶⁶ She saw treaties as enabling mechanisms for “power sharing, and genuine forms of self-determination and Indigenous decision-making.”⁶⁷ However, she did not bring UNDRIP into her treaty discussion, nor did she produce a proforma treaty.

George Williams and Harry Hobbs⁶⁸ produced in 2020 a second edition of *Treaty*, a publication that first appeared in 2005.⁶⁹ The book is the leading text on the treaty-making debate in Australia. It grew out of a three-year ‘Treaty Project’ of the Gilbert + Tobin Centre of Public Law at the University of New South Wales, which ended on 31 May 2005.⁷⁰ Michael Dodson has described the book as “akin to a manual as to why we need treaty and how we do treaty.”⁷¹ Williams and Hobbs argued persuasively (as they had done in Hobbs and Williams 2019) that tripartite treaties “offer the best prospect for reaching an enduring settlement that meets Aboriginal and Torres Strait Islander peoples’ aspirations within Australia’s legal framework.”⁷² They noted the coming into being of UNDRIP, acknowledging it as “the most comprehensive and progressive of international instruments dealing with Indigenous peoples’ rights.”⁷³ On matters that a tripartite treaty might deal with, they said:⁷⁴

It is impossible to predict what Indigenous communities and governments might agree to include in a treaty. In part, this is because much depends on the context of the negotiations and upon the parameters set by any negotiation framework and, unavoidably, political considerations. It is also difficult because any treaty is likely to be highly responsive to local conditions. Indeed, the capacity of treaties to be responsive to the aspirations of the signatories makes them desirable.

⁶⁵ Ibid: 26-27.

⁶⁶ Ibid: 27.

⁶⁷ Ibid: 27.

⁶⁸ Williams and Hobbs 2020.

⁶⁹ Brennan et al. 2005.

⁷⁰ Gilbert + Tobin Centre of Public Law, UNSW [n.d.].

⁷¹ Foreword to Williams and Hobbs 2020: xiv.

⁷² Williams and Hobbs 2020: 279-280.

⁷³ Ibid: 133.

⁷⁴ Ibid: 303.

Nevertheless, they set out a “possible” treaty content,⁷⁵ but did not discuss it in terms of the UNDRIP provisions.

My thesis also contributes to debate on the appropriate role of the judicial forum versus the political arena in pursuing First Nations peoples’ decolonisation agenda/significant social reform aspirations. It lends support to arguments that critique judicial avenues and favour political ones. In his 1991 book,⁷⁶ Gerald Rosenberg examined “the effectiveness of courts in producing significant social reform.”⁷⁷ He concluded that “the capacity of the courts to produce significant social reform” was limited “because, on the most fundamental level, [they] depend on political support to produce such reform.”⁷⁸ He said: “Problems that are unsolvable in the political context can rarely be solved by courts.”⁷⁹ However, he did acknowledge “courts can sometimes help social reform movements.”⁸⁰ Nevertheless, “Social reformers, with limited resources, forgo other options when they elect to litigate. Those options are mainly political and involve mobilizing citizens to participate more effectively.”⁸¹

In contrast to Rosenberg’s position, Lisa Strelein, in an article in 2000, stressed the strategic advantages in using the courts for the assertion of self-determination claims by First Nations peoples.⁸² She argued:

While accepting that the courts are not the answer to every claim of rights and having regard to their limitations, the advantages for indigenous peoples in accessing a central arm of government and public forum are important. ... The freedom of the courts from the vagaries of political and electoral pressures enables them to determine issues outside the public debate or popular opinion. This independence is imperative for the assertion of self-determination claims that may threaten the privileges of the majority or more powerful interests. Claims for the protection and promotion of the rights of minorities are bound to be politically unpopular ... Therefore, the courts are often able to act where other arms of the state are unable or unwilling. ... The adversarial system provides equal access and influence by allowing indigenous claimants to meet the state on a more equal footing, at least in terms of the presentation of

⁷⁵ Ibid: 303-305.

⁷⁶ Rosenberg 1991 [1993 paperback edition].

⁷⁷ Ibid: 5.

⁷⁸ Ibid: 336.

⁷⁹ Ibid: 338.

⁸⁰ Ibid: 342.

⁸¹ Ibid: 343.

⁸² Strelein 2000: 20.

argument. ... [T]he legal processes provide greater assurance that all interested parties will be heard and that all relevant information will be brought to bear.⁸³

Geoffrey Schiveley contradicted aspects of the above argument in an article in 2000.⁸⁴ He said: “Asking a court to ... determine the structure of all future relationships between Aboriginal and European descendants ... is neither an appropriate use of the court system’s time nor a practical possibility from the view of the parties involved.”⁸⁵ His argument may be summarised as follows. Courts, “by their nature, have fundamental structural characteristics that are inadequate for meeting the challenges” of determining such future relationships.⁸⁶ Courts can only address issues “that are [justiciable and] properly brought before them.”⁸⁷ A court’s “procedural and pleading requirements ... are designed to promote certainty, not flexibility.” However, “flexibility in the process appears to be a necessity for resolving any issues” concerning future relationships between First Nations peoples and their colonisers.⁸⁸ “The inflexibility of the ... court system is therefore the exact opposite to what is required to achieve an appropriate solution.”⁸⁹ In contrast, the negotiation process is inherently flexible,⁹⁰ and “may be fairer in practice than litigation because it has the potential to remove ... issues [of concern to the parties] from an adversarial [court] process.”⁹¹

There is extensive scholarship on the political arena as a forum for achieving the restructuring of the political, social and economic relationships between First Nations peoples and the Australian nation-state.⁹² Looking specifically at post-UNDRIP literature, one such publication is Sarah Maddison’s 2011 book.⁹³ She urged settler Australians to reflect deeply on

⁸³ Ibid: 20-21.

⁸⁴ Schiveley 2000.

⁸⁵ Ibid: 457.

⁸⁶ Ibid: 456.

⁸⁷ Ibid: 457.

⁸⁸ Ibid: 457.

⁸⁹ Ibid: 457.

⁹⁰ Ibid: 427, 461.

⁹¹ Ibid: 462. See also Williams and Hobbs 2020: 9

⁹² Examples of such scholarship are: Reynolds 1996b; Mulgan 1998; Dodson 2000a; Behrendt 2003 [2004 reprint]; Behrendt 2003a; Cronin 2003 [2004 reprint]; Davis 2003 [2004 reprint]; Dodson 2003 [2004 reprint]; Langton and Palmer 2003 [2004 reprint]; Mansell 2003 [2004 reprint]; Mansell 2005; McGlade 2003 [2004 reprint]; Dodson 2004; Moran 2005a; Russell 2005a; Brady 2007; Davis 2007b; Dodson 2007; Falk and Martin 2007; Mansell 2007; Moreton-Robinson 2007a; Moreton-Robinson 2007b; Walter 2007; Watson 2007; Brigg and Maddison 2011; Dodson and Cronin 2011; Maddison 2011; Behrendt 2013; Davis 2016b; Dodson 2016; Mansell 2016a; Mansell 2016b; Morris 2016c; Pearson 2016a; Pearson 2016b; Reid 2016; Twomey 2016; Lino 2018; Dodson 2018; Maddison 2019.

⁹³ Maddison 2011.

the fact that the Australian nation-state was founded on land that “did not belong to us”, that Indigenous Australia was colonised without the consent of First Nations peoples.⁹⁴ She suggested that such a process of introspection might lead to a positive acceptance that restructuring the relationship between Indigenous Australia and the Australian nation-state is in the national interest.⁹⁵ She said: “Colonisation not only damages Indigenous people, it also disfigures the coloniser.”⁹⁶ She argued: “Crucial to Australia’s efforts to decolonise the relationship between Indigenous and non-Indigenous people will be the commitment to a relationship of mutual recognition as equal, co-existing and self-governing peoples and cultures.”⁹⁷ In her view, decolonising the relationship between Indigenous Australia and the Australian nation-state “will require – as minimum – a constitution that recognises Indigenous sovereignty and/or a treaty that formalises a new relationship between [the two].”⁹⁸ She did not engage with UNDRIP in her discussion.

Michael Mansell – in two post-UNDRIP publications – did not see there was any real necessity for Constitutional recognition of First Nations peoples (including their sovereignty) in order to decolonise the relationship between Indigenous Australia and the Australian nation-state.⁹⁹ Instead, he advocated a legislated treaty as a viable decolonisation mechanism.¹⁰⁰ However, Patrick Dodson – in a post-UNDRIP publication – was of the view that “Constitutional recognition of Aboriginal and Torres Strait Islander peoples and treaty or agreement making are both important aspirations for the unfinished business of reconciliation.”¹⁰¹ But he did agree with Mansell that treaty making “is a political act that could be achieved legislatively.”¹⁰² Neither Mansell (as noted earlier on) nor Dodson brought UNDRIP into their discussion.

⁹⁴ Ibid: 3.

⁹⁵ Ibid: 4-5.

⁹⁶ Ibid: 147.

⁹⁷ Ibid: 163.

⁹⁸ Ibid: 176.

⁹⁹ Mansell 2016a: 48-51, 2016b: 145-147.

¹⁰⁰ Mansell 2016a: 72-73, 2016b: 147.

¹⁰¹ Dodson 2016: 182

¹⁰² Ibid: 182.

In a post-UNDRIP publication, Megan Davis said that “It is not for the courts to resolve that which the parliament must.”¹⁰³ She stipulated “the source of disquiet” among First Nations peoples and their “grievance that must be addressed” as follows:¹⁰⁴

Sovereignty was not passed from the Aboriginal people through any significant legal act. The British did not ask permission to settle. Aboriginal people did not consent and no one ceded.

In an article in 2018, Patrick Dodson expressed agreement with the above sentiment.¹⁰⁵ He said:¹⁰⁶

It is the parliament’s job to work towards [resetting the relationships between the Australian nation-state and First Nations peoples]. ... In the spirit of reconciliation, of relationships based on mutual understanding and respect, the parliament must rise to the challenge.

Dodson did not, in the above article, bring up UNDRIP as a basis for the structural reform that he envisaged. In the abovementioned publication, Davis saw the social justice measures, which the erstwhile Aboriginal and Torres Strait Islander Commission (ATSIC) had proposed to the Paul Keating Government in 1995, as a useful basis for a negotiated political settlement.¹⁰⁷ She did not engage with UNDRIP in her discussion. I examine ATSIC’s decolonisation measures in Chapter 6 of this thesis.

In the remainder of this chapter, I explain a number of concepts that will be employed as part of the core argument of the thesis and set out my thesis structure. Section 2 explains the meaning of “Indigenous difference”. Section 3 defines “Indigenous rights” as the collective rights contained in UNDRIP and discusses the status of UNDRIP in international law. Section 4 explains the meaning of “settler colonialism” and “settler-colonial impositions”. Section 5 outlines the thesis structure.

3 Indigenous difference and Indigenous sovereignty

“Indigenous difference” consists of attributes that set apart First Nations peoples from peoples who are not Indigenous to Australia. Drawing upon Patrick Macklem’s explanation of the

¹⁰³ Davis 2016b: 93.

¹⁰⁴ Ibid: 93.

¹⁰⁵ Dodson 2018.

¹⁰⁶ Ibid: 66.

¹⁰⁷ Davis 2016b: 94-95.

concept in relation to the Aboriginal people of Canada,¹⁰⁸ those attributes may be briefly stated as follows. First Nations peoples are the descendants of peoples, who, at the time British settler-colonisation of the Australian continent began, were the owners and occupiers of the continent. Those ancestors were in occupation of the entire Australian continent for millennia before the arrival of the British settler-colonisers in 1788.¹⁰⁹ The ancestors exercised sovereign authority over persons and territory; they were self-determining and self-governing peoples. First Nations peoples are the inheritors of their ancestors' sovereign authority. First Nations peoples insist that, despite being blanketed by settler colonialism, they have never ceded their inherited sovereign authority.¹¹⁰

Unlike their counterparts in Canada, New Zealand and the United States – all three, like Australia, were British settler-colonised – Australian First Nations peoples were never offered a treaty by their colonisers. Richard Broome points out that “Lieutenant James Cook’s voyage was formative” in this differential treatment of Australia’s First Nations:¹¹¹

Cook was ordered to search for ‘a Continent or Land of great extent’ in the south-west of the Pacific and ‘with the consent of the Natives to take possession of Convenient situations in the Country in the name of the King’. Cook took but a cursory look at the east coast of Australia, mostly from the deck of the *Endeavour*. He admired Aboriginal people, but perceived them as being without structures of religion and government; without agriculture or interest in trade; and indeed, without clothing and permanent shelters. To Cook, they roamed in search of food daily, ‘like wild Beasts’. Cook decided their consent for the British taking possession was not necessary, as the land seemed ‘waste’ and unowned.¹¹²

Calls by First Nations peoples for a treaty or treaties between them and the Australian nation-state gained momentum following the 1967 Constitutional Referendum, and, despite lack of success, have persisted ever since.¹¹³

¹⁰⁸ Macklem 2001 [2007 reprint]: 4.

¹⁰⁹ See ScienceDaily’s report, 8 March 2017, ‘Aboriginal hair shows 50,000-year connection to Australia’, on the University of Adelaide’s Aboriginal Heritage Project: “Modern Aboriginal Australians are the descendants of a single founding population that arrived in Australia 50,000 years ago, while Australia was still connected to New Guinea. Populations then spread rapidly – within 1500-2000 years – around the east and west coasts of Australia, meeting somewhere in South Australia.” (Tobler et al. 2017).

¹¹⁰ Mansell 2016a: 74-96.

¹¹¹ Broome 2019: 18-19.

¹¹² See full transcript of Cook’s secret instructions (30 June 1768):

<https://www.foundingdocs.gov.au/resources/transcripts/nsw1_doc_1768.pdf>.

¹¹³ Wright 1985: 14-15; Langton 2000:32-34; McGlade 2003 [2004 reprint]: 130-136; Brennan et al. 2005: 14-16; Bradfield 2006: 82-83; Mansell 2016b: 97-99; Lino 2018: 16-24; Petrie and Graham 2018: 1-6; Maddison 2019: 22-29; Williams and Hobbs 2020: 26-64.

By virtue of their difference, Indigenous peoples are recognised as having distinct rights under international law.¹¹⁴ These rights are a product of advocacy by Indigenous peoples, including Australian First Nations, who saw deficiencies in their home nation-states' responses to their claims.¹¹⁵

Indigenous sovereignty is, as noted above, a fundamental component of the Indigenous difference of First Nations people. Michael Mansell has pointed out:¹¹⁶

In the background of any significant agreement with Aboriginal people is the vexed question of Aboriginal sovereignty. Sovereignty is seen by Aboriginal people as the bedrock on which Aboriginal rights and entitlements are based. Sovereignty goes to the heart of the Aboriginal struggle. It sustains land rights, customary law and self-determination.

Mansell defines sovereignty as “the supreme authority a people have over a particular territory.”¹¹⁷ This definition is essentially similar to the one provided by Justice Jacobs in *New South Wales v Commonwealth* [1975] HCA 58 (*Seas and Submerged Lands Case*). As defined by Justice Jacobs, sovereignty is “a power and right, recognized or effectively asserted in respect of a defined part of the globe, to govern in respect of that part to the exclusion of nations or states or peoples occupying other parts of the globe.”¹¹⁸ Mansell noted: “The supreme authority Aboriginal people once exercised over Australia was all but destroyed from 1788.”¹¹⁹ He pointed out: “From a collective point of view, there was no Aboriginal consent to a change in sovereign rule over Aboriginal lands and its people.”¹²⁰ He said:¹²¹

The only way sovereignty can be lost entirely is if the original people were wiped out or they surrendered their sovereign rights. Neither of these events occurred in Australia. And adapting in order to survive, including participating in the invader's political system, is not detrimental to continuing Aboriginal sovereignty...

¹¹⁴ Anaya 2004: 61-72, 110-115, 129-156; Xanthaki 2007 [2010 paperback edition]: 13-39, 131-176; Anaya and Rodriguez-Piñero 2018.

¹¹⁵ Anaya 2007: 56-61; Xanthaki 2007 [2010 paperback edition]: 1-6; Anaya and Rodriguez-Piñero 2018: 39-48.

¹¹⁶ Mansell 2016a: 74.

¹¹⁷ Ibid: 75.

¹¹⁸ Justice Jacobs' judgment, paragraph 11.

¹¹⁹ Mansell 2016a: 77.

¹²⁰ Ibid: 78.

¹²¹ Ibid: 78-79.

And so: “Until the sovereign rights of Aboriginals are properly dealt with, Australia will remain a tarnished nation, built on invasion, dispossession, discrimination and oppression.”¹²²

As explained by Justice Jacobs, in the *Seas and Submerged Lands Case*, sovereignty could be viewed as having two components, an external component and an internal component.¹²³ External sovereignty is the sovereign right of a nation-state to govern itself without interference from other nation-states. External sovereignty is indivisible, and is, in the case of the federated Australian nation-state, held and exercised solely by the Commonwealth. Internal sovereignty, however, is divisible, as provided for in the constitutional and governmental framework that a nation-state has adopted. In the case of Australia, internal sovereignty is shared between the Commonwealth, States and the self-governing Territories (the Northern Territory and the Australian Capital Territory), in accordance with the provisions of the Commonwealth Constitution and each State/Territory Constitution.

Drawing upon Patrick Macklem’s line of argument in the Canadian context,¹²⁴ this thesis contends that the failure of the Australian settler nation-state to recognise internal forms of First Nations sovereignty is unjust. First Nations peoples exercised sovereign authority over Australia prior to the British settler-colonisation of the continent, a state of affairs not consented to by First Nations. Therefore, the legitimacy of the assumed exclusive sovereignty of the Australian nation-state over the Australian continent is contingent upon First Nations peoples being accorded a form of internal sovereignty. Such a form of sovereignty is fully compatible with Australia’s federal system of governance. This form of Indigenous sovereignty is no different from other manifestations of internal sovereign authority in Australia. As Patrick Macklem has put it: “It represents one strand in a larger web of entities that exercise some degree of sovereign authority over land and people.”¹²⁵ This form of sovereignty encapsulates the concepts of internal self-determination and self-government stipulated in UNDRIP Article 3 (right to self-determination) and Article 4 (right to self-government). According First Nations

¹²² Ibid: 84.

¹²³ Justice Jacobs’ judgment, paragraph 11.

¹²⁴ Macklem 2001 [2007 reprint]: 5-7, 107-111. Macklem argues that constitutional recognition of Aboriginal sovereignty within the constitutional and governmental framework of the Canadian nation-state constitutes a just distribution of sovereign authorities, “because the vesting of greater law-making authority in Aboriginal nations will assist in ameliorating contemporary substantive inequalities confronting Aboriginal people.” (op.cit: 5).

¹²⁵ Macklem 2001 [2007 reprint]: 111.

peoples the foundational rights to internal self-determination and self-government (pursuant to UNDRIP Article 3 and Article 4) will enable them to protect their Indigenous difference.

4 Indigenous rights and UNDRIP

I take “Indigenous rights” to mean the collective rights enumerated in UNDRIP. As S James Anaya and Luis Rodriguez Piñero have pointed out, UNDRIP:¹²⁶

... stands today as a major landmark in the development of international human rights law. In its content, the Declaration is at the forefront of some of the most significant transformation in the modern human rights regime, with its move beyond the classic individualistic paradigm and its embrace of collective human rights, and the vision it projects of restorative justice that canalizes social change away from the legacies of historical patterns of oppression.

UNDRIP “is more comprehensive in substance and more extensive in scope than any other existing international instrument specifically dedicated to indigenous issues.”¹²⁷ In this regard, the other significant international law instrument is the ILO Convention 169.¹²⁸ This Convention creates treaty obligations among ratifying states.¹²⁹ However, Australia has not to date ratified the Convention.¹³⁰

UNDRIP is a declaration of the United Nations (UN) General Assembly adopted by Resolution 61/295 on 13 September 2007.¹³¹ 143 member states voted in favour of the resolution, with 4 against and 11 abstentions.¹³² The 4 votes against the resolution were those of Australia, the United States of America, Canada and New Zealand.¹³³ Australia, New Zealand, Canada, and the United States have each subsequently reversed their position and

¹²⁶ Anaya and Rodriguez-Piñero 2018: 60.

¹²⁷ Allen and Xanthaki 2011: 1. See also Williams and Hobbs 2020: 133.

¹²⁸ Anaya 2004: 58-61; Xanthaki 2007 [2010 paperback edition]: 67-91. The Convention was adopted by the General Conference of the International Labour Organization, Geneva, on 27 June 1989 and entered into force on 5 September 1991 (Anaya 2004: 302).

¹²⁹ Anaya 2004: 61.

¹³⁰ Australian Human Rights Commission [n.d.]. Only 22 states have ratified the Convention to date (Cooper 2015).

¹³¹ United Nations 2008a.

¹³² Allen and Xanthaki 2011: 1; Daes 2011: 36.

¹³³ Allen and Xanthaki 2011: 1 (At the time, Australia was under the John Howard Coalition Government).

formally endorsed UNDRIP.¹³⁴ As discussed below, UNDRIP has not to date become a formal part of Australian law.¹³⁵

As a non-budget related resolution of the General Assembly,¹³⁶ Resolution 61/295 is formally non-binding on UN member states or in international law.¹³⁷ Australia supports UNDRIP “as a non-legally binding document.”¹³⁸ However, to the extent that UNDRIP’s provisions reflect articles in human rights treaties that Australia has ratified,¹³⁹ its provisions are binding on Australia as a matter of international law.¹⁴⁰ Also, to the extent that UNDRIP’s provisions reflect customary international law its provisions are binding on Australia as a matter of international law.¹⁴¹

Megan Davis has observed, from her survey of literature on the status of UNDRIP in international law:¹⁴²

... it would seem that the Declaration exists in an amorphous in-between state of constituting both a ‘non-binding’, influential and aspirational statement of soft law but equally an instrument that reflects already binding rules of customary international law.

The status of UNDRIP in international law is the subject of ongoing debate. On one side of this debate, Alexandra Xanthaki, for example, is of the opinion that regarding UNDRIP “or substantial parts of it as customary international law may be rather premature.”¹⁴³ She says that “the language of the *Declaration* itself does not support its reading as customary international

¹³⁴ Australia (under the Kevin Rudd Labor Government – see Macklin 2009) endorsed UNDRIP on 3 April 2009; New Zealand on 20 April 2010; Canada on 12 November 2010; and United State on 9 December 2010 (Anaya and Rodríguez-Piñero 2018: 60 – footnote 123).

¹³⁵ Australian Human Rights Commission 2017: 8; Law Council of Australia 2019: 12-14.

¹³⁶ Anaya and Wiessner 2007. See also Schwebel 1979: 301.

¹³⁷ Anaya and Wiessner 2007; Xanthaki 2009: 35; Indigenous Bar Association 2011: 7. Joffe 2010 [2014 reprint]: 87; Scheinin and Åhrén 2018: 64.

¹³⁸ Australian Government (Attorney-General’s Department) [n.d.(c)]. See also Macklin 2009.

¹³⁹ Australia is a party to the following core international human rights treaties: (1) International Covenant on Civil and Political Rights (ICCPR); (2) International Covenant on Economic, Social and Cultural Rights (ICESCR); (3) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); (4) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); (5) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); (6) Convention on the Rights of the Child (CRC); and (7) Convention on the Rights of Persons with Disabilities (CRPD): Australian Government [n.d.(c)].

¹⁴⁰ Kirby 1999; Young 1999: 190-198; Burmester and Reye 2000: 39; Australian Government (Attorney-General’s Department) [n.d.(c)].

¹⁴¹ Kirby 1999; Young 1999: 198-199; Burmester and Reye 2000: 40; Montague 2007: 21-27.

¹⁴² Davis 2012a: 19.

¹⁴³ Xanthaki 2009: 36.

law.”¹⁴⁴ In this regard, she points to UNDRIP’s preambular paragraph 24, which solemnly proclaimed the adoption of UNDRIP “as a standard of achievement to be pursued in a spirit of partnership and mutual respect”.¹⁴⁵ Also on the “soft law” side of the debate, Stephen Allen contends:¹⁴⁶

... the rights contained in the Declaration are best seen as propositional claims. These ‘rights’ are not positive or nascent international legal rights; they are focussed political claims, which have been infused with considerable political legitimacy derived from the extent to which they have been sanctioned by the international community and as a result of the processes by which the Declaration was developed. The fact that the Declaration adopts the language of rights in order to articulate its powerful aims heightens the persuasiveness of its provisions. Nonetheless, by not endorsing these rights as (international) legal rights, the international community has stopped short of trying to impose the Declaration on affected national communities. Instead, it has adopted an international instrument that has the normative capacity to influence and guide political discourse while leaving the ultimate political decisions to the national communities concerned.

Sylvanus Barnabas agrees with the above opinion of Xanthaki and of Allen. He says: “there is strength in the argument that it may be erroneous to view UNDRIP or substantial portions of its provisions as [customary international law].”¹⁴⁷

On the other side of the debate stands the International Law Association (ILA).¹⁴⁸ According to the ILA, although UNDRIP “as a whole cannot yet be considered as a statement of existing customary international law..., [it] includes key provisions which correspond to existing State obligations under customary international law.”¹⁴⁹ The ILA has identified four sets of state obligations under customary international law.¹⁵⁰ First, states are obliged to recognise, respect, protect, fulfil and promote the right of Indigenous peoples to self-determination. The corresponding UNDRIP provision is Article 3. Second, states are obliged to recognise and promote the right of Indigenous peoples to autonomy or self-government. The

¹⁴⁴ Ibid: 36.

¹⁴⁵ Ibid: 36.

¹⁴⁶ Allen 2011: 250.

¹⁴⁷ Barnabas 2017: 252.

¹⁴⁸ The ILA was founded in Brussels in 1873. Its head office is in London, with branches throughout the world. Its objectives, under its Constitution, are “the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law”. It has consultative status, as an international non-governmental organisation, with a number of the UN specialised agencies. <<https://www.ila-hq.org/index.php/about-us/aboutus2>>.

¹⁴⁹ ILA 2012a: 542, 2012b.

¹⁵⁰ ILA 2012a 542-543, 2012b.

corresponding UNDRIP provision is Article 4. Third, states are obliged to recognise, respect, safeguard, promote and fulfil the rights of Indigenous peoples to their traditional lands, territories and resources. The corresponding UNDRIP provision is Article 26. Fourth, states are obliged to recognise and fulfil the right of Indigenous peoples to reparation and redress for wrongs that they have suffered. The corresponding UNDRIP provisions are Articles 8(2), 11(2), 20(2) and 28.

Therefore, on the above basis, UNDRIP Articles 3, 4, 26, 8(2), 11(2), 20(2) and 28 are expressions of customary international law norms. On the ILA side of the debate, Federico Lenzerini agrees with such a conclusion.¹⁵¹ He sees those UNDRIP provisions as fundamental support for the preservation of Indigenous difference.¹⁵² The Law Council of Australia is supportive of the position taken by the ILA and by Lenzerini.¹⁵³ That UNDRIP is fundamentally concerned with the preservation of Indigenous difference is reflected in Article 43. The provision declares that the rights recognised in UNDRIP “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”

However, even if certain provisions of UNDRIP are formally binding under customary international law, those provisions will not be automatically enforceable in Australia. This is because, in terms of the process of applying a country’s international law obligations domestically, Australia is a dualist state.¹⁵⁴ This means that its international law obligations have to be legislatively transformed into domestic law in order for those obligations to be enforceable domestically. In contrast, the international law obligations of a monist state do not require such transformation for them to apply domestically. Australia does not subscribe to the position adopted, for example, in New Zealand concerning the automatic incorporation into the common law of customary international law provided there is no contrary statutory provision.¹⁵⁵ However, Australia does accept that “international human rights jurisprudence [is

¹⁵¹ Lenzerini 2019: 52. See also Lenzerini 2018: 586-595.

¹⁵² Lenzerini 2019: 52.

¹⁵³ Law Council of Australia 2019: 12-14.

¹⁵⁴ Fitzgerald 1994: 79-80; Kirby 1999: 109; Young 1999; Burmester and Reye 2000; Montague 2007; Crawford 2012.

¹⁵⁵ Fitzgerald 1994: 92; Kirby 1999, 2010, 2012. See Koki 2012 for a discussion of this issue in New Zealand. The New Zealand position has arisen because of the *New Zealand Bill of Rights Act 1990* and the *Human Rights Act 1993* (NZ) (Kirby 1999: 117).

a source for filling] the gaps of the common law and [for helping to] construe ambiguous legislation to conform with that law.”¹⁵⁶

The late Erica-Irene Daes¹⁵⁷ had pointed out: “The fact that the [UNDRIP’s] provisions are not legally binding does not detract from their potential for driving cultural and political transformations, which often run deeper than legal change.”¹⁵⁸ Megan Davis has observed: “The focus on the UNDRIP being ‘soft’ law does seem to overlook the impact it can have in domestic legal systems.”¹⁵⁹ Referring generally to resolutions of the UN General Assembly, Celine Van den Rule has argued:¹⁶⁰

To limit ourselves to the ‘legal status’ of GA resolutions would only give us a narrow view when assessing the impact of these resolutions. Even though they are not legally binding on member states, there is a real and persuasive point in having GA resolutions. They have a symbolic impact in the way they express, formulate and crystallize the opinion of the international community, which can serve to influence the behaviour of the [member states] themselves and stigmatize or formally condemn the practice of [member states] that do not conform with it. They also carry important weight in their political impact.

Indeed, unincorporated international law obligations and soft law instruments can be influential domestically. They can be used by courts to interpret statutory provisions.¹⁶¹ In his dissenting judgment, in *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, Justice Kirby referred to UNDRIP for that purpose.¹⁶² And Justice Bell also mentioned UNDRIP in *Maloney v The Queen* [2013] HCA 28.¹⁶³ However, in either case, the High Court did not accept that UNDRIP could be used to interpret statutory provisions. However, this negative Australian judicial reception of UNDRIP in this context does not detract from its usefulness as a treaty-content guide.

¹⁵⁶ Fitzgerald 1994: 90-93; Kirby 1999: 125.

¹⁵⁷ Chairperson/Rapporteur of the Working Group on Indigenous Populations (WGIP) from 1984 to 2001. The WGIP was created by the then UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, as authorised by the Economic and Social Council, in 1982. WGIP was assigned the task of preparing draft standards on the rights of Indigenous peoples that eventually crystallised into UNDRIP (Daes 2011: 11-34).

¹⁵⁸ Daes 2011: 38.

¹⁵⁹ Davis 2012: 38.

¹⁶⁰ Van den Rule 2016: 3.

¹⁶¹ Davis 2012: 39.

¹⁶² Justice Kirby’s judgment, paragraph 269 (note 383).

¹⁶³ Justice Bell’s judgment, paragraph 234 (note 286).

UNDRIP provides helpful normative guidance for responding to Indigenous peoples' decolonisation aspirations within the framework of existing nation-states and, therefore, is a useful the Australian context. The best way forward in this regard is for Australian governmental authorities to negotiate and implement treaties with First Nations premised upon UNDRIP. UNDRIP, and the Indigenous peoples' rights it affirms, provide a direct challenge to settler colonialism and settler-colonial impositions, which are two core concepts of my thesis introduced in the next section.

5 Settler colonialism, settler-colonial impositions and decolonisation

A cogent explanation of the concept of 'settler colonialism' has been provided by Adam Barker and Emma Battel Lowman, as follows:¹⁶⁴

Settler colonialism is a distinct type of colonialism that functions through the replacement of indigenous populations with an invasive settler society that, over time, develops a distinctive identity and sovereignty.

Settler colonialism can be distinguished from other forms of colonialism – including classical or metropole colonialism, and neo-colonialism – by a number of key features. First, settler colonisers 'come to stay': ... settler collectives intend to permanently occupy and assert sovereignty over indigenous lands. Second, settler colonial invasion is a structure, not an event: settler colonialism persists in the ongoing elimination of indigenous populations, and the assertion of state sovereignty and juridical control over their lands. Despite notions of post-coloniality, settler colonial societies do not stop being colonial when political allegiance to the founding metropole is severed. Third, settler colonialism seeks its own end: unlike other types of colonialism in which the goal is to maintain colonial structures and imbalances in power between coloniser and colonised, settler colonisation trends towards the ending of colonial difference in the form of a supreme and unchallenged settler state and people. However, this is not a drive to decolonise, but rather an attempt to eliminate the challenges posed to settler sovereignty by indigenous peoples' claims to land by eliminating indigenous peoples themselves and asserting false narratives and structures of settler belonging.

The settler-colonisation of Indigenous Australia by the British and the resulting state of affairs conform to the broad features described in the above passage.¹⁶⁵

¹⁶⁴ Barker and Battel Lowman [n.d.].

¹⁶⁵ Wolfe 1999; Moran 2002, 2005; Veracini 2007; Broome 2019; Maddison 2019.

The late Patrick Wolfe¹⁶⁶ observed that the settler-colonisation of Indigenous Australia proceeded in three stages: confrontation, incarceration, and assimilation.¹⁶⁷ These stages were manifestations of what Wolfe had termed “the logic of elimination”, that is, the replacement of First Nations society “with that imported by the colonisers”.¹⁶⁸ As Richard Broome has put it: “Australia’s history of its colonial relationship with [First Nations peoples] ... is a story of how settlers in overwhelming numbers, bearing new diseases, plants, animals, and new technologies, and with the blessing of the British Imperial Government, supplanted the original owners of a continent.”¹⁶⁹

During the first phase of settler colonisation – confrontation – First Nations land was rapidly expropriated by the settler-colonisers, based on their false perception that the land belonged to no one. As pointed out by Anthony Moran, the colonisers regarded First Nations as not owning the land because, by not “improving” it, they had, from the standpoint of the colonisers, failed to act in accordance with the principles for establishing proprietary interests in land prescribed by John Locke.¹⁷⁰ Broome has made the same point: “To justify [their expropriation of First Nations’ land], settlers created images and knowledge that eulogised themselves as pioneers and wealth creators, and denigrated Indigenous people as non-producers and not worthy of owning land.”¹⁷¹

The confrontation, or invasion, stage led to high mortality of First Nations peoples, “attributable to four main (and mutually supportive) agencies: homicide, sexual abuse, disease and starvation”.¹⁷² The “standard pattern” of this invasive or dispossession phase “was one of decimated but largely pacified survivors improvising a variety of livelihoods in the pores of the now-established settler society”.¹⁷³ As put by Broome, the dispossession, decimation and denigration of First Nations peoples “led to the social, economic, cultural and bodily impoverishment of Aboriginal people.”¹⁷⁴ Broome has provided an overview of this invasive

¹⁶⁶ Patrick Wolfe was a leading international exponent of settler-colonial studies: see Chakrabarty 2016; Veracini 2016; Silverstein 2016; Franklin, Njoroge, and Reiss 2017; Battell Lowman and Barker [n.d.].

¹⁶⁷ Wolfe 1999: 27-31.

¹⁶⁸ Ibid: 27.

¹⁶⁹ Broome 2019: 2.

¹⁷⁰ Moran 2002: 1021-1022.

¹⁷¹ Broome 2019: 2.

¹⁷² Wolfe 1999: 27-28.

¹⁷³ Ibid: 28.

¹⁷⁴ Broome 2019: 2.

phase of the settler-colonisation of Indigenous Australia.¹⁷⁵ Henry Reynolds presents a detailed account and analysis of this invasive phase in his book, *The Other Side of the Frontier*.¹⁷⁶ The late Charles Rowley had also provided an account of frontier conflicts in Queensland, Western Australia, and South Australia (including the Northern Territory) in his book, *The Destruction of Aboriginal Society*.¹⁷⁷ Lyndall Ryan recounts in detail the experience of Tasmania's First Nations peoples during this invasive phase in her book, *Tasmanian Aborigines*.¹⁷⁸

During the second phase of settler colonisation – incarceration – the surviving populations were gathered at missions, stations and reservations, “by the lure of rations or by coercive measures”.¹⁷⁹ This second phase – “whilst no longer directly homicidal” – was a continuation of the first stage process of “vacating Aboriginal country” for occupation by settlers.¹⁸⁰ Richard Broome provides an overview of this incarceration phase.¹⁸¹ Lyndall Ryan narrates the incarceration experience of the First Nations peoples of Tasmania at Wybalenna on Flinders Island in Bass Strait.¹⁸² As summed up by Broome, during this incarceration phase of settler colonisation, First Nations peoples were subjected to tight managerial and paternalistic control by “Aboriginal Boards acting under special legislation, which incarcerated people on reserves, managed their daily lives and work, fragmented families, and denied them civil rights.”¹⁸³ Rowley recounted this state of affairs in his book, *Outcasts in White Australia*.¹⁸⁴ Examples of the restrictive laws that governed the lives of First Nations peoples during this second phase of settler colonisation were Victoria's *Aboriginal Protection Act 1869* and *Aboriginal Protection Act 1886*; Western Australia's *Aborigines Protection Act 1886*; Queensland's *Aboriginal Protection and Restriction of the Sale of Opium Act 1897*; New South Wales's *Aborigines Protection Act 1909*; and South Australia's *Aborigines Act 1911*.¹⁸⁵

¹⁷⁵ Broome 2019: 36-56.

¹⁷⁶ Reynolds 2006.

¹⁷⁷ Rowley 1972a: 145-156, 157-186, 187-202, 203-221.

¹⁷⁸ Ryan 2012: 43-57, 74-83, 87-105, 106-121, 122-130, 131-141. See also Nicholas Clements' *The Black War* (Clements 2014).

¹⁷⁹ Wolfe 1999: 28-29.

¹⁸⁰ Ibid: 29.

¹⁸¹ Broome 2019: 57-80, 81-99, 172-194.

¹⁸² Ryan 2012: 219-239, 240-252.

¹⁸³ Broome 2019: 172. The Australian Institute of Aboriginal and Torres Strait Studies (AIATSIS) provides a comprehensive list of such legislation across Australia (AIATSIS [n.d.(f)]).

¹⁸⁴ Rowley 1972b: 41-61, 62-106, 107-127.

¹⁸⁵ AIATSIS [n.d.(f)].

Because First Nations peoples were regarded as a “dying race”, their “sojourn on the missions, stations and reservations ... was seen as a temporary expedient”.¹⁸⁶ Settler-colonisers considered First Nations peoples a dying race because they were (in Wolfe’s description of the settler-colonisers’ perception) “unstiffened by selection [and therefore] entirely unfit to survive in the presence of their immeasurably distant future”.¹⁸⁷ Wolfe was referring here to Social Darwinism.¹⁸⁸ This theoretical stance was the racist application to human societies of Charles Darwin’s biological theory of natural selection concerning the evolution of plants and animals, as elaborated in his *On the Origin of Species by Means of Natural Selection* (1859).¹⁸⁹ As Richard Broome has pointed out: “Darwin had argued in [that book] that different species evolved through a mechanism of ‘natural selection’ or ‘survival of the fittest’, by which favourable variations survived and developed to form new species. The previous forms died out.”¹⁹⁰ Broome noted:¹⁹¹

Social Darwinism came to be widely accepted in Australia by the 1880s. After all, “survival of the fittest” seemed to explain what many white Australians already believed; that some races were better than others, and that the weaker ones faded away.

Broome cited the following commentary by the *Age* (January 1888):¹⁹²

It seems a law of nature that where two races whose stages of progression differ greatly are brought into contact, the inferior race is doomed to wither and disappear ... The process seems to be in accordance with a natural law which, however it may clash with human benevolence, is clearly beneficial to mankind at large by providing for the survival of the fittest ... It may be doubted whether the Australian Aborigine would ever have advanced much beyond the status of the neo-lithic races in which we found him, and we need not therefore lament his disappearance.

The above passage conveyed the common perception among the settler-colonisers at the time that First Nations peoples were at the Stone Age stage of cultural evolution. The Stone Age lasted from about 2.5 million years ago to 3,000 BC, during which human cultures evolved from hunting and gathering and use of very basic stone tools to farming and food production.¹⁹³

¹⁸⁶ Wolfe 1999: 29.

¹⁸⁷ Ibid: 29.

¹⁸⁸ For a concise explanation of Social Darwinism, see Encyclopaedia Britannica [n.d.]; History.com Editors 2018; Broome 2019: 106-108.

¹⁸⁹ History.com Editors 2019.

¹⁹⁰ Broome 1994: 92, 2002: 96.

¹⁹¹ Broome 1994: 92, 2002: 96.

¹⁹² Broome 1994: 92, 2002: 96.

¹⁹³ Kennedy 2019.

So, the passage makes clear Wolfe's above descriptive phraseology that First Nations peoples were perceived by their colonisers as being so far behind in the evolution of their cultures. They had not developed the evolutionary strength – they were “unstiffened by selection” – to withstand a competitive struggle against a vastly “superior” race. The stage of the evolutionary development of the European civilisation of the settler-colonisers was at an “immeasurably distant future” for First Nations peoples.¹⁹⁴

However, during the course of the nineteenth century, the “romance of the dying race” metamorphosed into what the colonial authorities perceived as the “half-caste menace”.¹⁹⁵ Russell McGregor has provided – in his book, *Imagined Destinies*¹⁹⁶ – a detailed account and analysis of what he has termed the “doomed race” theory that informed the minds of settler Australians, until at least the 1950s, concerning the inevitable extinction of First Nations peoples.¹⁹⁷ But First Nations peoples were not dying out. Their number was being augmented by the offspring of sexual exploitation of First Nations women by white men.¹⁹⁸ McGregor¹⁹⁹ has provided a detailed account of “the problem of the half-caste” – of how “there was a growing realisation [by settler governmental authorities] that the descendants of a dying race might continue to haunt a White Australia for generations”²⁰⁰ – and how the authorities had tried to deal with it.²⁰¹

The “half-caste menace”, as perceived by settler-colonial authorities, led to the introduction of the third stage of settler-colonisation, assimilation, “whereby people of combined descent were not to be accounted Aboriginal – which is to say, they were to be accounted settler”.²⁰² Wolfe pointed out that the assimilation phase was inaugurated by the *Aborigines Protection Act 1886* of colonial Victoria. This Act provided for the expulsion of “half-castes” from Victorian First Nations reservations, in the expectation that they would then

¹⁹⁴ See also McGregor 1997: 33-59.

¹⁹⁵ Wolfe 1999: 30.

¹⁹⁶ McGregor 1997.

¹⁹⁷ Ibid: ix.

¹⁹⁸ Wolfe 1999: 29-30.

¹⁹⁹ McGregor 1997.

²⁰⁰ Ibid: 134-141 (the quoted expressions are at 134).

²⁰¹ Ibid: 142-180.

²⁰² Wolfe 1999: 30.

be forced to assimilate into settler society. Other colonies adopted the Victorian strategy as federation approached.²⁰³ However, as Wolfe went on to observe:²⁰⁴

As the new nation and the twentieth century unfolded, official policy progressively turned from a negative strategy of expelling ‘half-castes’ from reserves (which, so far as it worked at all, only produced ‘fringe-camps’ and a rural landscape punctuated by destitute Indigenous people shuffling between the margins of more or less hostile country towns) to a positive strategy whereby the products of ‘miscegenation’ were taken from their kin and incorporated into the settler domains.

Thus, by the 1930s, State governments began the practice of forcibly removing First Nations children of “combined descent” from their mothers, in order to obliterate their natal links, and so that they could then be “bred white”.²⁰⁵ McGregor has provided an account of the adoption of a policy of “breeding out the colour” in the Northern Territory.²⁰⁶ This biological absorption process was regarded as being accomplished over three generations: “half-caste” to “quadroon” to “octoroon”, and, in the fourth generation, the person was “white”.²⁰⁷ The assumption underlying this strategy of eliminating Indigeneity was that the “white man’s libido”²⁰⁸ would continue to do its work of producing “half-castes”,²⁰⁹ whose descendants would in due course, by the process of biological engineering, become “white”. A detailed account of the forcible removal of First Nations children in this context is contained in the 1997 *Bringing Them Home* report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families.²¹⁰ A list of relevant legislation that empowered such forcible removal of First Nations children has been provided by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).²¹¹

After the Second World War, the focus on assimilation of First Nations peoples by way of biological absorption tapered into an assimilation strategy that “was more generally thought of in cultural terms”.²¹² But this culturalist approach did, however, continue to have “genetic

²⁰³ Ibid: 31.

²⁰⁴ Ibid: 31.

²⁰⁵ Ibid: 112, 114, 185.

²⁰⁶ McGregor 1997: 161-180. See also McGregor 2002; Broome 2019: 210-217.

²⁰⁷ Wolfe 1999: 114, 185.

²⁰⁸ Ibid: 181.

²⁰⁹ Ibid: 31; Commonwealth of Australia 1937: 21 (“Ultimately, if history is repeated, the full bloods will become half castes” per J.A. Carrodus, Secretary of the Commonwealth Department of the Interior).

²¹⁰ Commonwealth of Australia 1997.

²¹¹ AIATSIS [n.d.(f)].

²¹² Moran 2005a: 169. See also Haebich 2002; McGregor 2009, 2011: 76-97, 98-118.

assimilation as an undercurrent”.²¹³ This strategy is consistent with Wolfe’s notion of the logic of elimination. The cultural absorption of First Nations peoples would eliminate cultural difference and leave unchallenged the British-derived cultural foundations of Australia as a settler nation-state.²¹⁴

Since the 1970s, successive Australian governments have, however, adopted policies of multiculturalism, to signify their acceptance of cultural diversity.²¹⁵ And since the 1980s, First Nations peoples have come to be included within the framework of Australian multiculturalism, but with a recognition of their special status as Indigenous peoples.²¹⁶ There is, however, a wariness among First Nations peoples that their Indigenous difference might “be diminished within broader multicultural discourse”.²¹⁷ As Alanna Kamp and her co-authors have noted:²¹⁸

[The] positioning of Aboriginal and Torres Strait Islander issues under the umbrella of multiculturalism has been controversial. It is widely documented that Aboriginal and Torres Strait Islander peoples reject being viewed as one ethnic group among many, as their situation is innately and profoundly different from the remainder of Australia’s population.

Thus, it is not surprising that First Nations peoples have not been particularly enthusiastic about engaging with multiculturalism.²¹⁹ In any event, multiculturalism “does not involve unsettling foundational settler narratives”; it “leaves settler colonial structures unchallenged”.²²⁰

The settler-colonial system, as Sarah Maddison has pointed out, “has never worked for Aboriginal and Torres Strait Islander peoples.”²²¹ She notes:²²²

Yet despite incontrovertible evidence of this failure, the nation persists in governing the lives of Aboriginal and Torres Strait Islander peoples in ways that are damaging and harmful, firm in its belief that with the right policy approach, the right funding arrangements, the right set of sanctions and incentives, Indigenous lives will somehow improve.

²¹³ Moran 2005a: 169.

²¹⁴ Ibid: 178; Haebich 2002; McGregor 2009.

²¹⁵ Koleth 2010: 1-26; Moran 2012: 2.

²¹⁶ Moran 2012: 4.

²¹⁷ Ibid: 8.

²¹⁸ Kamp et al. 2018: 52. See also Curthoys 2000: 30.

²¹⁹ Moran 2012: 6-8.

²²⁰ Veracini 2007: paragraph 26.

²²¹ Maddison 2019: xviii.

²²² Ibid: xviii.

Such persistence is attributable to what she has called the ‘colonial fantasy’.²²³ It is the “fantasy” of “colonial completion”.²²⁴ That is, as Adam Barker and Emma Battel Lowman have pointed out above (at the beginning of this section), the attainment of “a supreme and unchallenged settler state and people.”²²⁵

Maddison’s notion of ‘colonial fantasy’ is, in essence, similar to Kevin Bruyneel’s concept of ‘American colonial impositions’. Bruyneel defines his concept to mean “the efforts of the citizens, institutions, and governments of the United States to restrain indigenous people and tribes who are seeking to maintain and secure their cultural, economic, and political practices over time.”²²⁶ When I speak of ‘settler-colonial impositions’, I am drawing upon Bruyneel’s concept and applying it to the existential experience of First Nations peoples in the context of the Australian ‘colonial fantasy’ referred to by Maddison.

Australia’s First Nations peoples have been seeking, particularly since the 1967 Constitutional Referendum, recognition of their Indigenous difference and their Indigenous rights.²²⁷ They are demanding the decolonisation of the Australian nation-state.²²⁸ This decolonising demand is premised upon a firm understanding by First Nations that settler Australians – the dominant component of the Australian population – are here to stay. In the circumstances, decolonisation of the Australian nation-state involves a comprehensive restructuring of the political, social and economic relationships between Indigenous Australia and the Australian nation-state. The fundamental objective of this restructuring is to grant First Nations peoples the right to self-determination and the right to self-government within the constitutional and governmental framework of the Australian nation-state. Decolonisation in this sense does not preclude First Nations peoples from continuing to enjoy Australian citizenship rights.

²²³ *Ibid*: xviii.

²²⁴ *Ibid*: xx.

²²⁵ Barker and Battel Lowman [n.d.].

²²⁶ Bruyneel 2007: 6.

²²⁷ See Chesterman and Galligan 1997:193-222; Petersen and Sanders 1998: 17-23; Attwood and Markus 1999; Behrendt 2003a; Attwood 2003; Moran 2005b: 129-171; McGregor 2011: 162-182, 183-187; Lino 2018; Broome 2019: 217-254, 255-282, 283-319, 320-350; 351-378; Maddison 2019.

²²⁸ As in the immediately above footnote.

In their article, *Decolonization is not a metaphor*²²⁹ Eve Tuck and Wayne Yang have postulated that “decolonization in the settler colonial context must involve the repatriation of land ..., *all* of the land, and not just symbolically.”²³⁰ The decolonisation process must render “all settlers ... landless”²³¹ and must eliminate “settler sovereignty”.²³² In other words, what Tuck and Yang are saying, as I understand it, is that a real decolonisation of a settler-colonised country requires two fundamental events. One, settlers must surrender ownership of their lands to First Nations peoples. Two, the governing of the country must be in the hands of First Nations peoples. Applying this scenario to Australia, in the first situation, if, having surrendered ownership of their lands, non-First Nations peoples continue to occupy their former lands, they would be illegal squatters unless the new owners grant them permission to stay. If they are not allowed to continue occupying their erstwhile lands, then they would have to leave the country. Eventually, if all landless non-First Nations peoples are denied permission to occupy their former lands, then they would have no choice but to depart the country, and Australia would revert to a continent occupied only by the descendants of its original owners and occupiers. In the second situation, the First Nations governors would have the choice of either retaining the constitutional and governmental framework of the erstwhile settler nation-state, or dismantling it and emplacing their own preferred forms of governance. In the first case, assuming that non-First Nations peoples – who are demographically dominant – are permitted to remain in Australia, it would be necessary to disqualify them from becoming members of any of the Commonwealth or State Parliament or Territory Legislative Assembly, so as to ensure that law-making processes continue to be under the control of First Nations peoples. It would also probably be necessary to disqualify non-First Nations peoples from becoming members of the judiciary.

It appears to me that, while theoretically correct, the decolonisation process propounded by Tuck and Yang is idealistic. The context of their postulation is the United States of America. I find it very difficult to imagine that realistically the demographically dominant settler component of that country’s population²³³ would be prepared to render themselves landless and to surrender the governing of the country entirely to Native Americans. I find it equally hard to

²²⁹ Tuck and Yang 2012.

²³⁰ *Ibid*: 7 (emphasis in the original).

²³¹ *Ibid*: 27.

²³² *Ibid*: 26.

²³³ White people comprise 76.3% of a total population of approximate 339.9 million. Native Americans are only 1.3% of the total: (United States Census Bureau [n.d.]).

envisage that the also demographically dominant settler component of the Australian population²³⁴ would be willing to surrender their lands to First Nations peoples and/or give up having a part in the governing of Australia. My thesis takes a realistic approach to settler decolonisation, one that permits the peaceful and respectful coexistence of First Nations and non-First Nations peoples on the Australian continent. It seeks to reconcile: (a) the prior sovereignty of First Nations peoples (which they have never given up) and the assumed sovereignty of the settler colonisers, and (b) First Nations inherent title and the assumed title of the settler colonisers over the lands of the Australian continent.

Lorenzo Veracini – a prominent exponent of settler-colonial studies – has pointed out that “contrary to other types of colonial practice, settler colonialism has been in many ways remarkably resistant to decolonisation.”²³⁵ He takes a realistic approach to settler decolonisation. According to him, the requirement is “to decolonise settler colonial sovereignties [so as to accommodate] Indigenous sovereignties [and] establish settler-Indigenous partnership[s].”²³⁶ Thus, in a situation like Australia, settler decolonisation requires the acceptance and accommodation of First Nations internal sovereignty. This means according First Nations peoples self-determination and self-government rights within the constitutional and governmental framework of Australia. In other words, decolonisation of the settler nation-state requires a comprehensive restructuring of the political, social and economic relationships between Indigenous Australia and settler Australia.

In his book, *Settler Colonialism: A Theoretical Overview*,²³⁷ Veracini said: “Discontinuing settler colonial forms requires conceptual frames and supporting narratives of reconciliation that have yet to be fully developed and narrated.”²³⁸ However, by referring to a “genuinely post-settler compact” and to former Prime Minister John Howard’s well-known mantra that “a nation cannot make a treaty with itself”, Veracini was, it would appear, tentatively suggesting that a possible/suitable decolonisation framework would be a treaty.²³⁹ He said: “What [Howard] meant is that a *settler* nation cannot make a treaty with its non-settler

²³⁴ First Nations peoples comprise only 3.3% of the total population of Australia (Australian Institute of Health and Welfare [n.d.]).

Australia’s population is approximately 25.8 million (Australian Bureau of Statistics [n.d.]).

²³⁵ Veracini 2007: paragraph 1.

²³⁶ Ibid: paragraph 22.

²³⁷ Veracini 2010.

²³⁸ Ibid: 115.

²³⁹ Ibid: 116.

components.”²⁴⁰ But, he went on, “Then again, this is exactly the point: a post-settler nation, even if the precise meaning of such a compact is yet to be determined, could.”²⁴¹

In his article, *Introducing Settler Colonial Studies*,²⁴² Veracini pointed out: “Resistance and survival are ... the weapons of ... the settler colonised; it is resistance and survival that make certain that ... settler colonialism [is] never ultimately triumphant.”²⁴³ He said:²⁴⁴

[T]he struggle against settler colonialism must aim to keep the settler-indigenous relationship ongoing [and prevent settler colonialism’s ‘logic of elimination’ from running its course]. ... [S]ettler colonialism ends with an indigenous ultimate permanence.

Thus, for so long as First Nations peoples continue to resist the assimilative forces of settler colonialism and persistently assert their Indigenous difference and demand recognition of their Indigenous rights, “there can never be a moment of colonial completion in which the Indigenous presence is eliminated.”²⁴⁵

I set out below the structure of this thesis.

6 Thesis structure

I present in Chapter 2 an historical overview of First Nations’ struggle for rights and freedom from settler colonisation. Understanding this history is highly significant for two reasons. One, it leads to an appreciation of why First Nations persist in seeking to exercise self-determination and the decolonisation of Australia. Two, it provides an understanding of why various attempts to achieve those goals have been unsuccessful. The chapter highlights the resoluteness of First Nations peoples in asserting that their status as peoples with the right to self-determination has always been and will always be, and in demanding the decolonisation of the Australian nation-state.

To examine the utility of the judicial arena as a forum for the decolonisation objective of First Nations, I examine selected court cases in Chapters 3, 4 and 5. I dedicate three chapters to analyses of court cases in which First Nations have pursued decolonisation objectives

²⁴⁰ Ibid (emphasis in the original).

²⁴¹ Ibid.

²⁴² Veracini 2011.

²⁴³ Ibid: 3-4.

²⁴⁴ Ibid: 7.

²⁴⁵ Maddison 2019: 213.

because understanding the limits of the judicial system in relation to a comprehensive restructuring of the political, social, and economic relationships of Indigenous Australia and the Australian nation-state is important to my central thesis contention. The cases dealt with different aspects of Indigenous rights. Chapter 3 is concerned with First Nations sovereignty. Chapter 4 is about First Nations cultural heritage rights. Although its focus is a specific example of cultural heritage litigation, it also examines significant political events connected to that case. Chapter 5 dealt with the Indigeneity of urban-dwelling and fair-skin First Nations individuals.

Chapter 3 examines two High Court cases – *Coe v Commonwealth* [1979] HCA 68 and *Coe v Commonwealth* [1993] HCA 42. These two cases exemplified assertions by First Nations peoples of the wrongful British annexation and settler-colonisation of Australia and the continuing sovereignty of First Nations over the Australian continent. The plaintiff in each case was a First Nations individual. Fundamentally, the two cases were manifestations, in the judicial arena, of demands by First Nations peoples for the decolonisation of the Australian nation-state. The fundamental outcome in each case was a refusal by the High Court to recognise, and accommodate, a form of internal sovereignty for First Nations peoples. Accordingly, the cases demonstrate the extent to which judicial adjudication can contribute to the maintenance of settler-colonial power relations. The outcome of the two cases epitomises the fundamental inappropriateness of the judicial arena as a forum for achieving First Nations' decolonisation aspirations.

Chapter 4 examines conflicts and tensions arising out of the politics of competing interests in land that took place in South Australia from 1990 to 2001. This epic arose out of a proposal to construct a bridge across the Murray River from the township of Goolwa to Hindmarsh Island. I look at Federal Court cases concerning the Commonwealth ban against the construction of the Hindmarsh Island Bridge. The cases are *Thomas Lincoln Chapman v The Honourable Robert Tickner* [1995] FCA 1068 and *The Honourable Robert Tickner v Thomas Lincoln Chapman* [1995] FCA 1726. I also look the High Court case of *Kartinyeri v The Commonwealth* [1998] HCA 22, which challenged the constitutional validity of the *Hindmarsh Island Bridge Act 1997* (Cth). In addition to the court cases, I also examine three significant political events. The first one is the appointment by the South Australian Government of the Hindmarsh Island Bridge Royal Commission in June 1995. The second one is the application by Ngarrindjeri women for a protective declaration against the construction of the Hindmarsh

Island Bridge in December 1995 following the quashing by the Federal Court of the original Commonwealth ban against the construction of the bridge. The third one is the enactment of the *Hindmarsh Island Bridge Act 1997* (Cth). A case study of the conflicts and controversies surrounding the construction of Hindmarsh Island Bridge is particularly apt to illustrate a number of issues. One, it demonstrates First Nations peoples' enduring resistance to, and demand to be free of, settler colonialism and settler-colonial impositions. Two, it shows how judicial adjudication, in the context of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) and the Commonwealth Constitution, can contribute to the maintenance of settler-colonial power relations. This is because, under the ADJR Act, the rights and interests of First Nations peoples will be treated in exactly the same way as the rights and interests of other citizens. In other words, the Act does not recognise Indigenous difference. Similarly, under section 51(xxvi) of the Commonwealth Constitution, Indigenous difference is also not recognised. That is, under the Commonwealth Constitution, First Nations peoples will not be treated differently from people of other races. Three, judicial processes are therefore not a reliable tool for achieving First Nations' decolonisation aspirations.

Chapter 5 examines a Federal Court case – *Eatock v Bolt* [2011] FCA 1103. The case dealt with the assertion by First Nations individuals of an aspect of their Indigenous difference, their Indigenous identity, in circumstances where First Nations individuals, with fair skin and who are urban-dwelling, face a constant challenge to the authenticity of their Indigeneity. The case is an apt illustration of the contestation of Indigenous difference against assimilationist settler-nationalism in the judicial arena. At a fundamental level, the case demonstrates First Nations peoples' enduring determination in resisting the forces of assimilationist settler-nationalism and “to regain control of their Indigenous identity”.²⁴⁶ The case manifests an underlying demand to be free of settler-colonial impositions and of settler colonialism. The First Nations applicant was successful in her lawsuit. The case illustrates the strategic value of litigation, in appropriate circumstances, that Lisa Strelein speaks of (noted above).²⁴⁷ However, although the case affirmed the Indigenous difference of First Nations peoples, it did not prevent the continuation of settler-colonial impositions. This is because, in its aftermath, the case would appear to have in fact encouraged scepticism among white Australians about the authenticity

²⁴⁶ Maddison 2019: 226.

²⁴⁷ Strelein 2000.

of fair-skin First Nations individuals. This after-effect testifies to the strength of the assimilationist forces of settler colonialism.

Chapter 6 considers four sets of proposals by First Nations organisations and individuals for decolonising the Australia nation-state in the political arena. The first set comprises the proposals contained in the 1988 Barunga Statement. The second set is ATSIC's 1995 recommended "social justice measures". The package of measures proposed by ATSIC encompassed all the core issues for which Indigenous Australia has lobbied nationally since the 1970s. The third set comprises the measures recommended by the Council for Aboriginal Reconciliation (CAR) in 2000 for settling "unresolved reconciliation measures". The CAR's proposed agenda for decolonisation and the response to it by the John Howard Coalition Government provides an eminently suitable case for exploring the salience of the contestation of First Nations' demand for decolonisation against the forces of assimilationist settler-nationalism in the political arena. The fourth set comprises the proposals by the National Constitutional Convention of First Nations delegates at Uluru in May 2017 for the establishment of a "Voice to Parliament" and a Makarrata Commission, with the latter being responsible for initiating and managing national treaty-making and truth-telling processes. The National Constitutional Convention's Uluru Statement from the Heart and the response to it by the Malcolm Turnbull Coalition Government present another eminently suitable case for examining the continuing contestation of First Nations peoples' aspirations against the forces of assimilationist settler-nationalism. Chapter 6 seeks to examine the utility of the political arena as a forum for achieving First Nations' decolonising objective. The suitability of the political arena is not contingent upon whether or not particular political initiatives are accepted by the Australian nation-state's governmental authorities. What determines the political arena's utility is whether a proposal that has been put before it would bring about, if implemented, the desired result. To determine the suitability of the proposals, the focus of this chapter, in meeting First Nations peoples' decolonising aspirations, I analyse the proposals against the provisions of the UNDRIP. I do this because I argue that UNDRIP – if adopted as a content guide for tripartite treaty negotiation – would have the capacity of bringing about a decolonised relationship between Indigenous Australia and settler Australia.

Chapter 7 examines contemporary treaty-making processes in Victoria, South Australia, Northern Territory and Queensland as sources of useful lessons for a national tripartite treaty-

making process. The chapter also examines the Canada/BC tripartite treaty-making process as part of a possible model for Australia. It advocates the negotiation and implementation of tripartite treaties as the most effective and comprehensive framework for decolonising the Australian nation-state. It then sets out a proforma tripartite treaty with a minimum content premised primarily upon the provisions of UNDRIP.

Chapter 8 concludes my thesis by discussing the way forward. I suggest that the Commonwealth Government is the appropriate authority to initiate and coordinate the tripartite treaty journey. I also suggest the need for a highly focused treaty advancement organisation to spearhead a treaty-making campaign to convince the Commonwealth Government to initiate the treaty journey and to develop a broad base of political support for the treaty-making process.

Chapter 2

The First Nations of Australia: Struggle for Rights and Freedom from Settler Colonialism

1 Introduction

This chapter presents an historical overview of the struggle by the First Nations of Australia¹ for rights and freedom from settler colonialism. The British settler-colonisation of Australia dispossessed First Nations peoples of their lands, decimated and scattered their communities, and affected their ability to freely self-determine and self-govern their lives. The chapter shows the continuing salience to the present day of settler-colonial impositions on First Nations peoples. At the same time, it demonstrates First Nations peoples' abiding resistance to these impositions and their resolute determination to be free of the suffocating embrace of settler colonialism. The chapter indicates the disappointing results in many ways of First Nations' struggle for a decolonised relationship with the Australian nation-state. But it also highlights the resoluteness of First Nations peoples in asserting that their status as self-determining peoples has always been and always will be. It demonstrates their constant and undiminished hope to be one day free of settler colonialism.²

In section 2, I look at three cases that a number of writers have identified as significant demonstrations of First Nations peoples' struggle, in the nineteenth century, against settler colonialism and settler-colonial impositions.³ These involved First Nations communities in Tasmania, Victoria and New South Wales, who were demanding equal right to land ownership and autonomy in their internal affairs (as enjoyed by the settlers). In section 3, I provide a narrative of the emergence of First Nations representative organisations in the 1920s and the 1930s and their struggle for equal rights. In section 4, I look at First Nations peoples' struggle for Indigenous rights since the 1960s. The 1960s marked a redirection of First Nations peoples'

¹ Although, as noted in the introduction to Chapter 1, the use of the term "First Nations", "First Nations peoples" or "First Nations peoples of Australia" to refer to Aboriginal and Torres Strait Islander peoples has gained widespread popularity only in recent years, for consistency, I also employ those descriptive expressions in situations and circumstances that pre-date their recognition/usage.

² ATSIC 1995: paragraphs 1.17-1.20, paragraphs 3.1-3.69; Chesterman and Galligan 1997: 193-222; Peterson and Sanders: 17-28; Attwood and Markus 1999: 20-25, 172-174, 276-280; Behrendt 2003: 86-117; Broome 2019: 227-254, 255-282, 283-319, 320-350, 351-378; Mansell 2016b: 14-19, 42-73, 74-96; Maddison 2019: xvii-xliii, 1-29, 30-52, 53-74, 186-214, 215-234.

³ See, for example, Attwood and Markus 1999: 30-35; Broome 2019: 71-74, 81-89; Ryan 2012: 219-239, 240-252; Goodall 1996: 74-87, 88-94.

struggle for rights in Australia. They began to articulate their claims to distinct rights as First Nations peoples as opposed to simply claiming equal citizenship rights. This disjuncture in rights claiming “arose from the foundation of national organisations, deepening relationships between Aboriginal communities, and a change in Aboriginal consciousness, and lay in a reworking of the relationships between Aborigines and the Australian state.”⁴ The eight sets of events that I have chosen to examine are landmarks in the struggle for Indigenous rights by First Nations peoples since the 1960s.⁵ This shift led to two highly significant outcomes: the enactment of the Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976*, and the 1992 *Mabo* decision of the High Court.⁶ Section 5 concludes the chapter.

2 First Nations peoples’ struggle in the nineteenth century

First Nations communities at Wybalenna (Flinders Island, Van Diemen’s Land⁷); Coranderrk (Victoria); and Maloga/Cummeragunja (New South Wales (NSW)) provided significant examples of First Nations peoples’ struggle against settler colonialism and settler-colonial impositions in the nineteenth century. They demanded equal rights to land ownership and autonomy in their internal affairs. As pointed out by Attwood and Markus, those communities demanded “land for themselves or retention of land previously reserved for their use; help to develop that land; better living conditions; and self-government or at least governance sympathetic to their interests.”⁸ Richard Broome has provided an overview of that struggle.⁹ So have Lyndall Ryan (for Tasmania)¹⁰ and Heather Goodall¹¹ (for NSW).

The dispossessed and decimated First Nations peoples of Van Diemen’s Land were induced by the colonial government to leave the mainland of Van Diemen’s Land and move to Flinders Island (in Bass Strait) following their futile “bitterly fought war of resistance [1824-

⁴ Attwood and Markus 1999: 18-19.

⁵ See Stokes 1997: 159-169; Chesterman and Galligan 1997: 193-222; Petersen and Sanders 1998: 17-28; Attwood and Markus 1999: 18-25; Dow and Gardiner-Garden 2011; Gardiner-Garden 2011; Broome 2019: 227-254, 255-282, 283-219, 351-378.

⁶ [1992] HCA 23.

⁷ As Tasmania was known until 1855 (Encyclopaedia Britannica [n.d.]; State Library New South Wales [26 November 2015]).

⁸ Attwood and Markus 1999: 9, 30.

⁹ Broome 2019: 71-74, 81-89.

¹⁰ Ryan 2012: 219-239, 240-252.

¹¹ Goodall 1996: 74-87, 88-94.

1831^{12]} against the invasion of their lands”.¹³ They understood that Flinders Island was to be a sanctuary for them “as a recompense for the loss of their country.”¹⁴ However, as it turned out, “they had been led to have false hopes.”¹⁵ Rather than “a refuge free from harassment where their culture would be respected”,¹⁶ they had to endure, at Wybalenna,¹⁷ a highly regimented daily existence, vastly different from their way of life in their country on mainland Tasmania. As Broome has pointed out:

[They] were bombarded with Christianity and the work ethic. The children were schooled and catechised; women were taught domestic skills of cleaning, sewing and cooking; they and the men, who worked in the garden, were read the Bible at night and endured questions about God, the Devil, Heaven and Hell.¹⁸

And “the food and living conditions ... were poor, and many of the one hundred or so [individuals at Wybalenna^{19]} died while others suffered from malnutrition and disease.”²⁰ Wybalenna “was becoming a hell”²¹ for the residents.

The Wybalenna community wanted land for farming and to be left alone to manage their own affairs, “doing all we can to support ourselves upon Flinders without our being any more expense to the Government ...”²² Their protests, led by Walter George Arthur²³ as from 1842,

¹² Clements 2014: 1.

¹³ Attwood and Markus 1999: 30. See also Ryan 2012: 43-57, 74-83, 87-105, 106-121, 131-141.

¹⁴ Attwood and Markus 1999: 30.

¹⁵ Ibid: 30.

¹⁶ Broome 2019: 72.

¹⁷ Founded in 1834 (Shaw [n.d.]).

¹⁸ Broome 2019: 72.

¹⁹ They were the survivors of the nearly 300 people who had surrendered to the colonial government’s emissary, George Robinson, between 1831 and 1834] (Ryan 2012: 219).

²⁰ Attwood and Markus 1999: 30.

²¹ Broome 2010: 72.

²² Letter from Walter Arthur to George Walker, 30 December 1845 (Attwood and Markus 1999: Document 2 at 37-38); see also Ryan 2012: 247. George Walker was an “influential Quaker” (Ryan 2012: 247) in Hobart Town, as Hobart was known until 1875 (Twisted History [26 August 2016]).

²³ Attwood and Markus observe: “Arthur had been separated from his kin before he had learned much of his own culture and language and grew up among colonists, spending a few years in [an] orphan school in Hobart before being sent to Flinders Island in 1835. He formed a close association with [George Augustus] Robinson, leaving the island in [1838] with Robinson [for the Port Phillip District of New South Wales] and returning in 1842.” (Attwood and Markus 1999: 31). Robinson was the colonial government’s emissary to whom the Aboriginal people of Van Diemen’s Land surrendered (Attwood and Markus 1999: 30). Robinson was appointed Chief Protector of Aborigines under the newly created Aboriginal Protectorate system of the Port Phillip District (Attwood and Markus 1999: 30).

culminated in a petition, dated 17 February 1846, to Queen Victoria.²⁴ Ryan notes that this was “the first petition to a reigning monarch by an Aboriginal group in Australia.”²⁵ The petition drew the Queen’s attention to their agreement with the colonial government to “freely [give] up our Country to Colonel Arthur then the Governor after defending ourselves” and to live, as “free Aborigines”, on Flinders Island. They had “made our part of it good”, but the government had not kept its part of the bargain. The British Colonial Office “interpreted the petitioners’ claim for independence as a request to return to their own country” and “recommended [to Lieutenant-Governor William Denison] that Wybalenna should be abandoned for a new site [on the mainland of] Van Diemen’s Land.”²⁶ The site chosen by the colonial government was “an abandoned penal station at Oyster Cove ... about 30 kilometres south-east of Hobart.”²⁷ The 49 surviving members of the Wybalenna community – 17 men, 22 women and 10 children²⁸ – arrived at their new home on 18 October 1847.²⁹

The experience of a dispossessed and decimated Tasmanian First Nations community at Wybalenna was a stark example of how First Nations peoples were subjected to tight paternalistic control by settler-colonial authorities during the incarceration phase of settler colonialism. It also demonstrated the inability of First Nations peoples to realise their aspirations, in the nineteenth century, for equal right (as enjoyed by the settlers) to land ownership. But, at the same time, it highlighted the undaunted spirit of First Nations peoples in their demand to be free from settler-colonial impositions, to be free to manage their own lives as their ancestors had done for millennia before the arrival of the settler colonisers.

Similar to the situation in Tasmania, the First Nations peoples of Victoria suffered complete dispossession of land and decimation in numbers³⁰ following settler-colonial invasion

²⁴ Attwood and Markus 1999: Document 3, Petition to Her Majesty Queen Victoria, 17 February 1846, at 38-39. See also Broome 2019: 72-73; Ryan 2012: 247-249.

²⁵ Ryan 2012: 247.

²⁶ Ryan 2012: 250.

²⁷ Ibid: 251.

²⁸ Ibid: 251.

²⁹ Ibid: 253.

³⁰ The estimated population of First Peoples in Victoria in 1834-1835 was 10,000 and fewer than 2,000 in 1863 (Attwood 2003: 6).

that began in 1834–1835.³¹ The Kulin³² had sought land for themselves for farming since 1843.³³ At that time, they were under the governance of the old Aboriginal Protectorate system, which was established in 1838 and abandoned in 1849.³⁴

The Kulin's quest for land was finally met with success – or so they thought – in 1859. The government granted them a parcel of 1,820 hectares³⁵ – that they had selected – at the junction of the Acheron River and the Goulburn River, about 150 kilometres north-east of Melbourne.³⁶ The land was to the north of what was to be Coranderrk.³⁷ The grant was the outcome of an appeal to the Government, in March 1859, by William Thomas (“Guardian of Aborigines”) on behalf of the Kulin (who had sought his assistance).³⁸ However, no sooner had the Kulin commenced their pioneering work at Acheron – “clearing, fencing, building, and planting six hectares of wheat and vegetables” – than their “venture was threatened by local settlers ... who coveted their land for grazing purposes.”³⁹ Despite strong recommendation by Thomas that the Kulin should be permitted to stay at Acheron,⁴⁰ the Government deferred to settlers' demand, and the Kulin were forced to move to another area – Mohican Station – eight kilometres south of Acheron, in November 1860.⁴¹ This was land that was “so cold that no

³¹ Attwood and Markus 1999: 31; Attwood 2003: 6; Broome 2019: 76. Prior to 1 July 1851, when it became a separate colony, Victoria was the Port Phillip District of New South Wales (National Museum of Australia [n.d.(za)]).

³² The ethnonym for the First Nations peoples of the Port Phillip and Western Port regions of Victoria, comprising five related language groups (or clans): Boonwurrung, Dja-Dja Wurrung, Taungurung, Wathaurung, and Woiwurrung (commonly known as Wurundjeri) (Victoria University [n.d.]).

³³ Attwood and Markus 1999: 31–32; Attwood 2003: 6–9; Nanni and James 2013: 6; Broome 2019: 82.

³⁴ Christie [n.d.]; Aboriginal History of Yarra [n.d.]. With the closure of the Protectorate, the Victorian First Peoples “were left to their own devices” (Broome 2019: 81). It was not until 1860 that a new ‘protective regime’ was set up by the colonial government, in the form of the “Central Board Appointed to Watch Over the Interests of Aborigines” {Victoria-Organisation [n.d.(a)] and [n.d.(b)]}. Subsequently, in 1869, with the enactment of the *Aborigines Protection Act 1869*, a statutory regime was established under the control of the “Central Board for the Protection of Aborigines” {Victoria-Organisation [n.d.(a)]}.

³⁵ Attwood and Markus 1999: Document 6, paragraph 7, at 42 Broome 2019: 82.

³⁶ Attwood and Markus 1999: Document 6: William Thomas, Guardian of Aborigines, to the Commissioner of Lands and Survey, Victoria, 4 March 1859, paragraph 2, at 42; Nanni and James 2013: 7; Sovereign Union [n.d.].

³⁷ Attwood and Markus 1999: 13 (map: site of protest); Attwood 2003: 5 (map: site of protest).

³⁸ Ibid: Document 6 at 41–43.

³⁹ Broome 2010: 82. See also Attwood 2003: 9; Nanni and James 2013: 7; Sovereign Union [n.d.].

⁴⁰ Attwood and Markus 1999: Document 7, William Thomas, Guardian of Aborigines, to Robert Brough Smyth, Secretary, Victorian Central Board for the Protection of the Aborigines, 5 October 1860, at 43.

⁴¹ Attwood 2003: 9; Nanni and James 2013: 7; Broome 2019: 82.

Europeans had been willing to settle there”.⁴² And, moreover, “only about sixteen hectares [of the land] was suitable for farming, compared to 400 hectares at Acheron.”⁴³

In March 1863 – after three or so years of unsettled existence at Mohican Station and then at Yering (about 50 kilometres north-east of Melbourne)⁴⁴ – the Kulin “defiantly moved and squatted at a fourth place [which they] named Coranderrk”.⁴⁵ Coranderrk, initially comprising 930 hectares, was declared a First Nations reserve in June 1863.⁴⁶ This followed the attendance by a Kulin deputation, led by Simon Wonga, at a public reception, in May, that the Governor (Sir Henry Barkly) had organised in honour of Queen Victoria’s birthday.⁴⁷ At the reception, the Kulin presented, through the Governor, a “a message of congratulation ... written in the native language and in English” to the Queen “on the marriage of the Prince of Wales” and gifts for her, Prince Albert and the Prince of Wales.⁴⁸ The area of the reserve was subsequently increased to 1,960 hectares in 1866.⁴⁹ Coranderrk was located near Healesville, at the confluence of the Yarra River and Badger Creek, about 60 kilometres north-east of Melbourne.⁵⁰

The Kulin were determined to succeed in their pioneering work at Coranderrk and to make the place their new home.⁵¹ They were intent on making the reserve “fully self-supporting.”⁵² Coranderrk’s “first decade was one of considerable progress, encouraged by the management of John Green and the leadership of Simon Wonga, William Barak and Tommy Bamfield”.⁵³ By 1875 the reserve “was virtually self-supporting.”⁵⁴ And, in the course of their efforts to develop the reserve, the Kulin “acquired a sense of themselves as pioneer farmers who could manage their own affairs and prosper.”⁵⁵ However, by that time too, the Kulin’s dream of a permanent abode at Coranderrk “was [being] threatened by the Board for the

⁴² Nanni and James 2013: 7.

⁴³ Broome 2019: 82.

⁴⁴ Attwood 2003: 9; Nanni and James 2013: 8; Broome 2019: 83.

⁴⁵ Broome 2019: 83. See also Attwood 2003: 9; Nanni and James 2013: 8.

⁴⁶ Broome 2019: 83. See also Attwood and Markus 1999: 32; Attwood 2003: 6; Attwood 2008.

⁴⁷ Broome 2019: 83; Nanni and James 2013: 8-9.

⁴⁸ Attwood and Markus 1999: Document 8, *Illustrated Melbourne Post*, 25 June 1863, at 43-45; Nanni and James 2013: 9.

⁴⁹ Nanni and James 2013: 9; Broome 2019: 83.

⁵⁰ Attwood 2003: 6; Nanni and James 2013: 8; Broome 2019: 83.

⁵¹ Nanni and James 2013: 12-20.

⁵² *Ibid*: 12.

⁵³ Attwood and Markus 1999: 32.

⁵⁴ Broome 2019: 84.

⁵⁵ Attwood 2003: 10.

Protection of Aborigines”.⁵⁶ The Board was attempting to close the reserve and move the Kulin elsewhere in response to pressure “by powerful lobbies with vested interests in purchasing and settling the prime agricultural land of Coranderrk”.⁵⁷ John Green was dismissed by the Board as the reserve manager because of his avowed managerial style – to allow the community “to govern themselves as much as possible”⁵⁸ – and for his opposition to the Board’s intended closure of Coranderrk.⁵⁹

The foregoing events gave rise to “a prolonged political struggle”⁶⁰ by the Kulin to prevent the closure of Coranderrk and to demand the reinstatement of Green as manager.⁶¹ On the latter issue, Nanni and James note: “The Kulin regarded Green’s removal from Coranderrk as a direct threat to their aspirations for autonomy and self-determination.”⁶² Attwood is of the same view: “In calling for Green’s return, the Kulin were asserting the right to govern themselves and control the reserve just as they had under his direction.”⁶³ Attwood describes the Kulin’s campaign as “highly sophisticated”:⁶⁴

They were adept students of the colonial political system and adroit exponents of its techniques of lobbying. They combined their colonial masters’ written means of communication with their customary oral forms to follow events and make representations. They kept abreast of the most recent news through press reports of the Board’s decisions, government announcements and parliamentary debates, and they wrote pleas to journalists, the Board, politicians, humanitarians and the public in the form of petitions and letters to the editor. But they also kept in touch with their allies by word of mouth and sent delegations to speak face-to-face to political leaders, especially the chief secretary. On a few occasions they walked all the way to Melbourne to do so.

Nanni and James have commented: “The Kulin’s determination to keep their land at Coranderrk is best illustrated by the numerous deputations they sent to Melbourne to lobby for the assistance of the Chief Secretary over the following years.”⁶⁵ The activism of the Coranderrk

⁵⁶ Attwood 2003: 12. See also Attwood and Markus 1999: 32-33; Broome 2010: 92. The Board was established in 1869 under the *Aborigines Protection Act 1869* as a successor to the non-statutory Board Appointed to Watch Over the Interests of Aborigines (1860-1869) {Victoria-Organisation [n.d.(a)]}.

⁵⁷ Nanni and James 2013: 19. See also Attwood and Markus 1999: 32-33; Attwood 2003: 12; Broome 2019: 92.

⁵⁸ Nanni and James 2013: 10-11.

⁵⁹ Ibid: 17-20.

⁶⁰ Attwood 2003: 13.

⁶¹ Ibid: 13. See also Attwood and Markus 1999: 33; Nanni and James 2013: 20; Broome 2019: 92.

⁶² Nanni and James 2013: 20.

⁶³ Attwood 2003: 18.

⁶⁴ Ibid: 19.

⁶⁵ Nanni and James 2013: 20. William Barak led three deputations to meet with Chief Secretary Graham Berry (walking 120 kilometres to and from Melbourne each time) in February 1876, May 1878 and March 1881, after

community – led by William Barak, who had assumed the role of principal spokesman for the community following the death of Simon Wonga in 1875 – “is the first example of sustained indigenous protest in Australia.”⁶⁶

Attwood notes: “The protests of the Kulin and their allies were very effective.”⁶⁷ The sustained campaign resulted in the government appointing a Royal Commission in 1877⁶⁸ “to inquire into the present condition of the Aborigines”⁶⁹ and a Board of Inquiry in 1881 to examine the management of Coranderrk itself. The Royal Commission advised the Government that “a discontinuance of the existing stations would be unwise”.⁷⁰ As for the Board of Inquiry, the majority of its members (five out of nine)⁷¹ concluded that “the state of active discontent” in Coranderrk had been caused by the Protection Board’s dismissal of John Green as reserve manager and its “pertinacity ... in pressing upon successive Governments the gratuitous advice that the Blacks should be removed from Coranderrk.”⁷² The majority also found that the residents “earnestly desire to be free of Boards, and to be under the direct control of the Chief Secretary.”⁷³ They recommended the “permanent reservation of the [Coranderrk] land in trust for the Aborigines”⁷⁴ and that “the [Protection] Board should be relieved of its management of Coranderrk.”⁷⁵ Chief Secretary Graham Berry accepted the recommended permanent

an unsuccessful deputation to an unsympathetic Protection Board in the winter of 1875 (Nanni and James 2013: 20, 21, 22, 24, 27).

⁶⁶ Attwood 2003: 6, 13, 19.

⁶⁷ Attwood 2003: 21. Attwood (*Ibid*: 20) points out: “White allies were very important for the Kulin’s protest. They gave advice, facilitated access to politicians, introduced deputations, provided accommodation, helped formulate demands and promoted their claims. Journalists such as George Syme, brother of the editor of the liberal newspaper the *Age*, were useful supporters. The most valuable, though, were humanitarians, particularly Anne Bon and Thomas Embling but also a Jewish philanthropist Ephraim Zox, a Presbyterian clergyman Robert Hamilton and parliamentarians John Dow and Duncan McNab.”

⁶⁸ Attwood 2003: 21. See also Nanni and James 2013: 20; Broome 2019: 92.

⁶⁹ Victoria Parliament 1877.

⁷⁰ *Ibid*: xi. There were six “stations”. The other five were Ramahyuck (near Sale), Lake Tyers (near Lakes Entrance), Framlingham (near Warrnambool), Lake Condah (near Condah), and Ebenezer (near Dimboola).

⁷¹ Anne Bon, Thomas Embling, John Dow, John Kerr, and Duncan McNab (Victoria Parliament 1882). The other members (the minority) were Ewen Cameron (chairman), Thomas Armstrong, Guillaume de Pury, and James Steel. The minority did not recommend the closure of Coranderrk. See also Nanni and James 2013: 28-32.

⁷² Victoria Parliament 1882: vi (Addendum A, paragraph 20).

⁷³ *Ibid*: vi (Addendum A, paragraph 22).

⁷⁴ *Ibid*: vi (Addendum A, paragraph 23).

⁷⁵ *Ibid*: vi (Addendum A, paragraph 24).

reservation of Coranderrk. The Government's decision was notified in the Victorian Government Gazette on 10 October 1884.⁷⁶

By 1884 too, however, the Protection Board had convinced the Government to adopt as policy a formal distinction between "full blood" and "half-caste" First Nations individuals, and for the latter to be excluded from First Nations reserves.⁷⁷ The policy became law under the *Aborigines Protection Act 1886*. As noted in Chapter 1, Patrick Wolfe pointed out that this legislation marked the commencement of the assimilation phase of the settler colonisation of Indigenous Australia. The Act has been described by Mark McMillan and Cosima McRae as "the Half-Caste Act".⁷⁸ The Act, passed on 16 December 1886, came into operation on 1 January 1887.⁷⁹ Under the Act, "half-castes"⁸⁰ were deemed non-First Nations persons and so were disqualified from being residents of First Nations reserves. They were to be absorbed into the general community.⁸¹ The policy had a devastating effect on the population of Coranderrk, which "had a disproportionately large" component of "half-castes", and the well-being of its community.⁸² As the Board had started implementing the policy administratively even before receiving the Government's endorsement of it, by 1885 "there were only half-a-dozen 'half-caste' men" left in Coranderrk.⁸³ Many of the excluded individuals took refuge at the mission station of Maloga in NSW.⁸⁴

The population of Coranderrk had fallen to such an extent that the Government felt justified in revoking half of the area of the reserve in 1893. This (among a number of other revocations) was authorised by a special enactment – the *Crown Lands Reserve Act 1893*. The

⁷⁶ Victorian Government Gazette (Online Archive 1837-1997) – Gazette 119 (the site described as Gracedale), p. 2867. Prior notice of the proposed permanent reservation of Coranderrk was published on 5 September 1884 in Gazette 104 [the site described as Gracedale (Coranderrk)], p. 2604. See also Attwood 2003: 22; Nanni and James 2013: 182; Broome 2019: 93.

⁷⁷ Attwood 2003: 22-26.

⁷⁸ McMillan and McRae 2015.

⁷⁹ Act, section 1.

⁸⁰ As defined by section 3 of the 1886 Act, a "half-caste" was a person "of mixed aboriginal blood", unless he or she was deemed an "aboriginal" pursuant to section 4(2), 4(3), 4(4) or 4(5). A "half-caste" was "aboriginal" if: (a) under section 4(2), he or she was "habitually associating and living with an aboriginal" and had attained the age of thirty-four prior to the date the Act came into operation; (b) under section 4(3), she was married to "an aboriginal" and living with that husband prior to the date the Act came into operation; (c) under section 4(4), he or she was "an infant unable to earn his or her living" and was living with his or her "aboriginal" parent; and (d) under section 4(5), he or she had "a licence in writing from the Board ... to reside" at an Aboriginal reserve.

⁸¹ Attwood 2003: 22.

⁸² Ibid: 22-27; Nanni and James 2013: 182-188.

⁸³ Attwood 2003: 26.

⁸⁴ Ibid: 27.

long title of the Act was *An Act to revoke in the whole or in part the Permanent Reservation under Orders in Council of certain Crown Lands and to enable such Lands to be used for Agricultural Village and Homestead Settlement*. The preamble to the Act stated that the various revoked areas listed in the schedule to the Act were no longer “required for the purposes for which they were respectively reserved”. In other words, in relation to the Coranderrk reserve, half of its area was considered by the Government to be superfluous to the requirement of the remaining First Nations residents. The revoked land was to be made available to white settlers, for them to use (as put by the *Crown Lands Reserve Act 1893*) “for agricultural village and homestead settlement”.

The struggle by the dispossessed and decimated Kulin nation in nineteenth century Victoria for equal right to land ownership and to be free to manage their own lives was an awe-inspiring display of tenacity within a framework of asymmetric power relations. However, the Kulin people’s existential experience at Coranderrk – a place that they considered was their agricultural village and home, which they had arduously worked, as pioneers, to make it so – ultimately ended in a second dispossession. For First Nations peoples, Coranderrk was a despondent nineteenth-century illustration of uncaring settler-colonial impositions. In a conflict between requirement for land by First Nations peoples and that of white settlers, the former must make way for the latter.

The Maloga mission (NSW) was established by Daniel and Janet Matthews in 1874 on land privately owned by Daniel and his elder brother William on the Murray River near Echuca (Victoria).⁸⁵ In 1881, the First Nations residents of the mission petitioned the Governor of New South Wales (Lord Augustus Loftus) for farming land for themselves. They were, according to Attwood and Marcus, “undoubtedly encouraged by William Barak who was visiting at the time and by other Coranderrk Aborigines who had begun to return to their traditional homelands.”⁸⁶

The petitioners – describing themselves as “members of the Moira and Ulupna tribes” – drew the attention of the Governor to their sad and precarious circumstances as a consequence of being dispossessed of their lands:

⁸⁵ Cato 1974; Attwood and Markus 1999: 33; Attwood 2003: 27; Broome 2019: 87-89.

⁸⁶ Attwood and Markus 1999: 33. See also Attwood 2003: 28; Nanni and James 2013: 188.

[A]ll the land within our tribal boundaries has been taken possession of by the Government and white settlers. Our hunting grounds are used for sheep pasturage, and the game reduced, and in many places exterminated; rendering our means of subsistence extremely precarious, and often reducing us, and our wives and children, to beggary.⁸⁷

They assured the Governor that they were “earnestly desirous of settling down to more orderly habits of industry” and forming “homes for our families.”⁸⁸ They expressed confidence of being able “in a few years [to] support ourselves by our own industry were a sufficient area of land granted to us to cultivate and raise stock.”⁸⁹ However, rather than granting the petitioners land that would be privately owned as individual family blocks, a newly elected NSW Government⁹⁰ responded to the petition in 1883 by providing for a First Nations reserve of 728 hectares – that was to become the Cummeragunja reserve – on land near Barmah (Victoria), five kilometres from the Maloga mission.⁹¹ But the settlement of the reserve only began in 1888 when George Bellenger – who replaced Matthews as head of the Maloga mission in 1887 – closed the mission and moved its residents and “houses, huts and most of the other buildings” to Cummeragunja.⁹²

In the meantime, on 20 July 1887, the Maloga residents – describing themselves as “Aborigines and half-castes” – sent another petition⁹³ to the Governor (Baron Carrington). They requested grants of land “of not less than 100 acres [40 hectares] per family in fee simple” so as to enable them “to earn their own livelihood”. In support of their case, the petitioners reminded the Governor that “the Aborigines were the former occupiers of the land”. They did not get what they wanted, freehold farming land. Those who had moved to Cummeragunja in 1888 had to wait seven or so years before they were provided with private allotments of reserve land. From 1895 to 1898, when the management of the reserve was under George Harris, 20 farming blocks, each 16 hectares, were provided for the residents.⁹⁴ Many of the blocks were being operated profitably by the turn of the century.⁹⁵ However, notwithstanding the positive

⁸⁷ Attwood and Markus 1999: Document 15, Maloga petition, 1881, at 51.

⁸⁸ Ibid: Document 15, at 51.

⁸⁹ Attwood and Markus 1999: Document 15, at 51.

⁹⁰ Under Sir Alexander Stuart. The Stuart Government took over from that of Sir Henry Parkes on 5 May 1883 and was in power until 7 October 1885 (New South Wales Parliament [n.d.]).

⁹¹ Cato 1974; Attwood and Markus 1999: 33; Attwood 2003: 29; Koori History 2016; Broome 2019: 88.

⁹² Federal Court of Australia 1998: paragraph 40.

⁹³ Attwood and Markus 1999: Document 16: Maloga petition, 1887, at 59; Attwood and Markus 2004: Document 1, Maloga petition, 20 July 1887, at 27.

⁹⁴ Federal Court of Australia 1998: paragraph 42.

⁹⁵ Ibid: paragraph 42.

results, the blocks were resumed by the NSW Aborigines Protection Board in 1908, and “[m]uch of the land itself was subsequently leased to a neighbouring white farmer.”⁹⁶

The expectation of the First Nations residents of the Cummeragunja reserve of being granted equal right to freehold land ownership – and to be free to manage their own lives – in the same way as white settlers, failed to have a happy ending. The settler colonial authorities did not consider First Nations peoples worthy of being treated in the same way as white pioneering farmers. Just like Coranderrk in Victoria, Cummeragunja was a stark illustration of heartless settler-colonial impositions. Once again requirement for land by white settlers prevailed over that of First Nations peoples.

The trajectory of the existential experience of the First Nations communities examined above was a graphic demonstration of the inability of First Nations peoples to realise their aspirations, in the nineteenth century, for equal right to land ownership and to be free to manage their own lives outside of reserve/mission incarceration (the second phase of settler colonisation). But their struggle was and is not futile. It exemplified their abiding resistance to settler-colonial impositions. Such resistance continue to the present day.

The next section looks at the establishment of First Nations representative organisations in the 1920s and 1930s and their struggle for equal rights.

3 First Nations representative organisations in the 1920s and 1930s

First Nations peoples’ struggle for equal rights in these periods saw “the emergence of political organisations founded and led by Aborigines, yet supported by non-Aboriginal activists” in the 1920s and 1930s.⁹⁷ The leaders of these organisations:⁹⁸

... tended to be men who had not only acquired the rudiments of a European education but had also worked in many areas of Australia – experience that provided them with a broader knowledge of the oppression of their people than that held by most other Aborigines.

⁹⁶ Ibid: paragraph 42.

⁹⁷ Attwood and Markus 1999: 58.

⁹⁸ Ibid: 58.

Exemplars of these organisations were the Australian Aboriginal Progressive Association in the 1920s and the Aborigines Progressive Association in the 1930s in NSW, and the Australian Aborigines' League in Victoria also in the 1930s.⁹⁹

The Australian Aboriginal Progressive Association (AAPA) of NSW was founded in 1924 by Fred Maynard,¹⁰⁰ “in the midst of the second dispossession [that is, loss or reserve land],¹⁰¹ the growing [Aboriginal Protection Board] pressure on children and communities, and the spreading segregation of town services.”¹⁰² Maynard was born in 1879.¹⁰³ He “was a self-taught man, receiving no formal schooling, and travelling Australia as a drover and stockman while a young man, before returning to Sydney to work on the wharves and take an active part in the Waterside Workers' Union during the First World War.”¹⁰⁴

The AAPA was the first organisation representing First Nations peoples to be established in Australia.¹⁰⁵ In a letter to the NSW Premier, dated 25 May 1927, it demanded the following rights and benefits for the First Nations peoples of NSW:¹⁰⁶

- (a) grants of “good” freehold land of sufficient size “to maintain a family” to “all capable aboriginals”;
- (b) “the family life of the aboriginal people” to be “free from invasion” and for children to be “left in the control of their parents”;
- (c) “the incapables of the Aboriginal Community [to] be properly cared for in suitable homes on reserves”, at “the full expense” of the government;
- (d) management of “aboriginal Homes, Hostels or Reserves” to be “entrusted to ... educated aboriginals possessing the requisite ability”; and
- (e) “control of aboriginal affairs ... to be vested in a board of management comprised of capable educated aboriginals”.

⁹⁹ Ibid: 58-64; Goodall 1996: 149-170, 185-192, 230-246, 247-258; Maynard: 1997, 2003, 2005, 2007; Broome 2010: 200-206.

¹⁰⁰ Goodall 1996: 150; Maynard 2003: 91; Broome 2010: 204.

¹⁰¹ Goodall 1996: 125-148.

¹⁰² Ibid: 149.

¹⁰³ Maynard 2007: 9.

¹⁰⁴ Goodall 1996: 151. See also Maynard 2007: 9.

¹⁰⁵ Goodall 1996: 149; Attwood and Markus 1999: 58; Maynard 2007: 1; Broome 2019: 204.

¹⁰⁶ Attwood and Markus 1999: Document 27, Fred Maynard, President, L. Lacey, Secretary, Australian Aboriginal Progressive Association, to J.T. Lang, Premier of NSW, 28 May 1927, at 66-67. See also Goodall 1996: 149-170; Maynard 2007: 93-119.

The AAPA anchored the above demand on the fact that First Nations were “the original owners of the land” who managed their own affairs.¹⁰⁷ By virtue of that fact, the AAPA asserted, “the reasonableness”¹⁰⁸ and “the equity” of its demand were readily apparent.¹⁰⁹

The “AAPA abruptly ceased public operation in 1928.”¹¹⁰ According to John Maynard (Fred was his grandfather), the organisation “was hounded and harassed out of existence by the New South Wales police, acting on behalf of the Aborigines Protection Board.”¹¹¹ Ultimately, the AAPA’s struggle, over a period of about four years (1927 being “the busiest”¹¹²) was all to no avail. As John Maynard has pointed out, “one is left to ponder and lament what might been” if the AAPA’s demand had been met.¹¹³

The Aborigines Progressive Association (APA) of NSW was founded by William Ferguson and Jack Patten in 1937.¹¹⁴ Ferguson was born in 1882.¹¹⁵ He was a shearer and trade unionist. He received his “brief education” (1895-96) at Warangesda mission school (Darlington Point, NSW).¹¹⁶ Patten was born in 1905.¹¹⁷ He was educated at Cummeragunja mission school and at Tumbarumba and West Wyalong public schools. Unable to gain admission to the navy, he became a labourer and an occasional boxer, and, when not otherwise employed, he was a regular Sunday speaker on First Nations peoples’ rights at the Sydney Domain.¹¹⁸

The APA’s primary demand was for the First Nations peoples of NSW to be accorded “the same rights as other Australians”, that is, full citizenship rights.¹¹⁹ Towards this end, it

¹⁰⁷ Attwood and Markus 1999: Document 28: Fred Maynard, President, Australian Aboriginal Progressive Association, to J.T. Lang, Premier of New South Wales, 3 October 1927, at 67-70, 68.

¹⁰⁸ *Ibid*: Document 27, at 66-67, 67.

¹⁰⁹ *Ibid*: Document 28 at 67-70, 68.

¹¹⁰ Maynard 2007: 8. See also Attwood and Markus 1999: 59.

¹¹¹ *Ibid*: 8. The NSW police commissioner was the chairman of the Aborigines Protection Board (Maynard 2007: 8).

¹¹² *Ibid*: 93.

¹¹³ *Ibid*: 143.

¹¹⁴ Attwood and Markus 1999: 59; National Museum of Australia [n.d.(zb)].

¹¹⁵ Horner 1981.

¹¹⁶ *Ibid*.

¹¹⁷ Horner 1988.

¹¹⁸ *Ibid*.

¹¹⁹ Attwood and Markus 1999: 59.

“emphasised integration rather than Aboriginality in articulating its programme for change.”¹²⁰
And as pointed out by Attwood and Markus:¹²¹

The principal targets for [its] protest were the feared [*Aborigines Protection Act 1909* (NSW)]; the hated Aborigines Protection Board of NSW and many of its authoritarian reserve managers; the breaking up of many reserves and the concentration of First Nations peoples on other ones; the appalling conditions on these reserves; poor schooling; the loss of reserve lands; the denial of social welfare benefits; the removal of children from their parents; and the colour bar in country towns.

In January 1938, the APA published a pamphlet (under the name of Patten as President and Ferguson as Secretary), entitled *Aborigines Claim Citizen Rights! A Statement of the Case for the Aborigines Progressive Association*.¹²² The pamphlet – published a week before a government-sponsored re-enactment of the 150th anniversary of the landing of the First Fleet was to be held in Sydney on 26 January¹²³ – denounced the commemoration of the event. Its opening paragraph stated:¹²⁴

The 26th of January, 1938, is not a day of rejoicing for Australia’s Aborigines; it is a day of mourning. This festival of 150 years’ so-called ‘progress’ in Australia commemorates also 150 years of misery and degradation imposed upon the original native inhabitants by the white invaders of this country.

The second paragraph contained the following statement:¹²⁵

You are the New Australians, but we are the Old Australians. We have in our arteries the blood of the Original Australians, who have lived in this land for many thousands of years. You came here only recently, and you took our land away from us by force. You have almost exterminated our people, but there are enough of us remaining to expose the humbug of your claim, as white Australians, to be a civilised, progressive, kindly and humane nation. By your cruelty and callousness towards the Aborigines you stand condemned in the eyes of the civilised world.

The above statements, described by Patten and Ferguson as “harsh words”,¹²⁶ constituted a succinct denunciation of the British settler-colonisation of Australia and its consequences for

¹²⁰ Ibid: 59.

¹²¹ Attwood and Markus 1999: 60.

¹²² Patten and Ferguson 1938. An edited version of the pamphlet is reproduced in Attwood and Markus 1999 as Document 37, at 82-86.

¹²³ Broome 2019: 205.

¹²⁴ Patten and Ferguson 1938: 3.

¹²⁵ Ibid: 3.

¹²⁶ Ibid: 3.

the prior owners and occupants of the continent. The pamphlet concluded with an appeal for “a New Deal for Aborigines”.¹²⁷

The APA organised a “Day of Mourning” conference in Sydney to coincide with the official commemoration of the landing of Governor Phillip and the British settler-colonisers in 1788. It was held a kilometre away from where the re-enactment event was taking place,¹²⁸ during which the following resolution was passed:¹²⁹

WE, representing THE ABORIGINES OF AUSTRALIA, assembled in Conference at the Australian Hall, Sydney, on the 26th day of January, 1938, this being the 150th Anniversary of the whitemen’s seizure of our country, HEREBY MAKE PROTEST against the callous treatment of our people by the whitemen during the past 150 years, AND WE APPEAL to the Australian Nation of today to make new laws for the education and care of Aborigines, and we ask for a new policy which will raise our people to FULL CITIZEN STATUS and EQUALITY WITHIN THE COMMUNITY.

Subsequently, on 31 January, an APA deputation – led by Patten and Ferguson – met with Prime Minister Joe Lyons and presented him with a proposal for a “National Policy for Aborigines”.¹³⁰

The proposed policy program was premised on Commonwealth control of First Nations affairs, to be under the purview of a Minister for Aboriginal Affairs with full Cabinet rank. The Minister would have the administrative support of a Department of Aboriginal Affairs. There would also be a Board appointed to advise the Minister and Department. The Board would consist of six members, three of whom would be First Nations individuals nominated by the APA. The primary aim of the proposed program was to accord First Nations peoples full citizen status and equality with white Australians, including equality in education, labour laws, workers compensation, pensions, land ownership and wages. Rather than seeking to discuss possible solutions with State Governments or to amend the Commonwealth Constitution, Prime Minister Lyons took the easy way out in his response. He pointed out that under the

¹²⁷ Ibid: 11.

¹²⁸ Broome 2010: 206.

¹²⁹ Patten and Ferguson 1938: 12 (notice of conference). See also Broome 2019: 206; AIATSIS [n.d.].

¹³⁰ Attwood and Markus 1999: Document 39, Our Ten Points, at 89-91.

Commonwealth Constitution a Commonwealth takeover of Aboriginal affairs from the States was not possible.¹³¹ The APA ceased active operation in 1944.

Like that of the AAPA (NSW), the advocacy for citizenship rights for First Nations peoples by the APA(NSW) in the latter part of the 1930s was not given much of a hearing by either the NSW Government or the Commonwealth Government. Governmental authorities were, apparently, intent on subjecting First Nations peoples to settler-colonial impositions.

The Australian Aborigines' League (AAL) of Victoria was established in 1936 by William Cooper,¹³² in collaboration with "sympathetic non-Aboriginal activists",¹³³ in particular Arthur Burdeu.¹³⁴ However, for three or so years prior to the establishment of the AAL, Cooper himself had been actively engaged in advocating reforms in the treatment of First Nations peoples.¹³⁵ Cooper was born in 1861.¹³⁶ He had very little formal schooling as a child, and much of his later formal education was gained from attendance at adult literacy classes.¹³⁷ He "worked as shearer and handyman for pastoral employers for much of his life"¹³⁸ in Queensland, South Australia, NSW and Victoria.¹³⁹

A notable initiative taken by Cooper in September 1933 was the launching of a campaign for a First Nations petition to King George V.¹⁴⁰ Once the AAL was established, the campaign became its project. The petition (with 1,814 signatures) was presented to Prime Minister Joe Lyons by Cooper (as the Secretary of the AAL) in August 1937 for onward transmission to the King (who was by that time George VI).¹⁴¹ The petition recited:¹⁴²

¹³¹ AIATSIS [n.d.]: section "Beyond the Day of Mourning".

¹³² Attwood and Markus 2004: 11.

¹³³ Attwood [n.d.]

¹³⁴ Attwood [n.d.]; Attwood and Markus 2004: 11-13.

¹³⁵ Attwood and Markus 2004: 1933, Documents 8-11, 13-15, at 34-38; 1934, Documents 16-24 at 39-42; 1935, Documents 25-29, at 43-46.

¹³⁶ Barwick 1981; Attwood and Markus 2004: 2.

¹³⁷ Attwood and Markus 2004: 5. See also Barwick 1981.

¹³⁸ Barwick 1981.

¹³⁹ Attwood and Markus 2004: 3.

¹⁴⁰ Ibid: 7.

¹⁴¹ National Archives of Australia [n.d.(a)]; AIATSIS [n.d.]: section "Beyond the Day of Mourning". Cooper had provided a copy of the proposed petition to the Prime Minister as early as October 1933 (Attwood and Markus 2004: Document 13, William Cooper to the Minister of Australia, Joseph Lyons, 23 October 1933, at 36-37).

¹⁴² National Archives of Australia [n.d.(a)]: my numbering.

[1] it was not only a moral duty, but a strict injunction included in the commission issued to those who came to people Australia that the original occupants and we their heirs and successors should be adequately cared for [;]

[2] the terms of the commission have not been adhered to in that: (a) our lands have been expropriated by Your Majesty's Government in the Commonwealth; [and] (b) legal status is denied to us by Your Majesty's Government in the Commonwealth [;] [and]

[3] all petitions made on our behalf to Your Majesty's Government have failed.

As in the case of the opening statements in the Patten and Ferguson pamphlet referred to earlier,¹⁴³ the above recitals constituted a succinct denunciation of the British settler-colonisation of Australia and its consequences for the prior owners and occupants of the continent.

The petition prayed that the King:¹⁴⁴

will ... through the instrument of Your Majesty's Government in the Commonwealth of Australia: [1] prevent the extinction of the Aboriginal Race[;] [2] provide better conditions for all[;] and [3] grant us power to propose a ... person of our own Blood, or White man known to have studied our needs and to be in Sympathy with our Race to represent us in the Federal Parliament.

The Secretary of the Prime Minister's Department responded to Cooper on 2 March 1938. He assured the AAL "that the whole question of the welfare of the aboriginals is now receiving full and sympathetic consideration by the Commonwealth Government, in conjunction with the Governments of the various States".¹⁴⁵ Therefore, "no good purpose would be served by transmitting the petition to His Majesty".¹⁴⁶ The Lyons Government's promise of "sympathetic consideration" was a hollow one.

As set out in its Constitution,¹⁴⁷ the "ultimate object" of the AAL was "the conservation of special features of Aboriginal culture and the removal of all disabilities, political, social or economic ... borne by aboriginals and to secure their uplift to the full culture of the British

¹⁴³ *Aborigines Claim Citizen Rights! A Statement of the Case for the Aborigines Progressive Association* (Patten and Ferguson 1938).

¹⁴⁴ National Archives of Australia [n.d.(a)]: my numbering.

¹⁴⁵ National Archives of Australia [n.d.(c)]: folio 103.

¹⁴⁶ *Ibid*: folio 103.

¹⁴⁷ Attwood and Markus 2004: Document 31, William Cooper, Secretary, Australian Aborigines' League, to the Hon. the Minister for the Interior, 22 February 1936, at 48-49.

race.”¹⁴⁸ In light of the first part of this statement, on the need to conserve Aboriginal culture, the latter part, about the uplifting of First Nations individuals to “the full culture of the British race”, has to be understood not as requiring abandonment of their Indigenous difference, but their inclusion in the Australian community and enjoyment of the same rights and benefits as other Australians.

The AAL’s Constitution also set out its “immediate programme”, which was to achieve “the progressive elevation of the aboriginal race by education and training in the arts and crafts of European culture”.¹⁴⁹ This policy program was premised on an understanding that, in terms of European or western notions of civilisation and modernisation, First Nations peoples were in three stages of development: “primitive”, “semi-civilised and de-tribalised”, and “civilised”.¹⁵⁰ The program advocated different policies for each group, as set out below.

First Nations peoples classified as “living in their primitive state” would be provided – until “such time as [they were] civilised” – with adequate inalienable reserved land and “full” sustenance. Their youth would undergo “progressive” civilisation through education and industrial training. For the trial of “primitive” prisoners, “special Courts of Justice” would be established, which would, in the process, recognise “tribal laws and customs as complementary to the laws of the land”.¹⁵¹

First Nations peoples in the “semi-civilised and de-tribalised” category would be provided with inalienable reserved lands “suitable for stock, agriculture or other farming, with adequate machinery, equipment and training”. They would also have the “right to work for adequate remuneration” and be entitled to “Invalid or Old Age Pensions”. Their children would receive free education and technical training “up to the standard of White education”.¹⁵²

First Nations peoples who were “civilised” would receive grants of inalienable “allotments of land suitable for agriculture or other farming, with requisite machinery and equipment”, to be worked “for their own profit”, and disposable by “Will to [their] next of kin”. As in the case of individuals in the “semi-civilised and de-tribalised” category, First Peoples

¹⁴⁸ Ibid: Document 31, clause 7, at 49.

¹⁴⁹ Ibid: Document 31, clause 8, at 49.

¹⁵⁰ Ibid: 49-50.

¹⁵¹ Ibid: 49.

¹⁵² Ibid: 49-50.

individuals in the “civilised” category would be entitled to invalid or old-age pensions, and their children would receive free education and technical training up to White standards. Additionally, they would be entitled to “Full political, social and economic rights ... including the Franchise and ... maternity bonus.”¹⁵³

The AAL also advocated the federalisation of First Nations affairs.¹⁵⁴ The “Day of Mourning” conference referred to above was suggested by the AAL.¹⁵⁵ Its members participated in the conference,¹⁵⁶ and it endorsed the proposal for a national policy on Aboriginal affairs that was presented to Prime Minister Lyons on 31 January 1938.¹⁵⁷

With the death of Cooper in 1941, the AAL became more or less inactive, but it was revived after the Second World War by Doug Nicholls and Bill Onus.¹⁵⁸ Subsequently, it was subsumed into the Victorian Aborigines Advancement League,¹⁵⁹ which was founded in 1957 by Nicholls in collaboration with non-Aboriginal activists (Gordon Bryant MHR,¹⁶⁰ Doris Blackburn, and Stan Davey).¹⁶¹ Ultimately, the political campaigns of the AAL (Victoria), like those of the AAPA (NSW) and the APA (NSW), “met with little success”.¹⁶²

The lack of success in the equal rights campaigns, in the 1920s and 1930s, of the three First Nations representative organisations discussed above, is a vivid demonstration of the continuing salience of settler-colonial impositions that First Nations peoples experienced in the nineteenth century at Coranderrk (Victoria), Cummeragunja (NSW) and Poonindie (South Australia).

The next section examines First Nations’ struggle for Indigenous rights since the 1960s.

¹⁵³ Ibid: 50.

¹⁵⁴ Attwood and Markus 2004: Document 42, William Cooper, Secretary, Australian Aborigines’ League, to the Prime Minister, Joseph Lyons, 16 January 1937, at 64-66.

¹⁵⁵ Ibid: Document 56: *Argus*, 13 November 1937, ‘Aborigines’ Day of Mourning: Plan for 150th Anniversary’, at 82.

¹⁵⁶ AIATSIS [n.d.]: section “Surely the time has come”.

¹⁵⁷ Attwood and Markus 2004: Document 61, William Cooper, Secretary, Australian Aborigines’ League, to the Minister for the Interior, John McEwen, 19 January 1938, at 87-89.

¹⁵⁸ National Museum of Australia [n.d.(b)]; Attwood and Markus 1999: 62.

¹⁵⁹ National Museum of Australia [n.d.(b)].

¹⁶⁰ Gordon Bryant was the Minister for Aboriginal Affairs, 1972-1973, in the Whitlam Labor Government: (Museum of Australian Democracy [n.d.]; Gifford [n.d.]).

¹⁶¹ Broome 2019: 218.

¹⁶² Attwood and Markus 1999: 63.

4 First Nations' struggle since the 1960s

The struggle for Indigenous rights by First Nations peoples since the 1960s included a number of significant events, as follows:

- (1) demand for land rights by the Yolngu people and the Gurindji people;
- (2) the 1965 Freedom Ride;
- (3) the 1967 Constitutional Referendum;
- (4) the establishment of the Aboriginal Embassy in January 1972;
- (5) the adoption of a new approach to the management of First Nations affairs by the Commonwealth Government beginning in 1972;
- (6) the call for a national treaty by the National Aboriginal Conference in 1979;
- (7) challenges against settler colonialism and settler colonial impositions mounted by First Nations individuals in the judicial arena; and
- (8) proposals for decolonising the Australian nation-state, including constitutional recognition of First Nations, made by institutions established by the Commonwealth Government from the late 1980s.

The above sets of events constituted a significant re-direction of First Nations peoples' struggle for rights, from equal citizenship rights to Indigenous rights. The events were/are essentially inter-linked. Preceding events inspired subsequent ones.

The fundamental cause of the disjuncture in First Nations peoples' rights claiming was the establishment of national organisations dedicated to the advocacy of First Nations peoples' Indigenous rights. In this regard, the Federal Council for Aboriginal Advancement (FCAA) – founded in February 1958 – “became the most important voice in Aboriginal politics”.¹⁶³ As Attwood and Markus have pointed out, “the FCAA’s agenda underwent change in the 1960s.”¹⁶⁴ Its early focus on equal citizenship rights (including equal wages for First Nations pastoral workers) shifted to attack upon assimilation and advocacy for land rights.¹⁶⁵ Thus:¹⁶⁶

From 1963, at first slowly, then more quickly from 1966-67 – when a strike by cattle station workers at Wave Hill in the Northern Territory became a claim for land – the primary focus of

¹⁶³ Attwood and Markus 1999: 19.

¹⁶⁴ Attwood and Markus 1999: 19.

¹⁶⁵ Attwood and Markus 1999: 19-20. See also Bandler 1989: 15-34 (equal wages); 35-60 (land rights); Taffe 2001: 176-238 (anti-economic discrimination, including for equal wages); 239-307 (land rights).

¹⁶⁶ Attwood and Markus 1999: 20.

Aboriginal politics began to shift away from the ideal of rights for Aborigines as Australian citizens to that of *Aboriginal* rights, the rights of Aborigines as the *Aboriginal* peoples of this continent.

The struggle for land rights resulted in a major change in First Nations peoples' consciousness and identity, which was "nurtured by the annual national conferences and other networks of the FCAA¹⁶⁷ and improved means of communications."¹⁶⁸ First Nations peoples "across Australia came to have a much greater sense of themselves as a common national group ... with a shared historical expression of oppression..."¹⁶⁹ And so today First Nations peoples' struggle for Indigenous rights has become firmly rooted in a demand for the restructuring of the political, social and economic relationships of Indigenous Australia and the Australian nation-state – a demand for the decolonisation of the settler-colonial regime.

The Yolngu's demand for land rights began in August 1963 when they sent a bark petition to the House of Representatives.¹⁷⁰ They were protesting against an excision, by the Commonwealth Government, of part of their traditional homeland – the Arnhem Land Reserve (Gove Peninsula) – for bauxite mining by Nabalco Pty Ltd ("Nabalco"). The petition read in part:¹⁷¹

2. That the 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.

...

4. That the land in question has been hunting and food gathering land for the Yirrkala tribes from time immemorial; we were all born here.

5. That places sacred to the Yirrkala people, as well as vital to their livelihood are in the excised land, especially Melville Bay.

6. That 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.

¹⁶⁷ The FCAA was renamed the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI) in 1964 (Broome 2019: 219).

¹⁶⁸ Attwood and Markus 1999: 20.

¹⁶⁹ Ibid.

¹⁷⁰ Broome 2019: 227; National Museum of Australia [n.d.(m)].

¹⁷¹ Attwood and Markus 1999: Document 111: Yirrkala petition to the House of Representatives, August 1963, at 202-203; National Museum of Australia [n.d.(m)].

...

8. They humbly pray that no arrangements be entered into with any company which will destroy the livelihood and independence of the Yirrkala people.

The Yolngu petition resulted in the appointment of a House of Representatives Select Committee to investigate the Yolngu grievances. The Committee, in its report of 29 October 1963, did not recommend refusal of a mining lease to Nabalco. It recommended instead that the Yolngu people should be compensated for their “loss of traditional occupancy ... by way of (i) land grant, (ii) capital grant, [and] (iii) monetary compensation”.¹⁷²

The granting of the mining lease to Nabalco increased the determination of the Yolngu people to continue their fight for the preservation of the environmental integrity of their homeland, and of their sacred places, cultural practices, livelihood and way of life. They took out court proceedings against Nabalco and the Commonwealth Government on 13 December 1968¹⁷³ for “unlawful” invasion of their homeland and claiming “communal native title” to the land.¹⁷⁴ In his judgment delivered on 27 April 1971, Justice Blackburn dealt a heavy blow to the Yolngu people’s claim. As indicated in the headnote of the reasons for judgment¹⁷⁵, he agreed that the Yolngu people had a stable social organisation and system of law:¹⁷⁶

In the circumstances of the case, the natives had established a subtle and elaborate system of social rules and customs which was highly adapted to the country in which the people lived and which provided a stable order of society remarkably free from the vagaries of personal whim and influence. The system was recognised as obligatory by a definable community of aboriginals which made ritual and economic use of the areas claimed. Accordingly, the system established was recognisable as a system of law.

However, Justice Blackburn went on to find:¹⁷⁷

... the relationship of the native clans to the land under that system was not recognisable as a right of property ...

¹⁷² National Museum of Australia [n.d.(p)].

¹⁷³ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (Gove Land Rights Case).

¹⁷⁴ *Ibid*: 146 and 198.

¹⁷⁵ *Ibid*: 141-144.

¹⁷⁶ *Ibid*: 143 [paragraph 1 of holding (4)]

¹⁷⁷ *Ibid*: 143 [paragraphs 2 and 3 of holding (4)]

The natives had established a recognisable system of law which did not provide for any proprietary interest in the clans in any part of the areas claimed.

Therefore, the Yolngu homeland was, from the point of view of settler common law, *terra nullius*. Justice Blackburn also rejected the Yolgnu people's contention that they had "communal native title" to their land under the common law. He held: "The doctrine of communal native title ... did not form, and never had formed, part of the law of any part of Australia."¹⁷⁸

The Yolngu people expressed their extreme disappointment with Justice Blackburn's decision in a strongly-worded statement (signed by R. Marika, Daymbalipu Mununggurr, and W. Wunungmurra) to Prime Minister William McMahon on 6 May 1971. The statement read:¹⁷⁹

The people of Yirrkala have asked us to speak to you on their behalf. They are deeply shocked at the result of the recent Court case. We cannot be satisfied with anything less than ownership of the land. The land and law, the sacred places, songs, dances and language were given to our ancestors by spirits Djangkawu and Barama. We are worried that without the land future generations could not maintain our culture. We have the right to say to anybody not to come to our country. We gave permissions for one mining company but we did not give away the land. The Australian law has said that the land is not ours. This is not so. It might be right legally but morally it's wrong. The law must be changed. The place does not belong to white man. They only want it for the money they can make.

The people of Yirrkala want.

1. Title to our land.
2. A direct share of all royalties paid by Nabalco.
3. Royalties from all other businesses on the Aboriginal Reserves.
4. No other industries to be started without consent of the Yirrkala Council.
5. Land to be included in our title after mining is finished.

The above demands were rejected by the McMahon Government on Australia Day 1972.¹⁸⁰ Announced on a day that many First Nations peoples recall as the beginning of the settler-colonisation of Australia,¹⁸¹ this rejection was a trite settler-colonial political affirmation and

¹⁷⁸ Ibid: 143 [paragraph 3 of holding (3)]

¹⁷⁹ Attwood and Markus 1999: Document 129: Yolngu Statement in the Gupapunyngu Language, presented in Canberra to William McMahon, Prime Minister, 6 May 1971 at 236-237.

¹⁸⁰ National Museum of Australia [n.d.(s)] and [n.d.(t)].

¹⁸¹ Laugesen 2017.

reminder that the Australian continent was owned not by First Nations but by the settler colonisers' sovereign authority.

But the Yolngu people did eventually gain inalienable freehold title to their homeland in 1978 under the *Aboriginal Land Rights (Northern Territory) Act 1976*.¹⁸² The enactment of this legislation was a response to Justice Blackburn's judgment. It was initiated by the Commonwealth Labor Government under Gough Whitlam (prior to its dismissal by the Governor-General Sir John Kerr in November 1975) and continued by the succeeding Malcolm Fraser Coalition Government (following its victory in the 1975 election). Graeme Neate has provided a detailed account of the process that led to the passing of the *Aboriginal Land Rights (Northern Territory) Act 1976*.¹⁸³ He drew attention to, among others, the extra-curial role of Justice Blackburn (post his judgment) in encouraging the Commonwealth Government to pursue a political/legislative solution for the Yolngu people.¹⁸⁴

The Gurindji's demand for land rights was triggered by their walk-off from their pastoral employment at the Vestey-owned Wave Hill cattle station in August 1966. They walked off "in protest over an Arbitration Court ruling to postpone the payment of equal wages for Aboriginal pastoral workers for three years."¹⁸⁵ This walk-off metamorphosed in the following year into a claim for the return to them of their traditional homeland, which was part of the area of the Wave Hill Pastoral Lease.¹⁸⁶ The striking Gurindji pastoral workers and their families set up camp initially near the Wave Hill Welfare Station. In April 1967, they moved to, and settled at, Wattie Creek (Daguragu).¹⁸⁷

From Daguragu, the Gurindji people sent a petition to the Governor-General (Lord Casey), requesting a grant to them of a leasehold title to their traditional land.¹⁸⁸ The petition

¹⁸² National Museum of Australia [n.d.(o)].

¹⁸³ Neate 2009: 12-54.

¹⁸⁴ Ibid: 15-18.

¹⁸⁵ Chesterman and Galligan 1997: 194; Attwood and Markus 1999: 173; Broome 2019: 228.

¹⁸⁶ Australian Government [n.d.]; Chesterman and Galligan 1997: 194; Broome 2019: 228; National Museum of Australia [n.d.(u)].

¹⁸⁷ Australian Government [n.d.]; National Museum of Australia [n.d.(u)].

¹⁸⁸ Attwood and Markus 1999: Document 126: Gurindji petition to Lord Casey, Governor General, 19 April 1967 at 223-225; National Museum of Australia [n.d.(v)].

(undated)¹⁸⁹ was received by the Official Secretary to the Governor-General on 19 April 1967.¹⁹⁰ The petition read in part (my paragraph numbering):¹⁹¹

[1] We, the leaders of the Gurindji people, write to you about our earnest desire to regain tenure of our tribal lands in the Wave Hill-Limbunya area of the Northern Territory, of which we were dispossessed in time past, and for which we received no recompense.

[2] Our people have lived here from time immemorial and our culture, myths, dreaming and sacred places have evolved in this land. Many of our forefathers were killed in the early days while trying to retain it. Therefore, we feel that morally the land is ours and should be returned to us. Our very name Aboriginal acknowledges our prior claim. We have never ceased to say amongst ourselves that Vestey's should go away and leave us to our land.

...

[5] We beg of you to hear our voices asking that the land marked on the map be returned to the Gurindji people. It is about 500 square miles in area but this is only a very small fraction of the land leased by Vestey's in these parts. ...

The petition was rejected by the Governor-General in June 1967¹⁹² – an affirmation by the settler colonisers' sovereign authority that the Australian continent did not belong to First Peoples. The rejection letter pointed out: "The land which you seek to be made available to the Gurindji people under annual rental is Crown land ..."¹⁹³ However, the Gurindji's demand for title to a portion of their traditional country was eventually met. The land "was acquired by the Aboriginal Land Fund Commission and, on 16 August 1975 at Daguragu, Prime Minister Whitlam transferred leasehold title to the Gurindji, symbolically handing soil to Vincent Lingiari."¹⁹⁴ In 1986, the title to the Gurindji land was converted from leasehold to inalienable freehold.¹⁹⁵ And on 8 September 2020, the Federal Court (per Justice White) made a

¹⁸⁹ The petition was signed by Vincent Lingiari, Pincher Manguari, Gerry Ngalgardji, and Long-Jonny Kitgnaari. Frank Hardy assisted them in drafting petition.

¹⁹⁰ National Museum of Australia [n.d.(v)].

¹⁹¹ Attwood and Markus 1999: Document 126: Gurindji petition to Lord Casey, Governor General, 19 April 1967 at 223-225.

¹⁹² National Museum of Australia [n.d.(w)]: Letter dated 20 June 1967 from the Official Secretary to the Governor-General.

¹⁹³ Letter dated 20 June 1967 from the Official Secretary to the Governor-General.

¹⁹⁴ National Archives of Australia [n.d.(c)]; See also National Museum of Australia [n.d.(x)]; Korff 2019.

¹⁹⁵ The Gurindji's claim for freehold title under the *Aboriginal Land Rights (Northern Territory) Act 1976* was upheld in respect of most of the land by Justice Toohey (Aboriginal Land Commissioner), who found against the claimants in respect of one parcel of the claimed land. The Gurindji's appeal against that part of Justice Toohey's decision was upheld by the High Court, and was then granted by Justice Maurice (Aboriginal Land Commissioner) (Holding 1986).

determination of non-exclusive native title by consent – pursuant to section 87 of the *Native Title Act 1973* (Cth) – in favour of the Gurindji people over the entire area covered by the Wave Hill Pastoral Lease.¹⁹⁶

As Bain Attwood and Andrew Markus have noted, the struggle of the Gurindji and that of the Yolngu “became of crucial significance to the cause of land rights”.¹⁹⁷ Kathy Lothian is of the same view: the “land claims [of the Gurindji and the Yolngu] became powerful national symbols of the fight for land rights.”¹⁹⁸

The 1965 Freedom Ride was a bus tour through a number of country towns in NSW that took place during 12-26 February 1965.¹⁹⁹ It was organised by a group of Sydney University students, who were members of an organisation called Student Action for Aborigines (SAFA), and was led by the late Charles Perkins. The tour had a threefold purpose: to conduct a survey of Aboriginal living conditions, to protest against racial discrimination, and to encourage Aboriginal people themselves to resist such discrimination.

The Freedom Ride participants discovered shocking “living conditions which Aboriginal people endured outside the towns” they visited.²⁰⁰ And in the towns, they found that “Aboriginal people were routinely barred from clubs, swimming pools and cafes, [and] were frequently refused service in shops and refused drinks in hotels.”²⁰¹ Ann Curthoys, one of the Freedom Riders, recalled:²⁰²

[The students’] protests drew an angry response from some of the white people in those towns, leading one to force the students’ bus off the road outside Walgett, and hundreds to verbally abuse, throw missiles at, and in some cases physically assault the students outside the swimming pool in Moree. This angry response was taken up by the urban media who saw it as a sign that New South Wales was little different from the American South, with its racist white segregationists.

¹⁹⁶ *Dodd (Vincent) v Northern Territory of Australia* [2020] FCA 1279.

¹⁹⁷ Attwood and Markus 1999: 173.

¹⁹⁸ Lothian 2007: 21.

¹⁹⁹ Attwood and Markus 1999: 172; Curthoys 2002: 2, 5; Broome 2010: 220; Suresh and Kaur 2011; AIATSIS 2015; Reconciliation Australia 2015; National Museum of Australia [n.d.(i)].

²⁰⁰ National Museum of Australia [n.d.(i)].

²⁰¹ *Ibid.*

²⁰² Curthoys 2002: 2.

And, as pointed out by Attwood and Markus, “prior to the 1967 referendum, no protest had as much impact on public perceptions” about the plight of Aboriginal people as the Freedom Ride.²⁰³ It “attracted extraordinary publicity [and] made Perkins a national figure.”²⁰⁴ Attwood and Markus note: “the SAFA succeeded in pushing Aboriginal affairs onto the political stage as it had never been before.”²⁰⁵ According to Curthoys, “the Freedom Ride contributed to the holding and passing of the referendum of 1967”.²⁰⁶ Reconciliation Australia is of the same view.²⁰⁷

The Federal Council for Aboriginal Advancement (FCAA) was established in 1958, as “the first national organisation to represent Aborigines”.²⁰⁸ Organisations affiliated to the FCAA had mixed membership of Indigenous and non-Indigenous individuals. Membership of the FCAA executive committee also consisted of Indigenous and non-Indigenous individuals.²⁰⁹ The FCAA was renamed the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI) in 1964.²¹⁰ The FCAA/FCAATSI “dominated the struggle for Aboriginal rights until the late 1960s, when its authority was challenged by Aboriginal leaders, particularly a younger generation of activists, whose methods of protest, ideals and policies differed to some degree.”²¹¹ The FCAA/FCAATSI played a crucial role not only in persuading the Commonwealth Parliament to agree, with bi-partisan support, to the holding of the 1967 Constitutional Referendum but also in the subsequent campaign for the “yes” case.

The FCAA’s program for First Nations advancement had five primary objectives. These were to gain for First Nations peoples throughout the Commonwealth:²¹²

- (1) equal citizenship rights;

²⁰³ Attwood and Markus 1999: 172.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Curthoys 2002: 2.

²⁰⁷ Reconciliation Australia 2015.

²⁰⁸ Attwood and Markus 1999: 170. See also Pollock 2008; Broome 2019: 218. National Museum of Australia [n.d.(c)].

²⁰⁹ Attwood and Markus 1999: 19. See also National Museum of Australia (n.d.(zc)); The Australian Women’s Register [n.d.].

²¹⁰ Pollock 2008; Broome 2019: 219; National Museum of Australia [n.d.(c)].

²¹¹ Attwood and Markus 1999: 170.

²¹² Attwood and Markus 1999: Document 95 at 176-177.

- (2) a standard of living adequate for health, and well-being, including food, clothing, housing and medical care not less than for other Australians;
- (3) equal pay for equal work and at the same time industrial protection as other Australians;
- (4) free and compulsory for detribalised aborigines; and
- (5) retention of all remaining native reserves, with native communal or individual ownership.

For First Nations peoples to gain equal citizenship rights with other Australians, the FCAA considered it necessary not only that all legislation, which discriminated against First Peoples, must be repealed, but that the Commonwealth Constitution must also be amended so as to empower the Commonwealth “to legislate for [First Peoples throughout the Commonwealth] as for other citizens.”²¹³

However, the first organisation to draw up a petition for a referendum to amend the Commonwealth Constitution was the Aboriginal-Australian Fellowship (AAF)²¹⁴ It launched its petition campaign on 29 April 1957 “at a huge meeting in the Sydney Town Hall”.²¹⁵ The AAF petition pointed out that the “Aboriginal Residents of Australia suffer[ed] under disabilities, political, social and economic”. It asserted that these disabilities were “not remediable without Amendment of the Constitution of the Commonwealth.”²¹⁶ The petition – calling for amendment to section 51(xxvi) of the Commonwealth Constitution, so as to empower the Commonwealth “to make laws” for First Nations peoples, and repeal of section 127, which prohibited the counting of First Nations peoples as part of the population of Australia for the purposes of the distribution of parliamentary seats – was tabled in the House of Representatives by Labor MHR Leslie Haylen on 14 May 1957.²¹⁷

In 1958, following its establishment, the FCAA drew up its own constitutional referendum petition, which was framed in substantively similar language to that of the AAF’s.²¹⁸ The FCAA petition “was signed by more than 25,000 people in three months”.²¹⁹

²¹³ Ibid.

²¹⁴ The AAL became one of the affiliates of the FCAA when the latter was formed in 1958.

²¹⁵ National Museum of Australia [n.d.(d)]; Attwood and Markus 2007: 21.

²¹⁶ National Museum of Australia [n.d.(d)]: copy AAL petition; Attwood and Markus 2007: 100 (Document 13).

²¹⁷ National Museum of Australia [n.d.(d)]; Attwood and Markus 2007: 22.

²¹⁸ National Museum of Australia [n.d.(d)]: copy FCAA petition; Attwood and Markus 2007: 24.

²¹⁹ National Museum of Australia [n.d.(d)]; Attwood and Markus 2007: 24.

Labor MHR Gordon Bryant tabled it in the House of Representatives by on 17 September 1958.²²⁰

From October 1962 to October 1963, the FCAA conducted a concerted national campaign, premised on a re-drawn petition that asserted the discriminatory nature and effects of both section 51(xxvi) and section 127.²²¹ The petition recited that these two provisions had the effects of (1) giving “support to other laws and regulations which deprive Aborigines of equal wages and employment opportunities and deny[ing] them the right to own and develop their remaining tribal lands”; and (2) of according them “an inferior legal status compared with other citizens of the Commonwealth.”²²² An FCAA leaflet, which set out the FCAA’s arguments in support of the advocated constitutional change, explained further that the non-counting of First Nations peoples in censuses resulted in “an unfair distribution of the revenue from Income Tax to the States as this is distributed on the basis of the population figures obtained in the census.”²²³ The petition garnered over 100,000 signatures.²²⁴ The FCAA/FCAATSI campaign culminated in the hugely successful 27 May 1967 Constitutional Referendum.²²⁵ In an unprecedented result for a Constitutional Referendum, 90.77% of voters²²⁶ approved: (a) the deletion from section 51(xxvi) of the words “other than the aboriginal race in any State”, thereby empowering the Commonwealth Parliament “to make laws for the peace, order, and good government of the Commonwealth with respect to” First Nations peoples; and (b) the repeal of section 127.

The Referendum resulted in the empowerment of the Commonwealth Government and Parliament to be involved in First Nations affairs across Australia, not just in the Northern Territory. It raised high expectations among First Nations peoples that Commonwealth participation in the management of First Nations affairs throughout Australia would result in policies and laws that would bring about upliftment in their poor and marginalised existential circumstances.²²⁷ However, as the governmental Closing the Gap program has revealed, First

²²⁰ National Museum of Australia [n.d.(d)]; Attwood and Markus 2007: 24.

²²¹ National Museum of Australia [n.d.(e)]; Attwood and Markus 2007: 27-34.

²²² National Museum of Australia [n.d.(e)]: copy “National Petition: Towards Equal Citizenship for Aborigines”.

²²³ National Museum of Australia [n.d.(e)]: copy leaflet.

²²⁴ National Museum of Australia [n.d.(e)].

²²⁵ National Museum of Australia [n.d.(d)], [n.d.(e)], [n.d.(f)]; [n.d.(g)]; [n.d.(h)]; Broome 2019: 221-222.

²²⁶ Bandler 1989: 114; Broome 2019: 222.

²²⁷ See generally Attwood and Markus 2007.

Nations' expectations have remained largely unfulfilled to this day.²²⁸ But, as Sarah Maddison has pointed out: "despite this evidence of policy failure, the Australian settler state continues to pursue broadly the same approach to addressing Indigenous disadvantage, rejecting international evidence suggesting that self-determination and self-government are in fact far more effective in creating change."²²⁹

The Aboriginal Embassy was set up by young Black Power activists on 26 January 1972 opposite the (then) Commonwealth Parliament House.²³⁰ The establishment of the Embassy was a direct response to the McMahon Government's refusal to accede to the demand of the Yolngu people, noted above, for the introduction of land rights legislation.²³¹ The Embassy Cabinet Committee demanded:²³²

1. Aboriginal ownership of the Northern Territory and its minerals, and the conversion of the Territory into a State under majority Aboriginal control.
2. Aboriginal ownership of all other Aboriginal reserves and settlements outside of the Northern Territory and their minerals.
3. The preservation of all sacred lands outside of 1 and 2.
4. Aboriginal ownership of some city areas and their minerals.
5. The payment of compensation to Aboriginal people for dispossession, made up of a lump-sum payment of six billion dollars and an annual payment of a percentage of the gross national income of Australia.

The founding of the Aboriginal Embassy was a momentous First Nations political statement, and one that is ongoing. As Coral Dow has pointed out:²³³

The Aboriginal Tent Embassy has become part of Canberra's physical and political landscape. It has intermittently existed on the lawns of Old Parliament House since Australia Day 1972 and permanently since Australia Day 1992. In that time, it has achieved legendary status in Aboriginal political history ...

[In 1995] the Aboriginal Tent Embassy's place in history and as a symbolic site was recognised through its listing on the National Estate by the Australian Heritage Commission.

²²⁸ Higgins and Clarke 2018.

²²⁹ Maddison 2019: 154.

²³⁰ Attwood and Markus 1999: 174; Dow 2000: 1, 7; Lothian 2007: 20; Foley 2010: 15; Broome 2019: 229; National Museum of Australia [n.d.(y)], [n.d.(z)].

²³¹ Attwood and Markus 1999: 174; Dow 2000: 1, 7; Foley 2010: 15; National Museum of Australia [n.d.(z)].

²³² Attwood and Markus 1999: Document 142: Aboriginal Embassy Land Rights Policy, '5 Point Policy', at 257-258; Dow 2000: 1, 7-8; Broome 2019: 229.

²³³ Dow 2000: 1, 4.

And as Attwood and Markus have noted: “The embassy brilliantly symbolised Aborigines’ sense of being foreigners in their own land, all the more so when the Commonwealth government ordered police to remove the protestors.”²³⁴ It “also heightened the demand for Aboriginal autonomy while expressing an argument that hitherto had not been voiced or at least barely heard in Australian political discourse – a claim to Aboriginal sovereignty – which Paul Coe among others was to champion.”²³⁵ Gary Foley is of the same view: “The *Aboriginal Embassy* protest of 1972 saw the beginning of more than a decade of high profile indigenous protest actions that placed questions of Land Rights, Sovereignty, and self-determination firmly on the national political agenda.”²³⁶ Richard Broome notes: “Land claims, the Embassy and Indigenous rights galvanised many Aboriginal peoples across the country into a pan-Aboriginal identity.”²³⁷

The coming into power in 1972 of a Federal Labor Government, under Prime Minister Gough Whitlam, brought about a new approach in Commonwealth governmental management of First Nations affairs. The Whitlam Government was “the first in a succession of federal governments” that “sought to include Aboriginal leaders in the process of government.”²³⁸ This approach was exemplified by the establishment of: (a) the National Aboriginal Consultative Committee (NACC) by the Whitlam Government; (b) the National Aboriginal Conference (NAC) by the Coalition Government under Malcolm Fraser; (c) ATSIC by the Labor Government under Bob Hawke; and (d) the Council for Aboriginal Reconciliation (CAR), also by the Hawke Government. The establishment of these organisations resulted in First Nations’ rights struggle being by and large embodied in them. The outcomes that they sought to achieve were reflected in the way they operated.

²³⁴ Attwood and Markus 1999: 174. See also Foley 2010: 15.

²³⁵ Attwood and Markus 1999: 174.

²³⁶ Foley 2010: 20.

²³⁷ Broome 2019: 229.

²³⁸ Attwood and Markus 1999: 276.

The NACC was established by the Whitlam Labor Government in 1973.²³⁹ Its members were elected by First Nations voters. It had only an advisory role. It tried, unsuccessfully,²⁴⁰ to gain “some executive powers to manage or implement policy.”²⁴¹

A review of the NACC, commissioned by the Malcolm Fraser Coalition Government, following its election in 1975, “found that the NACC had not been an effective mechanism for providing advice to the Minister, or for consulting with Indigenous people.”²⁴² And so the Government abolished the NACC and replaced it with the NAC in 1977.²⁴³ The members of the NAC were also elected by First Nations voters. But, again, the NAC was only an advisory body. Nonetheless, in 1979, the NAC launched a campaign to promote its proposal for a national treaty “between the Aboriginal Nation and the Australian Government.”²⁴⁴

The NAC campaign received a positive response from the Senate. In September 1981, it tasked the Senate Standing Committee on Constitutional and Legal Affairs to inquire into:²⁴⁵

the feasibility, whether by way of constitutional amendment or other legal means, of securing a compact or ‘Makarrata’ between the Commonwealth Government and Aboriginal Australians.

In its 1982 submission to the Senate Standing Committee, the NAC said:²⁴⁶

In pursuing the Makarrata (Treaty) we assert our basic rights as sovereign Aboriginal nations who are equal in political status with the Commonwealth of Australia in accordance with the principle espoused by the International Court of Justice in the Western Sahara Case that sovereignty has always resided in the Aboriginal people ...

The Senate Standing Committee reported in 1983.²⁴⁷ It recommended that, if the Commonwealth Government were intending to pursue a “compact” with First Nations, the Constitution should preferably be amended so as to expressly confer on the Commonwealth a broad treaty making power. The new provision should “contain a non-exclusive list of those

²³⁹ Sanders 1994: 475; Pratt and Bennett 2004: 4; Dow and Gardiner-Garden 2011: 14; The Koori History Website [n.d.].

²⁴⁰ The Koori History Website [n.d.]: newspaper articles February-April 1974.

²⁴¹ Pratt and Bennett 2004: 4.

²⁴² Ibid: 5.

²⁴³ Ibid.

²⁴⁴ AIATSIS [n.d.]: various NAC documents.

²⁴⁵ Senate Standing Committee 1983.

²⁴⁶ Attwood and Markus 1999: Document 161: National Aboriginal Conference Submission to the Senate Standing Committee on Constitutional and Legal Affairs, on the Makarrata, 1982, at 294.

²⁴⁷ Commonwealth Parliament 1983: xii.

matters which would form an important part of the terms of the compact, expressing in broad language the types of subjects to be dealt with.”²⁴⁸ The Senate Standing Committee also recommended:²⁴⁹

If the compact proposal is pursued, the National Aboriginal Conference [to be re-established as an independent statutory authority] should be considered as the most suitable organisation to co-ordinate Aboriginal opinion during the negotiation process and, once negotiations are completed, to conclude the compact on behalf of the Aboriginal people.

The Senate Standing Committee report was completed and submitted to the Senate after the 5 March 1983 election (which was won by the Labor Party).²⁵⁰ The issues raised by the report were apparently not among the newly-elected Bob Hawke Labor Government’s list of priorities. The report was shelved and forgotten. Hawke was, however, subsequently reminded of First Nations’ enduring demand for a treaty with the Commonwealth Government when he received the Barunga Statement in 1988. Despite its promised support for the Barunga Statement’s treaty demand, the Hawke Government ultimately failed the political will test.²⁵¹ The Government did not embark upon a treaty-negotiation process with First Nations. In a Senate condolence speech on 3 July 2019 regarding the passing-away of Bob Hawke, Senator Patrick Dodson regretted the Hawke Government’s failure to do so.²⁵²

Much has been said in the weeks since the death of Bob Hawke about his love for his country and its peoples. I have some reservations about some of that, and I approach his legacy, and I know some of my colleagues approach it, with some frustration, anger and annoyance because he couldn’t achieve and deliver for First Nations—because of some of the vested interests and the hard-Right attitudes in our community—when it came to treaty and national land rights in particular. I reflect on the period with ambivalence and great disappointment and regret that, in relation to what could have been and what he hoped would be, because of Bob’s sense of pragmatism and sense of understanding of the challenges he faced, we were not able to achieve the unity of the Australian people with his aim and vision and ours. The reality is that Bob’s empathy for the cause of First Nations was not shared by the broader Australian population at the time. Political leadership should reflect hard on this conundrum as pivotal to the process of reconciliation.

²⁴⁸ *Ibid.*

²⁴⁹ Commonwealth Parliament 1983: xii.

²⁵⁰ Commonwealth Parliament 1983: 2.

²⁵¹ AIATSIS [n.d.(a)]; Brennan et al. 2005. Fitzgerald and Mangan 2019; Maddison 2019: 24.

²⁵² Dodson 2019.

The idea of a tripartite treaty, as a framework for a comprehensive restructuring of the social, economic and political relationships of Indigenous Australia and the Australian nation-state, will be dealt with in Chapter 7.

In 1978, Paul Coe took out proceedings in the High Court to challenge the legitimacy of the British annexation of the Australian continent.²⁵³ He asserted the existence of a sovereign pan-Australia First Nation, and that First Nations land was taken from its owners without their consent, treaty or compensation. The challenge was dismissed, at first instance, in 1978, by Justice Mason (as he was then).²⁵⁴ Coe appealed against Justice Mason's decision, but the appeal was rejected in 1979 by a split decision of the High Court (sitting with four justices).²⁵⁵ In 1993, Paul Coe's sister (the late Isabel), launched another court action, again challenging the legitimacy of the British settler-colonisation of Australia, and asserting, this time, the existence of a sovereign Wiradjuri nation.²⁵⁶ Ms Coe's court action was inspired by the momentous *Mabo* decision of the High Court in 1992.²⁵⁷ However, her challenge suffered the same fate as that of her brother. The cases of *Coe v Commonwealth* [1979] HCA 68 and *Coe v Commonwealth* [1993] HCA 42 will be examined in detail in Chapter 3.

The Hindmarsh Island Bridge Affair – as some commentators have described it²⁵⁸ – is a chronicle of the politics of competing interests in land that took place in South Australia from 1990 to 2001. It witnessed the deployment of an array of settler-colonial weaponry against the assertion by a First Nations group (the Ngarrindjeri people) of their cultural heritage rights. This story of the Ngarrindjeri continuing resistance to settler colonialism and settler-colonial impositions, as it unfolded in the judicial arena, will be the subject of Chapter 4.

The Andrew Bolt Racial Vilification Case,²⁵⁹ as the Human Rights Law Centre has described it,²⁶⁰ or, simply, the Bolt Case, as some other commentators have called it,²⁶¹ is another judicial arena event about the resistance of First Nations peoples to, and challenge

²⁵³ *Coe v The Commonwealth and Another* (1978) 18 ALR 592.

²⁵⁴ *Ibid.*

²⁵⁵ *Coe v Commonwealth* [1979] HCA 68.

²⁵⁶ *Coe v Commonwealth* [1993] HCA 42.

²⁵⁷ *Mabo v Queensland (No 2)* [1992] HCA 23.

²⁵⁸ See, for example, Langton 1996; Tonkinson 1997; Weiner 1999.

²⁵⁹ *Eatock v Bolt* [2011] FCA 1103.

²⁶⁰ Human Rights Law Centre 2014.

²⁶¹ See, for example, Griffith 2011; Aggarwal 2012: 238-257.

against, the forces of assimilationist settler nationalism. It is a significant illustration of the enduring assertion by First Nations peoples of their Indigenous difference. It will be the subject of Chapter 5.

The Bob Hawke Government established ATSIC as a body corporate in 1989 under the *Aboriginal and Torres Strait Islander Commission Act 1989* (ATSIC Act). ATSIC became operational in March 1990.²⁶² ATSIC's fundamental responsibility was:²⁶³

- (1) to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of Government policies that affect them;
- (2) to promote the development of self-management and self-sufficiency among Aboriginal persons and Torres Strait Islanders;
- (3) to further the economic, social and cultural development of Aboriginal persons and Torres Strait Islanders; and
- (4) to ensure co-ordination in the formulation and implementation of policies affecting Aboriginal persons and Torres Strait Islanders by the Commonwealth, State, Territory and local Governments ...

In 1994, the Paul Keating Government requested ATSIC to submit proposals for a "Social Justice Package" that the Government was considering as the third component of its three-part response to the 1992 *Mabo* decision.²⁶⁴ The request gave ATSIC the opportunity to put forward a set of measures that were designed to lead to a comprehensive restructuring of the political, social, and economic relationships of First Nations peoples and the Australian nation-state. ATSIC's Social Justice Package proposals (1995) – intended to be the foundations for the decolonisation of the Australian nation-state – will be discussed in Chapter 6. ATSIC was abolished by the Coalition Government under John Howard in May 2005.²⁶⁵

The Hawke Government established CAR in 1991 as a statutory authority – for a 10-year term – under the *Council for Aboriginal Reconciliation Act 1991* (CAR Act).²⁶⁶ The fundamental task of CAR was "to promote a process of reconciliation between Aborigines and

²⁶² Sanders 1994: 477; Pratt and Bennett 2004: 5.

²⁶³ ATSIC Act: section 3.

²⁶⁴ The first component was the *Native Title Act 1993*; the second was the establishment in 1995 of the Indigenous Land Corporation and the National Aboriginal and Torres Strait Land Fund (ATSIC 1995: xi).

²⁶⁵ *Aboriginal and Torres Strait Islander Commission Amendment Act 2005*.

²⁶⁶ In force from 2 September 1991 to 1 January 2001 (section 4).

Torres Strait Islanders and the wider Australian community”.²⁶⁷ CAR carried out most of its work during the term of the Keating Government (Keating took over from Hawke as Prime Minister on 20 December 1991), and during part of the tenure of the succeeding Coalition Government under Prime Minister John Howard as from 11 March 1996 (in power until 3 December 2007). CAR submitted its final report to the Howard Government and Commonwealth Parliament on 4 December 2000.²⁶⁸

One of the specific functions required of CAR, in order to discharge its responsibility, was “to consult Aborigines and Torres Strait Islanders and the wider Australian community on whether reconciliation would be advanced by a formal document or formal documents of reconciliation”.²⁶⁹ Following such consultation, CAR was “to report to the Minister [in this case the Prime Minister]²⁷⁰ on the views of Aborigines and Torres Strait Islanders and of the wider Australian community as to whether such a document or documents would benefit the Australian community as a whole”.²⁷¹ If CAR considered “there would be such a benefit”, CAR was obliged to “make recommendations to the Minister on the nature and content of, and manner of giving effect to, such a document or documents”.²⁷² CAR found that its “very extensive public consultation process”²⁷³ had produced positive outcomes.²⁷⁴ Two “documents of reconciliation” were drawn up by CAR, entitled *Australian Declaration Towards Reconciliation* and *Roadmap for Reconciliation*.²⁷⁵ The proposals contained in these documents – designed to lead to a treaty between First Nations and the Australian nation-state as a framework for the decolonisation of Australian nation-state – and their rejection by the Howard Coalition Government will be discussed in Chapter 6.

The Hawke Labor Government portrayed its establishment of ATSIC “as a major advance in the administration of Indigenous affairs”²⁷⁶ It combined both representative and executive roles. Having regard to the purely advisory role of its antecedents – the NACC and the NAC, noted above – ATSIC did certainly “represent the gaining of genuine Indigenous

²⁶⁷ CAR Act: section 5.

²⁶⁸ CAR 2000.

²⁶⁹ CAR Act: section 6(1)(g).

²⁷⁰ CAR 2000: 105.

²⁷¹ CAR Act: section 6(1)(h).

²⁷² CAR Act: section 6(1)(h).

²⁷³ CAR 2000: 105.

²⁷⁴ Ibid: 26-35.

²⁷⁵ Ibid: Appendix 1.

²⁷⁶ Pratt and Bennett 2004: 6.

power over management of, and decision-making in, Indigenous affairs for the first time.”²⁷⁷ However, given its dual roles – “the primary representative voice for Aboriginal and Torres Strait Islander peoples at the national level” and “operating as a government agency” – ATSIC “had to play a delicate balancing act”.²⁷⁸ And: “From its first days, ATSIC was subject to intense public and political scrutiny, no more than in the areas of expenditure and accountability.”²⁷⁹ Although ATSIC was not the primary service provider in many areas of the service requirements of First Nations peoples, such as, for example, in health care and education, ATSIC became “an easily identifiable symbol of the perceived failure of government spending on Indigenous-specific programs to yield sufficiently positive results.”²⁸⁰ There was a perception that ATSIC was “responsible for every Indigenous issue.”²⁸¹ As the late William Jonas (the Aboriginal and Torres Islander Social Justice Commissioner at the time) had pointed out: “The announcement by the [Howard] Government²⁸² that it intend[ed] to abolish [ATSIC] scapegoat[ed] it for the failures of successive Australian governments.”²⁸³

The Howard Government abolished ATSIC in March 2005.²⁸⁴ It depicted ATSIC as a failed “experiment in separate representation, elected representation, for indigenous peoples”.²⁸⁵ According to Prime Minister Howard, ATSIC failed because it had “become too preoccupied with what might loosely be called symbolic issues and too little concerned with delivering real outcomes for indigenous people.”²⁸⁶ The Howard Government’s “goals in relation to indigenous affairs [were] to improve the outcomes and opportunities and hopes of indigenous people in areas of health, education and employment.”²⁸⁷ According to Jane Robbins: “Two areas of activity that were obvious irritants to the [Howard Government] were

²⁷⁷ Ibid: 8.

²⁷⁸ Behrendt 2005: 1.

²⁷⁹ Pratt and Bennett 2004: 9.

²⁸⁰ Ibid: 9.

²⁸¹ Behrendt 2005: 4

²⁸² On 15 April 2004, at a joint press conference with the Minister for Indigenous Affairs, Senator Amanda Vanstone (Prime Minister 2004).

²⁸³ Australian Human Rights Commission 2004.

²⁸⁴ *Aboriginal and Torres Islander Commission Amendment Act 2005* (Cth). The abolishment of ATSIC was supported by the Labor Opposition (Pratt and Bennett 2004: 11).

²⁸⁵ Prime Minister 2004.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

the campaign for a treaty [by ATSIC]²⁸⁸ and ATSIC's participation in UN forums on indigenous and human rights as an NGO."²⁸⁹

As for the work of CAR, Patrick Dodson (the founding Chairperson of CAR, 1991–1997) is of the view that the reconciliation process that was put in place with the establishment of CAR should have been “a doorway to a political settlement” between Indigenous Australia and the Australian nation-state.²⁹⁰ But the Howard Government, he notes, had:²⁹¹

allowed the reconciliation process to drift and sink in the mire of a contrived and dishonest debate about the advantages of practical outcomes in health, employment, education and housing that the government favoured – that is, compared to what was said to be the meaningless symbolism of a treaty...

He says, ‘practical reconciliation’ “became the [Howard Government’s] weasel worded mantra to discredit the inherent rights of Indigenous people.”²⁹²

Labor Prime Minister Julia Gillard appointed the Expert Panel on Constitutional Recognition of Indigenous Australians (Expert Panel) on 23 December 2010.²⁹³ The membership of the Panel was “made up of Australians from indigenous and non-indigenous communities and organisations, small and large business, community leaders, academics, and members of Parliament from across the political spectrum”.²⁹⁴ It was co-chaired by Patrick Dodson (a Yawuru man) and Mark Leibler (non-Indigenous).²⁹⁵

By its terms of reference, the Expert Panel was required to investigate and “report to the Government on possible options for constitutional change to give effect to Indigenous constitutional recognition, including advice as to the level of support from Indigenous people

²⁸⁸ ATSIC's treaty campaign started after “a reconciliation convention attended by Aboriginal leaders in Melbourne in May 2000” (Clark 2003 [2004 reprint]: v). ATSIC's Chairperson, Geoff Clark, points out: “After this convention ATSIC's commitment to a treaty led to the convening of a National Treaty Support Group and think tank to oversee a public information and awareness strategy, a political strategy and a framework for further development of a treaty” (Clark 2003 [2004 reprint]: v).

²⁸⁹ Robbins 2010: 269.

²⁹⁰ Dodson 2007: 21.

²⁹¹ Ibid: 26.

²⁹² Ibid.

²⁹³ Expert Panel 2012: 1.

²⁹⁴ Ibid: 2.

²⁹⁵ Ibid: 234 (Appendix A).

and the broader community for each option by December 2011". The Expert Panel submitted its report to Prime Minister Gillard on 16 January 2012.

The report recommended five changes to the Commonwealth Constitution: (1) section 25 (disqualification from voting) should be repealed; (2) section 51(xxvi) (the race power) should be repealed; (3) a new section 51A should be inserted; (4) a new section 116A should be inserted; and (5) a new section 127A should be inserted.²⁹⁶

The recommended new section 51A reads:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

The recommended new section 116A reads:

Section 116A Prohibition of racial discrimination

- (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
- (2) Subsection (1) does not preclude the making of laws or measures for the purposes of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

The recommended new section 127A reads:

²⁹⁶ Ibid: xviii.

Section 127A Recognition of languages

- (1) The national language of the Commonwealth of Australia is English.
- (2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

The Gillard Government appeared to have run out of time from taking any concrete action on the Expert Panel's recommendations. Kevin Rudd took over the leadership of the Labor Party, and therefore the Prime Ministership, from Gillard on 26 June 2013. But, with its defeat at the 18 September 2013 election, the Rudd Government too lost its opportunity to progress the Expert Panel's recommendations.

Under the Tony Abbott Coalition Government (which came to power following the September 2013 election), the Parliament appointed, on 2 December 2013, a "Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples" to consider the Expert Panel's recommendations. The Chair of the Committee was Ken Wyatt MP and the Deputy Chair was Senator Nova Peris (both of whom are Indigenous). The Committee submitted its final report in June 2015. The Committee agreed with the Expert Panel's recommended repeal of section 25 (disqualification from voting) and of section 51(xxvi) (the race power); and the insertion of a new section 51A (recognition of First Peoples) and of a new section 116A (prohibition of racial discrimination).²⁹⁷ The Committee did not, however, agree with the Expert Panel's recommended insertion of a new section 127A (recognition of languages).²⁹⁸ The Committee recommended that a referendum on constitutional recognition of First Peoples should be held "when it has the highest chance of success."²⁹⁹

It is noteworthy that the Joint Select Committee also sought (unsuccessfully) to have UNDRIP legislatively recognised. It recommended that "the *Human Rights (Parliamentary Scrutiny) Act 2011* be amended to include the United Nations Declaration on the Rights of Indigenous Peoples in the list of international instruments which comprise the definition of human rights under the Act."³⁰⁰

²⁹⁷ Commonwealth Parliament 2015: xiii-xiv.

²⁹⁸ Ibid: 4.

²⁹⁹ Ibid: xiii, xvi.

³⁰⁰ Ibid: xvi.

Members of the Coalition Government were opposed to the recommendations of the Expert Panel and the Joint Select Committee,³⁰¹ so there was no likelihood of success on those reforms. At the same time, First Nations peoples were also adamant that any form of recognition must be supported by them. No process had consulted solely with First Nations peoples to ascertain what they meant and understood by constitutional recognition. So a new process was vital.³⁰² Forty First Nations leaders met with Prime Minister Tony Abbott and Opposition Leader Bill Shorten at the HC Coombs Centre, Kirribilli (Sydney) on 6 July 2015, as a prelude to a foreshadowed joint-commissioning by the Prime Minister and Opposition Leader of a new study process concerning the recommendations of the Expert Panel and the Joint Select Committee. At that meeting, the First Nations leaders issued what has become known as the Kirribilli Statement.³⁰³ The Statement made it clear to Abbott and Shorten that:³⁰⁴

Any reform must involve substantive changes to the Australian Constitution. It must lay the foundation for the fair treatment of Aboriginal and Torres Strait Islander peoples into the future.

A minimalist approach that provides preambular recognition, removes section 25 and moderates the races power (section 51(xxvi)) does not go far enough and would not be acceptable to Aboriginal and Torres Strait Islander peoples.

Malcolm Turnbull took over from Tony Abbott as leader of the Liberal Party, and as Prime Minister, in September 2015 (three months after the Joint Select Committee submitted its final report). In the event, it was Turnbull, in conjunction with Bill Shorten, who established the Referendum Council, on 7 December 2015, to conduct the new study process.³⁰⁵

The Referendum Council comprised “Aboriginal and Torres Strait Islander members and non-Indigenous members from a range of expert fields and backgrounds.”³⁰⁶ The Council was co-chaired by Pat Anderson (an Alyawarre woman) and Mark Leibler³⁰⁷ (non-Indigenous, who, as noted above, also co-chaired the Expert Panel with Patrick Dodson).

The Referendum Council was required to conduct a national consultation and community engagement process. Consultation with Indigenous communities were undertaken

³⁰¹ Robinson 2015, cited in Morris and Pearson 2017: 357.

³⁰² Davis 2018: 24-25.

³⁰³ Copy of statement in *Indigenous Law Bulletin* (2015) 8(19): 26-27.

³⁰⁴ Copy of statement in *Indigenous Law Bulletin* (2015) 8(19): 26-27.

³⁰⁵ Referendum Council 2017: 3.

³⁰⁶ *Ibid*: 3.

³⁰⁷ *Ibid*: 42 (Appendix A).

through a series of ‘First Nations Regional Dialogues’ – 12 in all – in various parts of Australia, between December 2016 and May 2017, and a First Nations ‘National Constitutional Convention’ at Uluru on 23-26 May 2017.³⁰⁸ The First Nations National Constitutional Convention issued the Uluru Statement from the Heart.³⁰⁹ The Statement called for the establishment of a “Voice to Parliament” under the Commonwealth Constitution, and a Makarrata Commission to supervise a treaty-making process and a truth-telling process (discussed in Chapter 6). The “broader community, including Aboriginal and Torres Strait Islander peoples who did not attend the regional dialogues” were consulted by means of: (1) the provision of a ‘digital platform’, between 26 October 2016 and 15 March 2017, for online submissions;³¹⁰ (2) call for public submissions between December 2016 and May 2017;³¹¹ and (3) “a large, targeted stakeholder engagement campaign.”³¹²

The Referendum Council submitted its final report to the Prime Minister and the Leader of the Opposition on 30 June 2017.³¹³ The Council made the following recommendations:³¹⁴

1. That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51(xxvi) and section 122. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.
2. That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians.

The Referendum Council’s report also pointed out:³¹⁵

... there are two matters of great importance to Aboriginal and Torres Strait Islander peoples, as articulated in the Uluru Statement from the Heart, that can be addressed outside the Constitution. The Uluru Statement called for the establishment of a Makarrata Commission with the function of supervising agreement-making and facilitating a process of local and regional truth telling. The Council recognises that this is a legislative initiative for Aboriginal and Torres

³⁰⁸ Ibid: 9.

³⁰⁹ Uluru Statement from the Heart 2017.

³¹⁰ Ibid: 33.

³¹¹ Ibid: 34.

³¹² Ibid: 34.

³¹³ Ibid: (ii).

³¹⁴ Ibid: 2.

³¹⁵ Ibid.

Strait Islander peoples to pursue with government. The Council is not in a position to make a specific recommendation on this proposal because it does not fall within our terms of reference. However, we draw attention to this proposal and note that various state governments are engaged in agreement-making.

In October 2017, the Turnbull Government rejected the Referendum Council's recommendation for an amendment to the Constitution to provide for a First Nations "Voice to Parliament".³¹⁶ The Government did not express any view on the Council's recommendation for a legislated "Declaration of Recognition", nor on the Uluru Statement from the Heart's proposal for the establishment of a Makarrata Commission and a national truth-telling process.

However, despite the Turnbull Government's rejection of the Voice to Parliament proposal, on 19 March 2018, the Parliament appointed a "Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples" to consider the Referendum Council's recommendations.³¹⁷ The Joint Select Committee was co-chaired by Senator Patrick Dodson and Julian Leeser MP. The Committee submitted its final report to Parliament on 29 November 2018.

The Joint Select Committee accepted in principle the idea of "The Voice". However, it was of the view that, before its implementation, it was necessary to determine "a design of The Voice that best suits the needs and aspirations of Aboriginal and Torres Strait Islander peoples".³¹⁸ The Commonwealth Government should, therefore, "initiate a process of co-design with Aboriginal and Torres Strait Islander peoples".³¹⁹ The Committee recommended the appointment of a task force to undertake the co-design process. The membership of the task force should comprise a majority of First Nations peoples, and "officials or appointees" of the Commonwealth Government.³²⁰ The Committee recommended that, once the co-design process had been completed, the Commonwealth Government should consider, "in a deliberate and

³¹⁶ Media release 26 October 2017:

<<https://www.malcolmturnbull.com.au/media/response-to-referendum-councils-report-on-constitutional-recognition>>.

³¹⁷ Commonwealth Parliament 2018: 1.

³¹⁸ *Ibid*: xvii.

³¹⁹ *Ibid*: (Recommendation 1).

³²⁰ *Ibid*.

timely manner, legislative, executive and constitutional options to establish The Voice.”³²¹ In other words, the Committee left open the method of establishing The Voice.

In the meantime, Scott Morrison had taken over leadership of the Liberal Party, and the Prime Ministership, from Malcolm Turnbull on 24 August 2018. The Morrison Government has adopted the idea of “The Voice”, but it would not be a “Voice to Parliament” as recommended by the Referendum Council. It would be a “Voice to Government”, and it would be established by legislation.³²² The Government has initiated a co-design study for the “Voice to Government”.³²³ The demand for a Voice to Parliament, a Makaratta Commission and a national truth-telling process contained in the Uluru Statement from the Heart, issued by National Constitutional Convention of First Nations delegates at Uluru on 23-26 May 2017, will be discussed in Chapter 6.

5 Conclusion

This chapter has highlighted the disappointing outcomes in many ways of First Nations’ struggle for a decolonised relationship with the Australian nation-state. In the nineteenth century, their demand for equal right to land ownership and self-reliance in the nineteenth century was a sad tale of the quashing of their “radical hope” of embracing “farming and a settled existence [but remaining] Aboriginal.”³²⁴ In the 1920s and the 1930s, campaigns by First Nations representative organisations for full citizenship rights (including land ownership) “met with little success”.³²⁵ Court actions taken by Paul Coe in 1978/1979³²⁶ and his sister, the late Isabel, in 1993³²⁷ to challenge the legitimacy of the British settler-colonisation of Australia and assert First Nations’ continuing sovereignty failed miserably. Given that the doctrine of *terra nullius* was extant at the time, it was probably unrealistic to have expected the High Court in the 1970s to find that First Nations were possessed of sovereignty and in sovereign control of the Australian continent in 1788. However, in 1993, after the 1992 *Mabo* judgment,³²⁸ a more

³²¹ Commonwealth Parliament 2018: xviii (Recommendation 2).

³²² Media release by Ken Wyatt, Minister for Indigenous Australians, dated 30 October 2019. <<https://ministers.pmc.gov.au/wyatt/2019/voice-indigenous-australians>>.

³²³ Media release by Ken Wyatt, Minister for Indigenous Australians, dated 8 November 2019. <<https://ministers.pmc.gov.au/wyatt/2019/voice-co-design-senior-advisory-group>>.

³²⁴ Broome 2019: 81.

³²⁵ Attwood and Markus 1999: 63.

³²⁶ *Coe v Commonwealth* [1979] HCA 68.

³²⁷ *Coe v Commonwealth* [1993] HCA 42.

³²⁸ [1992] HCA 23.

optimistic view could have been expected. As Sean Brennan and his co-writers have pointed out: “In *Mabo (No 2)*, the majority ... held that the courts do have jurisdiction to determine the *consequences* of the acquisition of [Crown] sovereignty.”³²⁹ This finding would appear to have offered an opening for a more positive consideration of the continuance of a form of Indigenous internal sovereignty (contrary to the way it was handled in *Coe* 1993) following the acquisition of Crown sovereignty. Such internal sovereignty was/is not incompatible with Crown sovereignty. However, although the *Coe* cases did not lead to the High Court finding that First Nations sovereignty existed/persisted, they were and remain potent political moments and succeeded in that respect at least.

But there were some positive results. The 1965 Freedom Ride contributed to the holding and passing of the 1967 Constitutional Referendum. The Yolngu land rights struggle led to the enactment the *Aboriginal Land Rights (Northern Territory) Act 1976*. It also inspired the establishment of the Aboriginal Embassy in January 1972. The Embassy in turn played a significant part in galvanising “many Aboriginal peoples across the country into a pan-Aboriginal identity.”³³⁰ In acting as a symbolic depiction of First Nations peoples’ sense of “being foreigners in their own land”,³³¹ the Embassy created a sustained momentum in First Nations’ struggle for Indigenous rights and demand for a decolonised relationship with the Australian nation-state. The cumulative effect of the events discussed above would have provided positive encouragement to the late Eddie Mabo in his determined pursuit in the judicial arena for recognition of First Nations peoples’ right to the lands that they have inherited from the ancestors.

In the twenty-first century, in their demand for a referendum to amend the Commonwealth Constitution – to provide for the creation of a First Nations parliamentary advisory body (Voice to Parliament) – First Nations were led from pillar to post by the Turnbull Coalition Government. It agreed for the proposal to be considered by the Referendum Council that it appointed (in conjunction with the Labor Opposition) as one of a number of options. But when the Council recommended adoption of the proposal, the Government rejected it! This historical overview has revealed the continuing salience to the present day of settler-colonial impositions on First Nations peoples. But it has also demonstrated the abiding resistance of

³²⁹ Brennan et al. 2004: 324.

³³⁰ Broome 2019: 229.

³³¹ Ibid: 174.

First Nations peoples to these impositions. It shows their constant and undiminished hope to be one day free of settler colonialism.

I continue to develop my thesis argument by examining and analysing, in Chapter 3, two direct challenges to the legality of the British settler colonisation of Australia initiated by First Nations individuals in the highest court of the land, the High Court of Australia – that is, *Coe v Commonwealth* [1979] HCA 68 and *Coe v Commonwealth* [1993] HCA 42. The outcome of these court cases leads to an appreciation of why a political settlement – through the coordinated negotiation and implementation of tripartite treaties between the Commonwealth, States, Territories and First Nations – is the preferable approach to achieving the decolonisation of the Australian nation-state.

Chapter 3

Asserting First Nations Sovereignty: *Coe v Commonwealth* [1979] HCA 68 *Coe v Commonwealth* [1993] HCA 42

1 Introduction

This chapter is an examination and analysis of two interconnected High Court cases: *Coe v Commonwealth* [1979] HCA 68 (*Coe 1979*) and *Coe v Commonwealth* [1993] HCA 42 (*Coe 1993*). These two cases exemplified assertions by First Nations peoples of the wrongful British annexation and settler-colonisation of Australia, and the continuing sovereignty of First Nations over the Australian continent. The plaintiff in each case was a First Nations individual. In *Coe 1979* the plaintiff challenged the validity of the British annexation of the Australian continent and asserted the existence and continuing sovereignty of a pan-Australia First Nation. In *Coe 1993* the plaintiff disputed the legitimacy of the British acquisition of Wiradjuri country and asserted the existence and continuing sovereignty of a Wiradjuri nation. Fundamentally, the two cases were manifestations, in the judicial arena, of demands by First Nations peoples for the decolonisation of the Australian nation-state. In that regard, the effective outcome in each case amounted to a refusal by the High Court to recognise and accommodate a form of internal sovereignty for First Nations peoples. The cases demonstrate the extent to which judicial adjudication can contribute to the maintenance of settler-colonial power relations. Judicial recognition of First Nations internal sovereignty would have produced the fundamental premise for enjoyment/exercise by First Nations peoples of rights to self-determination and self-government within the constitutional and governmental framework of the Australian nation-state. Therefore, the judicial arena is essentially an unsuitable forum for achieving First Nations' decolonisation objective. Accommodation of First Nations' internal sovereignty claim is fundamentally a political issue that is more appropriately dealt with by way of a negotiated political settlement.

Paul Coe, a Wiradjuri man, initiated a court action on 18 July 1977 – *Coe v The Commonwealth and Another* (1978) 18 ALR 592 (*Coe 1978*) – against the Commonwealth of Australia (“Commonwealth”) and the United Kingdom government in the High Court of Australia.¹ He was suing on behalf of “the Aboriginal community and nation of Australia”. The

¹ Justice Jacobs' judgment in *Coe 1979*: paragraph 1.

United Kingdom government did not participate in the proceedings.² The Commonwealth objected to Coe's statement of claim in support of his court action. It applied, on 2 September 1977, for that statement of claim to be struck out.³ A striking-out of the statement of claim would have the effect of aborting the court action. In response, Coe applied, on 23 September 1977, for leave of the Court to amend his statement of claim.⁴ Coe's application was heard by Justice Mason (as he then was), who refused the application.⁵ Coe appealed against Justice Mason's decision. *Coe 1979* deals with that appeal, which was heard, on 24 October 1978, by four judges: Justice Gibbs, Justice Jacobs, Justice Murphy and Justice Aickin. The four judges delivered their respective judgments on 5 April 1979. Coe's appeal was dismissed by Justice Gibbs and Justice Aickin. The appeal was upheld by Justice Jacobs and Justice Murphy. The end result of this split decision was that the original decision of Justice Mason in *Coe 1978*, refusing Coe leave to amend his statement of claim, was affirmed. This result follows from the provision of section 23(2)(b) of the *Judiciary Act 1903* (Cth).⁶

Coe 1993 was initiated, on 6 July 1993,⁷ by Paul Coe's sister, the late Isabel, with the same objectives as *Coe 1979*. It is notable that Ms Coe commenced court proceedings soon after the handing down of the decision in *Mabo v State of Queensland (No 2)* [1992] HCA 23. *Mabo (No 2)* was a momentous land rights case. The High Court found that First Nations peoples possess rights (as described by the concept of communal native title) to their traditional lands under the common law. Native title survived the British acquisition of sovereignty over Australia, but is extinguishable by the Crown by a valid exercise of its sovereign authority by, for example, the granting of freehold or leasehold estates.⁸ At the same time, there were statements by Justice Brennan in his judgment that implicitly recognised the existence of First Nations sovereignty prior to 1788.⁹ *Coe 1993* was in part a native title claim. This claim was based on *Mabo (No 2)*'s finding on the existence of First Nations peoples' native title rights. *Coe 1993*'s challenge to the legitimacy of the British annexation of Wiradjuri land and its

² Justice Mason's judgment in *Coe 1978* at 593 (paragraph 1).

³ Justice Jacobs' judgment in *Coe 1979*: paragraph 1.

⁴ *Ibid.*

⁵ *Coe 1978*: Justice Mason's order at 598.

⁶ The provision stipulates: "if the Court is equally divided in opinion [as in this instance], the opinion of the Chief Justice, or if he or she is absent the opinion of the Senior Justice present [in this case, Justice Gibbs], shall prevail."

⁷ High Court file S65 of 1993: "Isabel Coe on behalf of the Wiradjuri Tribe v Commonwealth of Australia (First Defendant) and State of New South Wales (Second Defendant)".

⁸ Justice Brennan's judgment in *Mabo (No 2)*: paragraph 83.

⁹ *Ibid.*: paragraphs 59, 61, 62, 64 and 65.

assertion of continuing Wiradjuri nation's sovereignty was partly inspired by Justice Brennan's recognition of First Nations sovereignty prior to 1788, and partly based on Justice Brennan's statement in paragraph 32 of his judgment. He said (in that paragraph):

Although the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law.

Based on the above statement, Ms Coe was clearly expecting that the High Court would see itself as having jurisdiction to decide the issue of whether or not the Wiradjuri were a "domestic dependant nation" and therefore possessing internal sovereignty. Such sovereignty was not incompatible with Crown sovereignty under international law.

The action in *Coe 1993* was against the Commonwealth of Australia ("Commonwealth") and the State of New South Wales. Ms Coe was suing on behalf of herself and "the Wiradjuri nation". In response, the Commonwealth applied for certain paragraphs of Ms Coe's statement of claim to be struck out.¹⁰ New South Wales applied for dismissal or permanent stay of the proceedings, alleging that Ms Coe had commenced her proceedings "for an improper purpose, amounting to an abuse of process".¹¹ The two applications were heard on 17 August 1993 by Chief Justice Mason. Chief Justice Mason was the judge who (before he became the Chief Justice) refused leave for Paul Coe to amend his statement of claim in *Coe 1978*. Chief Justice Mason delivered his judgment in *Coe 1993* on 23 December 1993. He agreed with the improper purpose contention by NSW and ordered that Ms Coe's statement of claim be struck out.¹²

The structure of the rest of this chapter is as follows. Section 2 sets out, briefly, the plaintiff's three alternative formulations of the amended statement of claim in *Coe 1979*. Section 3 discusses the plaintiff's claim in *Coe 1979* concerning the existence of a pan-Australia First Nation, and the judicial response to that claim. Section 4 sets out, briefly, the plaintiff's statement of claim in *Coe 1993*. Section 5 discusses the plaintiff's claim in *Coe 1993* concerning the existence of a sovereign Wiradjuri nation, and the judicial response to that claim.

¹⁰ Chief Justice Mason's judgment: paragraph 1.

¹¹ Ibid: paragraph 6.

¹² Chief Justice Mason's reasoning for accepting for the improper purpose contention is set out in paragraphs 54 and 55 of his judgment.

Section 6 concludes the chapter by pointing out that the fundamental outcome in *Coe 1979* and in *Coe 1993* was a refusal by the High Court to recognise and accommodate a form of internal sovereignty for First Nations peoples. Accordingly, the cases demonstrate the extent to which judicial adjudication can contribute to the maintenance of settler-colonial power relations. The judicial arena is therefore an unsuitable forum for a comprehensive decolonisation of the relationship between Indigenous Australia and the Australian nation-state.

2 The amended statement of claim in *Coe 1979*

Coe's amended statement of claim is set out in full in paragraphs 1-7 of Justice Gibbs' judgment. It had three alternative formulations. I reproduce these alternative formulations (using my own sequential paragraph numbering¹³) in Appendix 1, Appendix 2 and Appendix 3 respectively.

The alternative formulations revolved around three core issues. The first was a claim: (1) that a sovereign First Nation was in occupation of the whole continent of Australia prior to the arrival of British settlers, and (2) which continued to exist afterwards because of the wrongful British annexation of Australia (Appendix 1). The second – premised on an assumption that the British gained possession of Australia by occupation/settlement – concerned the continuance of the First Nation's land rights under the common law (Appendix 2). The third – based on an assumption that the British gained possession of Australia by conquest – concerned the survival of the First Nation's pre-existing land rights if those rights had not been set aside by prerogative acts of the British Crown (Appendix 3). Within each of the three alternative formulations, Coe also asserted the negative impacts of British colonial settlement on First Nation peoples' way of life, culture and religion.

The focus of my analysis of *Coe 1979* is the assertion by Paul Coe concerning the existence of a sovereign pan-Australia First Nation (Appendix 1) and the judicial response to that assertion. I deal with this issue in the next section.

¹³ The plaintiff's numbering of the paragraphs of the amended statement of claim (in its three alternative formulations) had been described by Justice Gibbs as "marked by eccentricity" (Justice Gibbs' judgment: paragraph 9).

3 Was there a sovereign pan-Australia First Nation in 1788?

It was Coe’s fundamental premise – in the first formulation of his proposed amended statement of claim (Appendix 1) – that a sovereign First Nation was in existence in Australia.¹⁴ This sovereign First Nation was in exclusive possession and occupation of the entire Australian continent prior to the arrival of British colonial settlers.¹⁵ As the British had not obtained the First Nation’s consent, the act of annexation performed by Captain James Cook in 1770 and the subsequent acts of British settlement of Australia – commencing in 1778 with the arrival of Captain Arthur Phillip and the first batch of British settlers – were wrongful.¹⁶ The British wrongfully treated the Australian continent as *terra nullius*.¹⁷ The British colonies and then the Commonwealth of Australia had wrongfully dispossessed First Nation peoples of their land.¹⁸ The wrongful occupation and use of First Nation land by British colonial settlers and their descendants prevented First Nation peoples from continuing to pursue their traditional land use.¹⁹ The British colonial settlers and their descendants had thereby destroyed the traditional hunter-and-gatherer way of life and culture of First Nation peoples.²⁰ The Commonwealth had permitted by legislation the exploitation of Australia’s mineral resources. Those mineral resources formed parts of lands of religious significance to First Nation peoples. Therefore, such legislation had prohibited the free exercise by First Nation peoples of their religion.²¹ In relation to continuing First Nation sovereignty, an alternative submission was made by Coe (in the course of the proceedings) that the First Nation possessed internal sovereignty as a “domestic dependent nation” (a concept propounded by Chief Justice Marshall of the United States Supreme Court in 1831, in relation to North American Indians, in the case of *Cherokee Nation v Georgia* 30 U.S. (5 Pet.) 1 (1831)²²).

The initiation by Paul Coe of proceedings in *Coe 1978*²³ and in *Coe 1979* were inspired by the struggle of First Nations peoples during the 1960s and early 1970s for recognition of

¹⁴ Statement of claim (Appendix 2): paragraphs [1], [2], [3], [9], [10], [11], and [12].

¹⁵ Ibid: paragraphs [9], [10], [11] and [12].

¹⁶ Ibid: paragraphs [4], [5] and [6].

¹⁷ Ibid: paragraph [13].

¹⁸ Ibid: paragraph [14].

¹⁹ Ibid: paragraph [15].

²⁰ Ibid.

²¹ Ibid: paragraphs [16], [17] and [18].

²² Babcock 2005: note 138, at 475.

²³ *Coe v The Commonwealth and Another* (1978) 18 ALR 592

their Indigenous difference and Indigenous rights.²⁴ As noted in Chapter 2, the abovementioned struggle manifested in three sets of highly significant, and much publicised, events²⁵: (1) the Yolngu people's bark petition of 1963 and their subsequent court action, the *Gove Land Rights Case*, which was commenced on 13 December 1968²⁶; (2) the Gurindji people's walk-off from Wave Hill station in 1966 and their petition to the Governor-General; and (3) the establishment of the Aboriginal Tent Embassy in Canberra in 1972. Coe's court proceedings were also influenced by the 1975 International Court of Justice's *Western Sahara Advisory Opinion* ("ICJ Advisory Opinion 1975")²⁷.

Coe adopted Justice Blackburn's conclusion, in the *Gove Land Rights Case*, that the Yolngu people had a stable social organisation and system of law,²⁸ and asserted its applicability in a pan-Australia First Nation context. But Coe rejected Justice Blackburn's finding that the Yolngu social organisation and system of law did not give the Yolngu people ownership of their homeland.²⁹ Justice Blackburn considered himself bound by *Cooper v Stuart*³⁰ in reaching his decision in the *Gove Land Rights Case*. Thus, paragraph [10] of Coe's first formulation of his amended statement of claim (Appendix 1), which is repeated in the second and third alternative formulations of the amended statement of claim (Appendix 2 and Appendix 3 respectively) states:

[10] The aboriginal people have had from time immemorial a complex social, religious, cultural and legal system under which individuals and tribes had proprietary and/or possessory rights, privileges, interests, claims and entitlements to particular areas of land subject to usufructuary rights in other aboriginal people.

Coe incorporated in his amended statement of claim the decision of the International Court of Justice (ICJ) in ICJ Advisory Opinion 1975.³¹ The ICJ had been requested by the UN General Assembly to provide an opinion on whether the Western Sahara was *terra nullius* before its

²⁴ Foley 2000: 78-81, 2001: 1-22, 2010: 4-23; Broome 2019: 227-254.

²⁵ See Chapter 2 for a description of these events.

²⁶ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

²⁷ *ICJ Reports* 1975 12.

²⁸ *Milirrpum v Nabalco Pty Ltd* (1971) 17 141, at 267.

²⁹ This rejection was acknowledged by Justice Gibbs in paragraph 15 of his judgment, by Justice Jacobs in paragraph 11 of his judgment, and by Justice Murphy in paragraph 5 of his judgment.

³⁰ This case is accessible at <https://legalhelpdesklawyers.com.au/1886/05/17/cooper-v-stuart/> - cited as [1889] UKPC 1 (03 April 1889). The case is otherwise normally cited as (1889) 14 App. Cas. 286.

³¹ Justice Murphy himself adopted the decision: paragraph 7 of his judgment. Paul Coe's adoption of the decision was expressly indicated in *Coe 1978*, and acknowledged by Justice Mason in his judgment in that case, at 596.

colonisation by Spain in 1884. The territory is part of the Sahara Desert,³² and was, at the time of Spanish colonisation, sparsely populated by nomadic tribes, who pastured their animals and grew crops “as and where conditions were favourable”.³³ The ICJ described the environmentally well-adapted way of life of those peoples as follows:

[The] members of [the tribes] traversed the desert on more or less regular routes dictated by the seasons and the wells or water-holes available to them. In general, ... the right of pasture was enjoyed in common by these tribes... Perennial water-holes were in principle considered the property of the tribe which put them into commission, though their use ... was open to all, subject to certain customs as to priorities and the amount of water taken. Similarly, many tribes were said to have their recognised burial grounds, which constituted a rallying point for themselves and for allied tribes.³⁴

These various points of attraction of a tribe to particular localities were reflected in its nomadic routes. ... [The] sparsity of the resources and the spasmodic character of the rainfall compelled all those nomadic tribes to traverse very wide areas of the desert.³⁵

The nomadic way of life of the inhabitants of the Western Sahara did not prevent the ICJ from reaching a unanimous decision that the territory was not *terra nullius* at the beginning of its colonisation by Spain.³⁶ The nomadic tribes of the region had a “social and political organisation” and therefore they had proprietary interests in the territory.³⁷ As put by Judge Gros (who provided a separate “declaration”³⁸), “independent tribes travelling over [a] territory, or stopping in certain places, [may exercise] a *de facto* authority [over that territory]”.³⁹

Coe developed the conceptual essence of the ICJ Advisory Opinion 1975 to its logical conclusion when he applied it to the circumstances of First Nation peoples. This application is reflected in paragraphs [10], [11] and [12] of the first formulation of his amended statement of claim (Appendix 1) as follows:

[10] The aboriginal people have had from time immemorial a complex social, religious, cultural and legal system under which individuals and tribes had proprietary and/or

³² ICJ Advisory Opinion 1975: paragraph 75.

³³ Ibid: paragraph 87.

³⁴ Ibid.

³⁵ Ibid: paragraph 88.

³⁶ Ibid: paragraph 83.

³⁷ Ibid: paragraphs 80 and 81.

³⁸ Ibid: pp. 69-77

³⁹ Ibid: Judge Gros’ judgment – paragraph 9.

possessory rights, privileges, interests, claims and entitlements to particular areas of land subject to usufructuary rights in other aboriginal people.

[11] Clans, tribes and groups of aboriginal people travelled widely over the said continent now known as Australia developing a system of interlocking rights and responsibilities making contact with other tribes and larger groups of aboriginal people thus forming a sovereign aboriginal nation.

[12] The whole of the said continent now known as Australia was held by the said aboriginal nation from time immemorial for the use and benefit of all members of the said nation and particular proprietary possessory and usufructuary rights in no way derogated from the sovereignty of the said aboriginal nation.

The above paragraphs are repeated in the second and third alternative formulations of the amended statement of claim (Appendix 2 and Appendix 3 respectively).

Coe 1979 was, first and foremost, an assertion of the existence of a pan-Australia First Nation and its continuing sovereignty. Paragraph [9] of Coe's first alternative formulation of his amended statement of claim (Appendix 1) reads:

[9] From time immemorial prior to 1770 the aboriginal nation had enjoyed exclusive sovereignty over the whole of the continent now known as Australia.

In the course of proceedings, an alternative claim concerning sovereignty was put to the Court by Coe's counsel that (in the words of Justice Gibbs) "there is an aboriginal nation which has sovereignty over its own people, notwithstanding that they remain citizens of the Commonwealth..."⁴⁰ In other words, as acknowledged by Justice Gibbs, the claim "sought to treat the aboriginal people of Australia as a domestic dependent nation [according to the concept propounded by Chief Justice Marshall of the United States Supreme Court in relation to North American Indians]".⁴¹ In either claim, exclusive sovereignty, as stated in paragraph [9] of the first formulation of the amended statement of claim, or a limited "domestic dependent nation" sovereignty, is an assertion that First Nations had not given up their status as a self-determining and self-governing nation. Coe has subsequently, outside of the court arena, restated this fundamental assertion:⁴²

⁴⁰ Justice Gibbs' judgment: paragraph 12.

⁴¹ *Ibid.*

⁴² *Coe 1988*: 141-142.

Sovereignty is a European concept. It is really the sharing of power between groups of people and, while one group has dominant power and the means to implement it, that does not necessarily give that group the *right* to sovereignty and the exercise of that power. Aboriginal people will always maintain that, despite the fact that Europeans have taken our land and 'legitimised' this act of theft, we are still a sovereign people and nation.

Despite the existence of an overwhelming police force, army, navy and air force to enforce white will upon us, and of the mechanism, through corrective services, to penalise our people when we rebel against that, Aboriginal people are dying today because they are resisting in many ways – because we still believe that we are sovereign people.

In other words, and in short, First Nations had never consented to the imposition of the settler-colonial system on them.

Coe 1979 was a challenge to the legitimacy of the Australian settler-colonial regime. Paragraph [13] of the first alternative formulation of the amended statement of claim (Appendix 1) asserts the wrongful settler-colonisation of Indigenous Australia by the British. The paragraph reads:

[13] The proclamations by Captain James Cook, Captain Arthur Phillip and others and the settlement which followed the said proclamations and each of them wrongfully treated the continent now known as Australia as terra nullius whereas it was occupied by the sovereign aboriginal nation as set out in paragraphs [10], [11] and [12].

And paragraph [14] (Appendix 1) asserts the entitlement of First Nation peoples not to be dispossessed of their lands:

[14] The aboriginal people being as aforesaid a nation from time immemorial to the present day were and are entitled to the quiet enjoyment of their rights, privileges, interests, claims and entitlements in relation to lands in the continent now known as Australia and were entitled not to be dispossessed thereof without [a] treaty [and] compensation.

In other words, Coe drew attention to the fact that the British settler-colonisers completely ignored the prior occupants and owners of Australia. They did not seek the consent of First Nation peoples for the establishment of their settler colony in Indigenous Australia. The British did not negotiate and enter into a treaty with First Nation owners of the continent. First Nation peoples had not been compensated for the loss of their lands. The British claimed the whole of the Australian continent for themselves, by the simple expedient of planting the British flag on Indigenous Australian soil.

The dubiousness of this claim, from First Nation peoples' point of view, was highlighted by paragraph 23A of Coe's amended statement of claim:

23A. On November 2nd, 1976 members of the aboriginal nation including the Plaintiff planted their national flag on the beach at Dover, England, in the presence of witnesses and natives of the territory of the second named Defendant and proclaimed sovereignty on behalf of the aboriginal nation over all of the territory of the second named Defendant, namely the United Kingdom of Great Britain and Northern Ireland.

On the 9th day of April 1977, the aboriginal nation confirmed this sovereignty over its lands, country and territory known as the Commonwealth of Australia by planting its flag in the presence of witnesses at Kurnell.

Coe was castigated by the judiciary for the above claim, but the paragraph is a powerful political statement. If the British could claim a populated continent by simply planting their flag on Indigenous Australian soil, why could not Indigenous Australia, despite its futility, claim the United Kingdom and reclaim the Australian continent in a similar fashion?

Coe 1979 also made a number of other highly significant assertions. First Nation peoples are entitled to Indigenous rights because they are the prior occupants and owners of the Australian continent.⁴³ The Australian settler-colonial regime was imposed on First Nation people "by force and with callous disregard for their cultures and rights".⁴⁴ First Nation people are entitled to compensation for "the injustice of colonial dispossession".⁴⁵ Indigenous Australia is experiencing ongoing settler-colonialism.⁴⁶

Underlying all of the claims and assertions in *Coe 1979* was a demand for the decolonisation of the Australian nation-state. As mentioned in Chapter 1, my notion of decolonisation in the context of a settler nation-state is a state of affairs in which First Nations peoples are able to exercise their inherent Indigenous rights. As defined in Chapter 1, Indigenous rights are the collective rights enumerated in UNDRIP. Recognition/acceptance by the Australian nation-state that First Nations peoples possess those UNDRIP declared rights would lead to recognition/acceptance that First Nations peoples have inherent rights to self-determination and self-government within the governmental and constitutional framework of

⁴³ Appendix 1: paragraphs [9]; [10] and [12]. See also Justice Gibbs' judgment: paragraph [12].

⁴⁴ Mulgan 1998: 179; see Appendix 2: paragraphs [15], [16], [17] and [18].

⁴⁵ Mulgan 1998: 190; see Appendix 1: paragraphs [7], [13], [14], [15], [16], [17] and [18] and the remedies sought.

⁴⁶ Appendix 2: paragraphs [16], [17] and [18] and the remedies sought.

the Australian-state. UNDRIP Article 3 and Article 4 respectively affirms Indigenous peoples' right to self-determination and self-government. Therefore, recognition/acceptance by the Australian nation-state of First Nations peoples' right to self-determination and the flow-on right to self-government would logically lead to a restructuring of the political, social and economic relationships between Indigenous Australia and the Australian nation-state – that is, to a decolonisation of Australia. This state of affairs accords with the alternative contention in *Coe 1979* that the First Nation was a domestic dependent nation.

All of the four judges rejected Coe's assertion that there was in existence a pan-Australia First Nation, which had either exclusive sovereignty over Australia or internal sovereignty as a domestic dependent nation within the constitutional and governmental framework of the Australian nation-state.

Justice Gibbs' reasoning for rejecting Coe's assertion is stated in paragraph 12 of his judgment, as follows:

It is clear that the allegations [by Coe] could not form the basis of any cause of action. The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state⁴⁷ whose validity cannot be challenged: see *New South Wales v The Commonwealth* [1975] HCA 58; (1975) 135 CLR, at p. 388, and cases there cited. If the amended statement of claim intends to suggest either that the legal foundation of the Commonwealth is insecure, or that there is an aboriginal nation which has sovereignty over Australia, it cannot be supported. In fact, we were told in argument, it is intended to claim that there is an aboriginal nation which has sovereignty over its own people, notwithstanding that they remain citizens of the Commonwealth; in other words, it is sought to treat the aboriginal people of Australia as a domestic dependent nation, to use the expression which Marshall CJ applied to the Cherokee Nation of Indians: *Cherokee Nation v State of Georgia* [1831] USSC 6; (1831) 5 Pet. 1, at p. 17. However, the history of the relationships between the white settlers and the aboriginal people has not been the same in Australia and in the United States, and it is not possible to say, as was said by Marshall CJ, at p. 16, of the Cherokee Nation, that the aboriginal people of Australia are organised as a "distinct political society separated from others", or that they have been uniformly treated as a state. The judgments in that case therefore provide no assistance in determining the position in Australia. The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth, or of a State or Territory, might

⁴⁷ An "act of state" is an act arising from the exercise of the executive power of a sovereign state (Alderton 2011).

confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.

Justice Aickin rejected Coe's assertion for the same reason given by Justice Gibb.⁴⁸

Justice Jacobs rejected Coe's assertion because the acts of British annexation and subsequent occupation/settlement of Australia were "not matters of municipal law but of the law of nations" and could not be challenged in a domestic court. In other words, like Justice Gibbs, Justice Jacobs could not accept the thrust of Coe's first formulation of his amended statement of claim (Appendix 1). In Justice Jacobs' view, Coe was asserting "a claim based on a sovereignty adverse to the Crown".⁴⁹ In short, like Justice Gibbs, Justice Jacobs could not accept the assertion by Coe of continuing First Nation sovereignty, even one that is a form of internal sovereignty. Justice Murphy rejected Coe's claims for the same reason given by Justice Jacobs.⁵⁰

Justice Jacobs and Justice Murphy were prepared to grant Coe leave to amend his statement of claim based on the second and third formulations of it.⁵¹ In other words, the court proceedings would then be dealing with a claim for land rights. The claim would be for land rights under the common law on the basis that the British gained possession of Australia by occupation/settlement (Appendix 2) or for land rights on the basis that the British gained possession of Australia by conquest (Appendix 3). Justice Gibbs and Justice Aickin agreed in principle that Coe had a justiciable course of action for a land rights claim under the common law. However, Coe had not, according to them, properly pleaded his case and this failure warranted rejection of his claim on this issue.⁵²

Justice Gibbs' argument for rejecting Coe's assertion of continuing First Nation sovereignty is highly Eurocentric. He pointed out that at the time of British annexation, the Australian continent was regarded by the British Crown as *terra nullius*. Australia was *terra*

⁴⁸ Justice Aickin's judgment: "I have had the advantage of reading the reasons for judgment prepared by my brother Gibbs. I am in full agreement with what he has said and there is nothing I can usefully add."

⁴⁹ Justice Jacobs' judgment: paragraph 3.

⁵⁰ Justice Murphy's judgment: paragraph 10.

⁵¹ Justice Jacobs' judgment: paragraphs 11 and 14; Justice Murphy's judgment: 9.

⁵² Justice Gibbs' judgment: paragraph 15: "[T]he assertions made are perfectly general; no particular land is identified... Whether the claims are intended to refer to lands which have been alienated, and to lands which have been specifically dealt with by statute, and to lands in States as well as in Territories, is not made clear, but it appears that they are so intended."

nullius because it was “a territory which, by European standards, had no civilised inhabitants or settled law”.⁵³ Justice Gibbs was relying here on a finding by the Privy Council in *Cooper v Stuart*⁵⁴ that the Australian continent was *terra nullius* when it was colonised by the British. Therefore, *ipso facto*, at the time of British annexation, there were no First Nations possessing sovereignty over the continent at all. There were no First Nations sovereignty, even one that is a form of internal sovereignty, that could be recognised at the time of annexation or could be resurrected by any contemporary First Nations community.

However, as pointed out by Gerry Simpson,⁵⁵ Justice Gibbs’ conception of *terra nullius* – “a territory which, by European standards, had no civilised inhabitants or settled law” – was a reformulation of that stated by the Privy Council in *Cooper v Stuart*. According to the Privy Council, a territory was *terra nullius* if it was “practically unoccupied, without settled inhabitants or settled law”.⁵⁶ In other words, as defined by the Privy Council, an inhabited territory was nonetheless *terra nullius* if the inhabitants lacked social organisation.⁵⁷ For Justice Gibbs, a territory “inhabited by groups possessing a form of social organisation and a legal system” was also *terra nullius* if those “structures were not European in style.”⁵⁸ The Privy Council’s definition of *terra nullius* was itself a departure from the original articulation of the concept by Sir William Blackstone in 1793.⁵⁹ For Blackstone, a territory was *terra nullius* only if it was “desert and uncultivated”.⁶⁰ Justice Gibbs’ definition of *terra nullius* “was one which had ceased to bear any resemblance to the original doctrine.”⁶¹

Michael Mansell has disputed the contention that First Nations had no governmental or sovereign authority over individuals prior to British settler-colonisation of the Australian continent. He pointed out: “Aboriginal society existed since time began and could not have done so without the benefit of complex rules of organisation and cohesion.”⁶² He drew attention

⁵³ Ibid: paragraph 13.

⁵⁴ This case is accessible at <https://legalhelpdesklawyers.com.au/1886/05/17/cooper-v-stuart/> - cited as [1889] UKPC 1 (03 April 1889). The case is otherwise normally cited as (1889) 14 App. Cas. 286.

⁵⁵ Simpson 1993: 201.

⁵⁶ [1889] UKPC 1 (03 April 1889) at 5.

⁵⁷ Simpson 1993: 202.

⁵⁸ Simpson 1993: 202.

⁵⁹ *Commentaries on the Laws of England* (9th Edition): 107-108 (cited in Simpson 1993: 199).

⁶⁰ Ibid: 107.

⁶¹ Simpson 1993: 202.

⁶² Mansell 2016a: 76-77.

to the following statement by Justice Blackburn in the *Gove Land Rights Case* on the existence of a stable Yolngu social organisation and system of law:⁶³

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be call “a government of laws, and not of men”, it is that shown in the evidence before me.

As noted in the previous section, Paul Coe similarly adopted and applied the above judicial statement in a pan-Australia First Nation context. Coe’s assertion that there was a pan-Australia First Nation in existence at the time of British acquisition is probably not historically accurate. This fact had probably weakened his overall claim.

The next two sections summarise the plaintiff’s statement of claim in *Coe 1993*.

4 The statement of claim in *Coe 1993*

The initiation of proceedings in *Coe 1993* was inspired by the High Court decision in *Mabo (No 2)*.⁶⁴ The statement of claim in *Coe 1993* is reproduced in Appendix 4.⁶⁵ It raised four sets of core issues: (a) the existence of a sovereign Wiradjuri nation;⁶⁶ (b) genocide acts and crimes against humanity perpetrated on the Wiradjuri people;⁶⁷ (c) fiduciary and trustee duties owed to the Wiradjuri people;⁶⁸ and (d) native title rights of the Wiradjuri people.⁶⁹

As I have done in relation to *Coe 1979*, my focus in this analysis of *Coe 1993* is the claim by Ms Coe that there was in existence a sovereign Wiradjuri nation, and the judicial response to that claim. I deal with this issue in the next section.

⁶³ *Milirrpum v Nabalco Pty Ltd* (1971) 17 *Federal Law Reports* 141: 267.

⁶⁴ *Mabo v Queensland (No 2)* [1992] HCA 23.

⁶⁵ High Court file S65 of 1993: “Isabel Coe on behalf of the Wiradjuri Tribe v Commonwealth of Australia (First Defendant) and State of New South Wales (Second Defendant)”.

⁶⁶ Statement of claim: paragraphs [1], 2, 3, 5, 6, 7, 8 and 13.

⁶⁷ *Ibid*: paragraphs 9 and 10.

⁶⁸ *Ibid*: paragraphs 13, 14, 15, 18, 19, 21 and 22. The claim against the Commonwealth, as set out in these paragraphs, was subsequently dropped (Chief Justice Mason’s judgment: paragraphs 21 and 33). As to the inclusion of paragraphs 18 and 19 as part of the fiduciary and trustee duties set of issues, see Chief Justice Mason’s judgment: paragraph 44: Chief Justice Mason notes the statement in argument by Ms Coe’s counsel that those two paragraphs “were intended to achieve no more than to plead a breach of fiduciary duty”.

⁶⁹ Statement of claim: paragraph 23.

5 Was/is there a sovereign Wiradjuri nation?

Ms Coe framed her claim concerning Wiradjuri sovereignty in three alternative ways. The first formulation of the claim contended that the Wiradjuri people were a sovereign nation, which had been in existence since time immemorial.⁷⁰ This first form of the claim can be understood as stating that the Wiradjuri nation had exclusive sovereignty over and within its national territory.⁷¹ The second formulation of the claim, if the first form no longer applied, was that the Wiradjuri people were a domestic dependent nation.⁷² She adopted here, as Paul Coe had done in *Coe 1979*, the concept employed by Chief Justice Marshall of the United States Supreme Court in 1831 to describe the status of Native Americans.⁷³ In other words, Ms Coe was claiming that, like Native American nations, the Wiradjuri nation possessed rights of internal sovereignty, internal self-determination and self-government. The third form of the claim was that the Wiradjuri “are a free and independent people”.⁷⁴

Ms Coe adopted the claim in *Coe 1979* concerning the existence of a sovereign pan-Australia First Nation and its challenge to the legitimacy of the British annexation and settlement of the Australian continent, and applied it to the specific circumstances of the Wiradjuri people. Thus, at the time of the British annexation, there was in existence a sovereign Wiradjuri nation that was in occupation of Wiradjuri country from time immemorial. And Wiradjuri country was unlawfully annexed and Wiradjuri sovereignty wrongfully usurped by the British. Therefore, the Wiradjuri people continue to be a sovereign nation, or, alternatively, they possess internal sovereignty as a domestic dependent nation.

Chief Justice Mason rejected each of the three alternative forms of Wiradjuri sovereignty argued for by Ms Coe.⁷⁵ The first form – that the Wiradjuri nation had sovereignty over and within Wiradjuri territory – was rejected by him because it was a claim to sovereignty adverse to the exclusive sovereignty of the Crown over the entire Australian continent. He

⁷⁰ Ibid: paragraphs 2 and 6.

⁷¹ The boundaries of the Wiradjuri national territory, or country, are indicated in paragraph 3 of the statement of claim.

⁷² Paragraph 7 of the statement of claim.

⁷³ *Cherokee Nation v State of Georgia* 30 U.S. (Pet.) 1 (1831).

⁷⁴ Paragraph 8 of the statement of claim.

⁷⁵ Chief Justice Mason’s judgment: paragraphs 24-28.

contended, as all the four judges in *Coe 1979* had done, that the validity of Crown sovereignty over Australia could not be challenged in a domestic court. He said:⁷⁶

[*Coe 1979*] lends no support whatsoever to a subsisting Aboriginal claim to sovereignty. That claim was rejected by all four Justices. Gibbs J stated that the annexation of the east coast of Australia by Captain Cook and the subsequent acts by which the whole of the Australian continent became part of the Dominions of the Crown were acts of state whose validity could not be challenged.

In this regard, he also referred to the *Mabo (No 2)* decision.⁷⁷ He said: “*Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia”.⁷⁸ In rejecting Ms Coe’s second form of Wiradjuri sovereignty (that of a domestic dependent nation), Chief Justice Mason again relied on *Mabo (No 2)*. He said:⁷⁹

The [*Mabo (No 2)*] decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are ‘a domestic dependent nation’ entitled to self-government. ... *Mabo (No 2)* denied that the Crown’s acquisition of sovereignty over Australia can be challenged in the municipal courts of this country.

Chief Justice Mason rejected Ms Coe’s third formulation of Wiradjuri sovereignty (that of a free and independent people) because in essence it had “no independent legal significance”.⁸⁰ He concluded that, in any event, each of the second and third formulations of Wiradjuri sovereignty was “but another way of putting the sovereign claim”.⁸¹ In other words, he conflated the three formulations into a claim of sovereignty adverse to Crown sovereignty over Australia. In the circumstances, Chief Justice Mason’s judgment in *Coe 1993* may overall be regarded as a finding that following the British acquisition of sovereignty over Australia, the Wiradjuri could not thereafter exercise sovereign law-making authority.

As Sean Brennan and his co-writers have pointed out:⁸²

Asking the [High] Court an international law question of whether the Crown in Australia validly holds sovereignty over the continent in the external sense of the word does raise difficulties. The authority of the High Court is derived from the Australian Constitution. Asking the Court

⁷⁶ Ibid: paragraph 24.

⁷⁷ *Mabo v State of Queensland (No 2)* [1992] HCA 23.

⁷⁸ Chief Justice Mason’s judgment: paragraph 27.

⁷⁹ Ibid.

⁸⁰ Ibid: paragraph 28.

⁸¹ Ibid.

⁸² Brennan et al. 2004: 347.

to question Crown sovereignty required it to question its own legitimacy. Therefore, it is not surprising that the Court has refused to examine the question, stating it is a ‘non-justiciable’ issue for Australia’s domestic courts.

But:⁸³

The legal position regarding internal sovereignty is less obvious. ... When the High Court of Australia recognised the prior ownership of land by Indigenous peoples in *Mabo (No 2)*, it raised new possibilities for the formal recognition of Indigenous forms of governance and authority.

Yet, as noted above, Chief Justice Mason in *Coe 1993* was of the view that *Mabo (No 2)* is “at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty.”

It would appear that Chief Justice Mason:⁸⁴

... overlooked or underplayed two key aspects of the decision in *Mabo (No 2)*. First, the systems of traditional law and custom survived the acquisition of Crown sovereignty, presently operating to regulate the rights enjoyed by native title holders and governing their decision-making. Secondly, ‘[a]lthough the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law.’⁸⁵ In other words, the High Court may abstain from dealing with arguments about whether the Crown’s assertion of sovereignty over Australia was legal or not, but it can still talk about what effect that assertion of sovereignty has on the existing systems of law within the nation.

Justice Nettle, in *Love v Commonwealth of Australia* [2020] HCA 3, has made the same observation concerning the justiciability in municipal courts of the consequences of the acquisition of Crown sovereignty over Australia.⁸⁶

The concept of First Nations sovereignty propounded by Larissa Behrendt,⁸⁷ Michael Mansell,⁸⁸ Phillip Falk and Gary Martin,⁸⁹ and many other Australian Indigenous writers and commentators⁹⁰ is an aspect of internal sovereignty. There are a number of other First Nations activists and scholars who are not content with internal self-determination, for example, Irene

⁸³ Ibid.

⁸⁴ Ibid: 348.

⁸⁵ Justice Brennan’s judgment in *Mabo (No 2)* [*Mabo v Queensland (No 2)*] [1992] HCA 23]: paragraph 32.

⁸⁶ Justice Nettle’s judgment: paragraph 264.

⁸⁷ Behrendt 2013: 164.

⁸⁸ Mansell 2016: 74-96. Mansell’s call for internal self-determination for First Nations peoples reflects a change in position by him. He, as part of the Aboriginal Provisional Government, had previously argued for external self-determination (see Aboriginal Provision Government website: “ABOUT the Aboriginal Provisional Government”).

⁸⁹ Falk and Martin 2007: 39-40.

⁹⁰ Behrendt 2003: 86-117.

Watson (see, for example, Watson 2007). Behrendt describes First Nations sovereignty as consisting of “rights to make decisions and have control over the decisions that affect [First Nations peoples’] lives”.⁹¹ First Nations sovereignty in this sense is well within the constitutional and governmental structure of Australia. Thus, as Behrendt has pointed out:⁹²

It is a falsehood that the recognition of Aboriginal sovereignty is a threat to Australian sovereignty and the two cannot exist. Every day the law finds ways to balance the sovereignty of local, state, and federal governments. Coexisting sovereignty is in no way conceptually difficult for our laws or institutions – unless it involves the incorporation of the sovereignty of Aboriginal people.

In short, First Nations sovereignty as an aspect of internal sovereignty is no “different from other manifestations of internal sovereign authority”, but merely “one strand in a larger web of entities that exercise some degree of sovereign authority over land and people”.⁹³

In *Mabo (No 2)*, the High Court relied upon the “logic employed in *Western Sahara*”⁹⁴ to reject the view held in *Coe 1979* (and in *Cooper v Stuart*) that the Australian continent was *terra nullius* when colonised by the British in 1788.⁹⁵ Such a position would have logically led to a rejection that Australia was acquired by the British by settlement (or by occupation as the concept is known in international law).⁹⁶ But the High Court refused to do so, affirming instead that Australia was indeed acquired by the British by settlement/occupation. A rejection by the High Court of the settlement/occupation hypothesis would not have amounted to a challenge against the Crown’s sovereignty over Australia.⁹⁷ It would simply have been a finding on the manner of acquiring sovereignty, which would not have undermined the Crown’s sovereignty over Australia at all. As Justice Brennan, in *Mabo (2)*, had pointed out: “International law recognised conquest, cession, and occupation of territory that was *terra nullius* as three of the effective ways of acquiring sovereignty.”⁹⁸ Therefore: “In the absence of either a treaty

⁹¹ Behrendt 2013: 164.

⁹² Behrendt 2013: 175.

⁹³ Macklem 2001 [2007 reprint]: 110.

⁹⁴ *Advisory Opinion Western Sahara* ICJ Reports 1975: 12 (Simpson 1993: 207).

⁹⁵ Justice Brennan’s judgment: paragraph 40.

⁹⁶ Simpson 1993: 207.

⁹⁷ *Ibid*: 208.

⁹⁸ Justice Brennan’s judgment: paragraph 33.

(cession) or a determination that Australia was *terra nullius* (occupation), the only method of acquisition was conquest.”⁹⁹

According to Gerry Simpson:¹⁰⁰

Conquest was a legitimate method of acquisition in international law prior to 1945 and, according to the doctrine of intertemporal law, the acquisition of Australia can be judged according to international law norms prevailing at the time. This would allow the [High] Court to declare Australia as conquered territory and, at the same time, maintain Crown sovereignty over the territory. This would be significant in respect of both native title and the recognition of Aboriginal customary law generally. Both the common law and international law regulating conquered territory from Blackstone to the present day, insist that the indigenous or sovereign laws in existence at the time of conquest shall remain in force until expressly extinguished by the Crown. These would include Aboriginal customary laws covering areas other than property ...

In the event, given that *Mabo (No 2)* had affirmed that Australia was acquired by settlement/occupation, the decision had produced: (a) “a theory of communal native title that was an expression of the legal manifestations of a finding of conquest in international law” and (b) “a theory of acquisition that lacks a foundation in international law.”¹⁰¹ The High Court, in *Mabo (No 2)*, had missed “an opportunity to dispel the myths of peaceable occupation, with the enormous symbolic and psychological impact grasping this opportunity would have had on both Aborigines and non-Aborigines in Australia.”¹⁰²

In *Members of the Yorta-Yorta Aboriginal Community v Victoria* [2002] HCA 58, the High Court explained that the “rights and interests in relation to land or waters” (that is, native title) of First Nations peoples that survived “the Crown’s acquisition of sovereignty over the several parts of Australia ... owed their origin to the traditional laws acknowledged and the traditional customs observed by” the First Nations peoples concerned.¹⁰³ Following the Crown’s acquisition of sovereignty over the entire Australian continent, “there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty.”¹⁰⁴ Thus, “the normative or law system” that produced those traditional laws and traditional customs

⁹⁹ Simpson 1993: 208.

¹⁰⁰ Simpson 1993: 208-209.

¹⁰¹ Simpson 1993: 209.

¹⁰² Ibid: 208.

¹⁰³ Joint judgment of Chief Justice Gleeson and Justices Gummow and Hayne: paragraph 37.

¹⁰⁴ Ibid: 44.

“could not thereafter validly create new rights, duties or interests.”¹⁰⁵ In other words, the traditional laws and traditional customs that give rise to native title “are those that find their origin in pre-sovereignty law and custom.”¹⁰⁶ This contention, according to Sean Brennan and his co-writers, “was sufficient to freeze the state of traditional law and custom in its ‘ancient’ state.”¹⁰⁷ The High Court in *Yorta-Yorta* would appear to have closed “down [at least in the short-term] any judicial exploration of a more nuanced, internal view of sovereignty.”¹⁰⁸

6 Conclusion

The plaintiffs in *Coe 1979* and *Coe 1993* asserted that from time immemorial, prior to British annexation (1770) and occupation/settlement of Australia (1788 onwards), the ancestors of First Nations peoples exercised sovereign control and ownership of the Australian continent. The ancestors were self-determining and self-governing peoples. The British annexation and settlement of Australia were unlawful. The British did not seek the consent of the prior occupants and owners of the continent and did not pay them any compensation. Because of the unlawfulness of the British annexation and settlement, First Nations sovereignty over the Australian continent subsists.

The statements of claim in *Coe 1979* and *Coe 1993* demonstrated the enduring resistance of First Nations peoples to settler colonialism. Underlying the plaintiff’s claims and assertions in *Coe 1979* and *Coe 1993* was a demand for the decolonisation of the Australian nation-state. Each plaintiff was prepared to accept the conferment of a domestic dependant nation status on First Nations. This status would give First Nations the right to internal sovereignty. Consequently, they would enjoy the rights to self-determination and self-government within the constitutional and governmental framework of the Australian nation-state.

The fundamental outcome in *Coe 1979* and in *Coe 1993* was a refusal by the High Court to recognise, and accommodate, a form of internal sovereignty for First Nations peoples. The Court conflated the demand by the plaintiff for recognition of First Nations internal sovereignty

¹⁰⁵ Ibid: 43.

¹⁰⁶ Ibid: 44.

¹⁰⁷ Brennan et al. 2004: 348.

¹⁰⁸ Brennan et al. 2004: 349. In the circumstances, if ever a suitable occasion necessitates a court action by a First Nation community, great care would need to be taken in how the claim is to be pleaded.

into a claim of sovereignty adverse to Crown sovereignty over Australia. This conflation constitutes a form of settler-colonial imposition. *Coe 1979* and in *Coe 1993* demonstrated the extent to which judicial adjudication can contribute to the maintenance of settler-colonial power relations. Therefore, the judicial arena is essentially an unreliable forum for achieving First Nations' decolonisation objective. Accommodation of First Nations' internal sovereignty claim is fundamentally a political issue that is more appropriately dealt with by way of a negotiated political settlement.

In the next chapter (Chapter 4), I examine the conflicts and tensions arising out of the politics of competing interests in land that took place in South Australia from 1990 to 2001. I use this case study to illustrate the difficulties First Nations face in using the judicial arena to protect another crucial category of their rights as Indigenous peoples: their right in relation to their cultural heritage.

Chapter 4

Asserting First Nations Cultural Heritage Rights: The Chronicle of the Hindmarsh Island Bridge

1 Introduction

This chapter is a case study of conflicts and tensions arising out of the political epic of competing interests in land – concerning economic development and First Nations cultural heritage – that took place in South Australia from 1990 to 2001. This epic arose out of a proposal to construct a bridge across the Murray River from the township of Goolwa to Hindmarsh Island. A case study of the controversies surrounding the construction of Hindmarsh Island Bridge is particularly apt to illustrate First Nations peoples’ enduring resistance to, and demand to be free from, settler colonialism and settler-colonial impositions; and how judicial adjudication can contribute to the maintenance of settler-colonial power relations. The study demonstrates that litigation and enquiries are unpredictable in their scope and outcomes and do not provide an appropriate mechanism for the resolution of fundamental issues for First Nations. It provides support for agreements or treaties with much broader scope and a principled policy approach to the resolution of those issues.

The construction of the bridge was a planning approval condition imposed, in April 1990, by the South Australian Government, on the extension of a sizeable marina and residential allotments complex on Hindmarsh Island by Binalong Pty Ltd, a company owned by Thomas Chapman and his wife, Wendy.¹ A ban on the construction of the bridge, for a period of twenty-five years, was imposed in July 1994 by the then Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs, Robert Tickner. The ban was the Minister’s response to an application for a protective declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) by the Aboriginal Legal Rights Movement Inc. on behalf of the Lower Murray Aboriginal Heritage Committee. The Minister’s decision to impose the ban was found by the Federal Court to have been “heavily influenced” by the argument advanced by a group of Ngarrindjeri women that the construction of the bridge was against their spiritual and cultural beliefs – summed up by the term “women’s business” – in relation

¹ *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 (Justice von Doussa’s judgment: paragraph 33).

to the bridge area.² The chronicle of the Hindmarsh Island Bridge produced “one of the more spectacular practical, legal, political, and ideological victories of the forces of economic development over Aboriginals hoping to retain their traditional relationship to the land.”³

I will examine four notable events of the epic. The first one is the judicial review of the ban against construction of the Hindmarsh Island Bridge pursuant to the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). The second is the appointment of the Hindmarsh Island Bridge Royal Commission. The third one is a second application for a protective declaration against construction of the Bridge. And the fourth is the enactment of the *Hindmarsh Island Bridge Act 1997* (Cth) (Bridge Act).

2 Judicial review of the ban against the construction of the Hindmarsh Island Bridge

The Aboriginal Legal Rights Movement applied, on 23 December 1993, to Minister Tickner, on behalf of the Lower Murray Aboriginal Heritage Committee (“Aboriginal Heritage Committee”), for a protective declaration under section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (Heritage Protection Act) against the construction of the Hindmarsh Island Bridge.⁴ The declaration was needed because the construction of the bridge would destroy Ngarrindjeri cultural heritage sites – “two major camp site areas adjacent to the bridge approaches, and the sites on Hindmarsh Island as a whole”.⁵ The Minister appointed Cheryl Saunders (a Professor of Law at the University of Melbourne) on 26 May 1994,⁶ pursuant to section 10(1)(c) of the Heritage Protection Act, to provide him with a report on the application, as required by section 10(4). Saunders provided the Minister with her report on Friday, 8 July 1994.⁷ The Minister made his protective declaration on Saturday, 9 July 1994.⁸

² *Thomas Lincoln Chapman v The Honourable Robert Tickner* [1995] FCA 1068 (*Chapman v Tickner*) (Justice O’Loughlin’s judgment: paragraph 15).

³ Van Krieken 2011: 126.

⁴ *Chapman v Tickner*: Justice O’Loughlin’s judgment – paragraph 15.

⁵ *Ibid.*

⁶ *Ibid.*: paragraph 20.

⁷ *Ibid.*: paragraph 21. Saunders had sent a draft copy of the report by facsimile transmission on the evening of Thursday, 7 July 1994 to the Minister’s office in Canberra. The Minister was in Sydney. That copy of the report was forwarded by facsimile transmission to his electoral office shortly after its receipt in Canberra.

⁸ *Ibid.*: paragraph 21.

Thomas and Wendy Chapman applied for a judicial review⁹ – pursuant to the provisions of the ADJR Act – of Minister Tickner’s decision on 22 July 1994¹⁰ and of the Saunders report on 3 August 1994.¹¹ The making of the Saunders report was deemed to be the making of a decision pursuant to section 3(3) of the ADJR Act and was accordingly reviewable.¹² Justice O’Loughlin heard the Chapmans’ application. He delivered his judgment on 15 February 1995. He found both decisions to have been tainted by error of law and ordered that they be quashed with effect from the respective date they were made (8 July 1994 for Saunders’ decision and 9 July 1994 for that of Tickner).

Saunders, as statutory reporter, was required to publish a notice inviting members of the public to make representations to her for her to consider in the preparation of her report to the Minister. The notice must comply with the requirements of section 10(3)(a)(i) of the Heritage Protection Act. This provision stipulates that the notice must state (1) “the purpose of the application” that is the subject of the statutory report; and (2) “the matters required to be dealt with in the report”. The required notice was published in the *Commonwealth Gazette* on 26 May 1994 and in *The Advertiser* (Adelaide newspaper) on 28 May 1994.¹³

Justice O’Loughlin found that the notice published by Saunders was defective. The information contained in the notice was inadequate to enable members of the public to make “meaningful representations”.¹⁴ The notice “did not identify sufficiently just what area or areas in the vicinity of Goolwa and the island would be the subject of [the Saunders] report.”¹⁵ It also failed to “address, as events transpired, the likely threat of injury or desecration”¹⁶ to women’s business by the construction of the bridge. At the time of the publication of the notice (May 1994), the subject of women’s business was unknown to Saunders. She only gained that information at her meeting with the proponent women¹⁷ on 20 June 1994.¹⁸ Justice O’Loughlin

⁹ Ibid.

¹⁰ Ibid: paragraph 1.

¹¹ Ibid: paragraph 24.

¹² Section 3(3) stipulates: “Where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under another law, the making of such a report or recommendation shall itself be deemed, for the purposes of this Act, to be the making of a decision.”

¹³ *Chapman v Tickner*: Justice O’Loughlin’s judgment – paragraph 20.

¹⁴ Ibid: paragraphs 181 and 182.

¹⁵ Ibid: paragraph 184.

¹⁶ Ibid: paragraph 185.

¹⁷ The Ngarrindjeri women who were proponents of women’s business.

¹⁸ Justice O’Loughlin’s judgment: paragraph 185.

stated that she should have then issued a correcting notice, advising members of the public of the material change in the nature of the threat of injury or desecration. She did not do so. Thus, the published notice also “became deficient in due course of time because of the advent of women’s business and the reliance on that subject by both the reporter and the Minister without giving notice of it to interested members of the public.”¹⁹ It “was incumbent on [Saunders] to offer some detail of the existence of the women’s business so that meaningful submissions could be made.”²⁰ Without the publication of a correcting notice, Saunders was not entitled to rely on that subject in her report to the Minister.²¹ The existence of the women’s business was a central issue in her report.

Justice O’Loughlin found that Minister Tickner had failed to consider the representations attached to the Saunders report as he was required to do by section 10(1)(c) of the Heritage Protection Act.²² There were over 400 representations,²³ which were only received at the Minister’s Canberra office on 8 July 1994,²⁴ the day before he made the protective declaration. He was in Sydney, and the representations remained in Canberra.²⁵

Counsel for the Minister submitted that the Minister had considered the representations for the following reasons. He had read the Saunders report (a copy of which was sent to him by facsimile transmission on the evening of 7 July 1994²⁶). He had discussed the representations with a female member of his staff, who advised him that their contents were reflected in the Saunders report.²⁷ Justice O’Loughlin rejected the submission.²⁸ He said that the Minister could only be said to have considered the representations if there had been “a substantial personal involvement” on his part in considering the representations.²⁹ Such personal involvement did not require that he “must read every word of every document”.³⁰ The Minister was entitled to

¹⁹ Ibid: paragraph 187.

²⁰ Ibid: paragraph 204.

²¹ Ibid: paragraph 208.

²² Ibid: paragraph 196.

²³ Ibid: paragraph 21

²⁴ Ibid: paragraph 21; *The Honourable Robert Tickner v Thomas Lincoln Chapman* [1995] FCA 1726 (“*Tickner v Chapman*”): Justice Burchett’s judgment – paragraph 14.

²⁵ *Tickner v Chapman*: Justice Burchett’s judgment – paragraph 14 [The case is also known as *Norvill v Chapman* (1995) 133 ALR 226].

²⁶ *Chapman v Tickner*: Justice O’Loughlin’s judgment – paragraph 21.

²⁷ Ibid: paragraph 190.

²⁸ Ibid: paragraph 196.

²⁹ Ibid: paragraph 192.

³⁰ Ibid: paragraph 192.

receive a measure of assistance from his staff.³¹ However, he could not rely entirely on the advice of his staff concerning the contents of the representations. In short, although he need not “read every word of every document”, he was required to have personally perused the documents to such an extent as to be able to determine for himself their contents. Thus, he failed to comply with his statutory obligation that he considered the representations before deciding to exercise his power to make a protective declaration under section 10 of the Heritage Protection Act.³²

Justice O’Loughlin also referred to the refusal of the Minister to read for himself the contents of two secret envelopes, which dealt with the subject of women’s business.³³ This was because the contents of the secret envelopes were meant to be read only by women. They were part of the anthropological report provided by Deane Fergie to Saunders on behalf of the Aboriginal Legal Rights Movement. Justice O’Loughlin found that the Minister “was heavily influenced” in his decision to issue his protective declaration “by the women’s business”.³⁴ He said “it was not a proper exercise of a power on the part of the Minister to rely so heavily on the subject of women’s business, yet deny himself access to the contents of the secret envelopes.”³⁵

Justice O’Loughlin pointed out that, if the published notice had not been “fatally flawed”,³⁶ the “the matter could have been sent back to the Minister”³⁷ to enable him to give the representations (including the contents of the secret envelopes) proper consideration. However, the fatal inadequacy of the published notice had deprived the Minister of jurisdiction to make the protective declaration.³⁸

Minister Tickner appealed against the judgment of Justice O’Loughlin. The Full Court of the Federal Court, comprising Chief Justice Black, Justice Burchett and Justice Kiefel, heard the appeal – *The Honourable Robert Tickner v Thomas Lincoln Chapman*³⁹ (“*Tickner v*

³¹ Ibid: paragraph 193.

³² Ibid: paragraph 197.

³³ Ibid: paragraph 207.

³⁴ Ibid: paragraph 198.

³⁵ Ibid: paragraph 199.

³⁶ Ibid: paragraph 208.

³⁷ Ibid: paragraph 207.

³⁸ Ibid: paragraph 208.

³⁹ [1995] FCA 1726 [The case is also known as *Norvill v Chapman* (1995) 133 ALR 226].

Chapman”) Their judgments – handed down on 7 December 1995 – affirmed Justice O’Loughlin’s decisions.

Chief Justice Black was very much aware of what Justice Jane Mathews subsequently described as “the fundamental differences between the introduced common law system and the legal system of the indigenous oral culture.”⁴⁰ He said:⁴¹

It must be recognised that there is an inevitable tension between the need for a decision-maker to know the relevant facts in accordance with the requirements of administrative decision-making or in accordance with the requirements of the judicial process on the one hand and, on the other hand, a system of beliefs and traditions originating in times when such external elements were entirely absent.

Nevertheless, there were no two ways about it. The First Nations system must be subordinated to the introduced system. Thus:⁴²

In the present case there can, in my view, be no doubt that the obligation imposed upon the Minister by the [Heritage Protection Act] to consider any representations attached to a report submitted to him for the purposes of s.10(1) is not subject to any implied exception to the effect that the Minister need not consider them if, according to Aboriginal tradition, the matters contained in them are only to be disclosed to a person of the opposite sex. The Act proceeds upon the clear basis that the actual decision-maker, the Minister, must consider the report and the representations attached to it.

Therefore:⁴³

It is of great importance that all concerned know what the requirements of the Act are in this respect. If Aboriginal people and those advising them have a clear understanding that the obligation to consider all representations is part of the process of protection, then they can make an informed decision about whether, and to what extent, information should be given in support of an application.

Justice Burchett described the subordination of First Nations legal system to the settler system in the following way:⁴⁴

⁴⁰ Mathews 1996: 1.

⁴¹ *Tickner v Chapman*: Chief Justice Black’s judgment – paragraph 55.

⁴² *Ibid*: paragraph 58.

⁴³ *Ibid*: paragraph 59.

⁴⁴ *Tickner v Chapman*: Justice Burchett’s judgment – paragraph 22.

... Aboriginals, just like all their fellow members of the community, if they wish to avail themselves of legal remedies, must do so on the law's terms. To take away the rights of other persons on the basis of a claim that could not be revealed to the maker of the decision himself would be to set those rights at naught in a way not even the Inquisition ever attempted.

Justice Burchett, however, did suggest a measure of accommodation – but one that did not in any way involve compromising the absolute necessity for disclosure to the decision maker of confidential matters that support an application for protection. He said:⁴⁵

If [the Minister] thought the Aboriginal women's claim to confidentiality required a departure from the normal way of dealing with the matter, it did not follow that the ordinary rights of other citizens, protected by the express provisions of the Act, had to be jettisoned. He could have asked the Prime Minister to appoint a female Minister ... to act for the time being on his behalf during the consideration of the report and recommendations.

Andrea Malone points out that *Tickner v Chapman* marked the beginning of a “progressive shift” by the Federal Court “away from the Heritage [Protection] Act's main objects, thus disadvantaging the Aboriginal people [the Act] was designed to benefit.”⁴⁶ In a prior case decided in April 1993 – *Robert Tickner v Robert Bropho*⁴⁷ (“*Tickner v Bropho*”) – the Full Court was emphatic in its view concerning the beneficial purposes of the Act and the importance of protecting First Nations cultural heritage areas and objects from injury or desecration. In *Tickner v Chapman*, however, the focus of the Full Court had shifted to stressing the rights of interested members of the public to be provided an effective opportunity to make representations. Subsequently, in a case decided in May 1996 – *Minister of Aboriginal and Torres Strait Islander Affairs v Malcolm McDonald Douglas*⁴⁸ (“*Broome Crocodile Farm Case*”) – the emphasis of the Full Court then turned to upholding additional rights of persons, whose interests are directly affected by a protective declaration. Such persons must be accorded an opportunity to respond to submissions and other written materials provided to the statutory reporter by or on behalf of the applicant for the declaration.

In *Tickner v Bropho*, the Full Court (comprising Chief Justice Black, Justice Lockhart and Justice French) upheld the judgment of Justice Wilcox at first instance to invalidate Minister Tickner's refusal to make a protective declaration, which a First Nations group had

⁴⁵ Ibid: paragraph 24.

⁴⁶ Malone 1996: 23.

⁴⁷ [1993] FCA 208.

⁴⁸ [1996] FCA 1509.

applied for, over the old site of the Swan Brewery in Perth, Western Australia.⁴⁹ The area had been earmarked for commercial and residential development.⁵⁰ Minister Tickner refused to make the protective declaration despite not having appointed a statutory reporter to inquire into the significance of the area to the First Nations group in question.⁵¹ The following statement by Chief Justice Black is illustrative of the Full Court's view:⁵²

I cannot accept that an Act described in the then Minister's second reading speech (H of R Deb. 9.5.84 p2133)⁵³ as beneficial legislation, remedying social disadvantage of Aboriginals and Islanders, and of having the effect, by preserving and protecting an ancient culture from destructive processes and of enriching the heritage of all Australians, could have been intended to allow for the rejection of applications for protection without proper consideration being given to the significance of the area sought to be protected. To conclude that the Act contemplates cases in which the national interest is so overwhelming that no protective declaration should be made irrespective of any consideration of the particular significance of the area sought to be protected would be to ignore the purposes of the Act and to assume, wrongly, that the Act reflects the prevailing attitudes of earlier times.

In *Tickner and Chapman*, the Full Court emphasised the crucial function of the statutory notice in providing interested members of the public an effective opportunity to make representations. Chief Justice Black said:⁵⁴

The legislative intention revealed by [the notice requirement of the Heritage Protection Act] is that interested members of the public should have an effective opportunity to provide information and express opinion concerning the important issues involved in the consideration [by the Minister] of an application [for a protective declaration]. The intention is that the Minister should make an informed decision on all relevant questions, with input from interested persons ... The Parliament no doubt intended that the 'interested persons' would include those who might oppose the making of a declaration as well as those who might support it.

Similarly, Justice Burchett stressed the necessity for the notice to be precise in stating the particular issues raised by an application for a protective declaration, so that persons – who might wish to make representations – could meaningfully address such issues.⁵⁵ So too did Justice Kiefel, who said that the notice “would be illusory”⁵⁶ if it did not provide “sufficient

⁴⁹ *Tickner v Bropho*: Chief Justice Black's judgment – paragraphs 1-2, 5, 13, 16.

⁵⁰ *Ibid*: paragraph 12.

⁵¹ *Ibid*: paragraphs 35-37.

⁵² *Ibid*: paragraph 38. See also Malone 1996: 25.

⁵³ House of Representatives Hansard No 137, 1984, Wednesday, 9 May 1984: 2012-2133.

⁵⁴ *Tickner v Chapman*: Chief Justice Black's judgment – paragraph 17.

⁵⁵ Justice Burchett's judgment: paragraphs 30 and 31.

⁵⁶ Justice Kiefel's judgment: paragraph 33.

information to permit an understanding of what the application concerns and to enable facts to be put forward and views expressed upon it and the making of a declaration.”⁵⁷

Broome Crocodile Farm Case,⁵⁸ concerned an appeal by Minister Tickner against Justice Carr’s judgment at first instance,⁵⁹ setting aside a protective declaration made by him, on 6 April 1994, over an area of land near Broome, Western Australia. The owners of the land, Malcolm Douglas and his wife, Valerie, wanted to develop it as a crocodile farm.⁶⁰ The declaration prohibited any earthworks or removal of vegetation on the land for a period of five years from 16 March 1995 and prevented its development as a crocodile farm.⁶¹ Minister Tickner made the protective declaration in response to an application, on 1 February 1994, by the Kimberley Land Council (on behalf of the Yawuru people).⁶² The Council’s application referred to the findings of two anthropologists, David Mardiros and Patrick Sullivan, “to the effect that the area was of particular significance to the Yawuru people in accordance with their law, traditions, observances, customs and beliefs.”⁶³

Mardiros found that the land had been used “by aboriginal people as a camping and meeting place”, and he “identified an initiates’ track through part of the area which linked two nearby ceremonial grounds.”⁶⁴ Mardiros also “referred to the ‘power’ that the Yawuru elders considered still to be present in the area, and made brief mention of two aboriginal traditions, one relating to mythic heroes and ‘The Song Cycle’, as showing a possible relationship between aboriginal people and the land.”⁶⁵ Sullivan confirmed Mardiros’ findings.⁶⁶ Sullivan also “found evidence of a mythological ‘two snake dreaming’ site in close proximity to the proposed farm.”⁶⁷

Minister Tickner appointed Fred Chaney as the statutory reporter on 14 February 1994. Chaney published the required notice, on 3 March 1994, inviting interested persons to provide

⁵⁷ Justice Kiefel’s judgment: paragraph 32.

⁵⁸ [1996] FCA 1509.

⁵⁹ *Malcolm McDonald Douglas v The Hon Robert Tickner* [1994] FCA 1066.

⁶⁰ Joint judgment of Chief Justice Black, Justice Burchett and Justice Kiefel: paragraph 1.

⁶¹ *Ibid.*

⁶² *Ibid.*: paragraph 7.

⁶³ *Ibid.*

⁶⁴ *Ibid.*: paragraph 4.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*: paragraph 7.

⁶⁷ *Ibid.*

representations in relation the Kimberley Land Council's application for a protective declaration.⁶⁸ He received a number of representations.⁶⁹ Copies of these were not made available to Malcolm and Valerie Douglas.⁷⁰ In his report to Minister Tickner, Chaney was of the opinion that "the importance of the land, sufficient to warrant protection, lay in its connection with the maintenance of the Yawuru culture by preserving, not only the initiates' track identified in some reports, but also the Yawuru people's right to control the land, which in turn would preserve confidentiality and access to the ceremonial grounds."⁷¹

Minister Tickner's decision to impose a protective declaration was set aside by Justice Carr on the grounds that Malcolm and Valerie Douglas were denied procedural fairness and that Minister Tickner had not read and considered representations included in Chaney's report. The denial of procedural fairness arose from the fact that Malcolm and Valerie Douglas were not provided with copies of all representations received by Chaney.⁷² They were, therefore, denied the opportunity to respond to those representations before Minister Tickner made his decision.⁷³ Justice Carr's finding that Minister Tickner had not read and considered the representations enclosed with Chaney's report was based, it would appear, on his perception that Minister Tickner would not have had the time to read and consider them, because they, together with the original copy of Chaney's report, were only taken to his office on 1 April 1994, which was Good Friday.⁷⁴

The Full Court (comprising, as in *Tickner v Chapman*, Chief Justice Black, Justice Burchett and Justice Kiefel) upheld, in a joint judgment, the decision of Justice Carr to set aside Minister Tickner's protective declaration on the grounds set out by Justice Carr.⁷⁵ In relation to procedural fairness, the Full Court therefore affirmed the finding of Justice Carr that persons, whose interests were directly affected by a protective declaration, must be given access to submissions and other written materials provided to the statutory reporter by or on behalf of the applicant for the declaration. Such persons must be accorded an opportunity to respond to those

⁶⁸ Ibid: paragraph 9.

⁶⁹ Ibid: paragraph 10.

⁷⁰ Ibid: paragraphs 10-16.

⁷¹ Ibid: paragraph 21.

⁷² Ibid: paragraphs 10-16.

⁷³ Ibid: paragraphs 24-31.

⁷⁴ Ibid: paragraphs 17 and 54.

⁷⁵ Ibid: paragraphs 1, 55.

submissions and materials, before the Minister exercised his/her right to make the declaration.⁷⁶ In other words, persons whose interests are directly affected by a protective declaration have rights to procedural fairness – in relation to the applicant’s submissions and written materials – in addition to their rights to make representations in response to the statutory notice. The Full Court expressly disagreed⁷⁷ with the view of Justice O’Loughlin in *Chapman v Tickner*⁷⁸ that the rights of such persons to procedural fairness were limited to making representations in response to the statutory notice. This issue did not arise for consideration by the Full Court in *Tickner v Chapman*.

Thus, as noted by Malone:⁷⁹

While there is no doubt that the scheme of the Heritage [Protection] Act contemplates involvement of third parties and makes provision for members of the public to make a contribution to the decision-making process, ... the focus of the [Federal] Court has changed away from the Act’s intention of protecting Aboriginal [cultural heritage rights], and the benefits of such protection to ‘all Australians’, and has turned towards upholding the rights of third parties to object.

Robert van Krieken⁸⁰ points out that this outcome is the inevitable result of what he describes as a “contracted” view of “social relations”. Such a view, he explains, is:⁸¹

... a universalistic one in which real, existing economic and political interests, as well as social relations of power, recede from view, and the world is composed only of more or less equal citizens ...

In the Australian context – where there is a minority First Nations peoples and a dominant non-Indigenous population – such a universalistic viewpoint has the effect of shoring-up an assimilationist settler-colonial approach to managing social relations. It requires, as pointed out by Malone, “that all aspects of legal and administrative procedure promote citizenship rights for all citizens.”⁸²

⁷⁶ Ibid: Full Court’s reasoning – paragraphs 24-31.

⁷⁷ Ibid: Full Court’s joint judgment – paragraph 31.

⁷⁸ [1995] FCA 1068: Justice O’Loughlin’s judgment – paragraphs 40-47, 186.

⁷⁹ Malone 1996: 28.

⁸⁰ Van Krieken 2011.

⁸¹ Ibid: 143.

⁸² Malone 1996: 31.

Malone notes:

the evolution of the implication of procedural fairness has largely taken place in the context of migration, where executive government decision making has a direct effect on the personal and family lives of the applicants for review.⁸³

But:

In the context of Aboriginal heritage applications, there are competing rights, interests and expectations between a number of interested parties, with executive government decision making having to strike a balance between the group interests associated with the Aboriginal claims for protection and the property rights of ... developers ...⁸⁴

First Nations peoples claims for heritage protection have therefore “a quite different social, cultural and legal context.”⁸⁵ In that context, as van Krieken has argued, procedural fairness “might in fact have a paradoxical operation, one that works to the benefit of the powerful at the very same time that the protection of the rights of the weak and the colonized are being championed most vociferously.”⁸⁶

Maureen Tehan argues that, in the context of First Nations cultural heritage protection:⁸⁷

The interests of indigenous groups are often perceived as spiritual or religious in nature and are often considered only because of the existence of a legislative regime requiring their consideration. No inherent rights, and in particular no property rights, attach to indigenous claims to protection. Heritage is not valued because it is not accorded the status of property ... Thus, claims for indigenous heritage protection are tenuous and dependant.

Therefore, as Malone points out:⁸⁸

In balancing the rights and interests of the parties in [Heritage Protection Act] cases in relation to procedural fairness, the rights and interests associated with traditional, western private property and individualised rights are necessarily re-valued as more significant than the less tangible rights and interests of Aboriginal religious beliefs, customs and cultural practices, particularly as they relate to communities or groups.

⁸³ Ibid: 29.

⁸⁴ Ibid: 29.

⁸⁵ Ibid: 29.

⁸⁶ Van Krieken 2011: 145-146.

⁸⁷ Tehan 1996b: 268.

⁸⁸ Malone 1996: 23.

Thus, Malone concludes it is procedural fairness that has “systematically destroyed the operation of the substance of the [Heritage Protection] Act and resulted in First Nations culture and tradition being subjugated to the proprietary and pecuniary interests of developers.”⁸⁹

The *Tickner v Chapman* decision means that First Nations peoples will not be able to seek protection for their cultural heritage under the Heritage Protection Act if they are not prepared to reveal to the Minister the full details of why that protection should be granted. Mere assertion that their spiritual and cultural beliefs demand such protection would be futile. They must reveal the full contents of those beliefs, including secret knowledge, to the Minister. That will be so even if, under First Nations customary law, the Minister may not be a person to whom the knowledge could be divulged. The *Broome Crocodile Farm Case* decision means that persons, whose interests are directly affected by a First Nations application for a protective declaration, must be given access to submissions and other written materials, including secret knowledge, provided to the statutory reporter by or on behalf of the applicant for the declaration.

The more fundamental implication of *Tickner v Chapman* and the *Broome Crocodile Farm Case* is that First Nations legal systems must be subordinated to the introduced settler legal system. The settler system will only provide legal remedies upon its own terms. It does not recognise Indigenous difference or prioritise the protection of Indigenous rights. The rights and interests of First Nations peoples will be treated in exactly the same way as the rights and interests of other citizens. Therefore, for First Nations peoples, the dominant settler legal system is fundamentally a force for their assimilation into settler society.

I turn next to examining the appointment of the Hindmarsh Island Bridge Royal Commission and its findings. The Commission was in effect set up to inquire into the religious and spiritual beliefs of Ngarrindjeri women who were opposed to the construction of the Bridge. Its appointment was a brutal exercise of settler-colonial power.

3 Hindmarsh Island Bridge Royal Commission

The South Australian Government appointed the Hindmarsh Island Bridge Royal Commission on 16 June 1995 (four months after Justice O’Loughlin had quashed Minister Tickner’s ban on

⁸⁹ Ibid: 31.

the construction of the Bridge⁹⁰). The Commission was to inquire into whether the women's business – that was relied upon by Minister Tickner in imposing his ban on the construction of the Bridge – was a fabrication.⁹¹ The Commission interpreted its terms of reference as requiring it to inquire into “the ‘women's business’ contained in the sealed envelopes sent to [Minister Tickner] and reported on by the [statutory reporter]”.⁹² The Commission did not have access to the contents of the sealed envelopes. However, according to the Commission, despite “the lack of direct evidence relating to the more particular description of the ‘women's business’ contained in the Confidential Appendices, there has been a body of evidence out of which it has been possible to infer their contents.”⁹³ The Commission inferred from this “body of evidence” that ‘women's business’ was supposedly “an Aboriginal tradition of Ngarrindjeri women [concerning the] “spiritual and cultural significance [of] the specific area of the proposed bridge, that is, Hindmarsh and Mundoo Islands, the waters of the Goolwa Channel, Lake Alexandrina and the Murray Mouth.”⁹⁴ As summed up by the Commission, the ‘women's business’ belief required the “preservation of the area, by a prohibition on the construction of a bridge, was crucial for the reproduction of the Ngarrindjeri peoples and of the cosmos which supported their existence”.⁹⁵

The preamble to the Commission's terms of reference set out the reasons for the appointment of the Commission,⁹⁶ as follows. There were allegations that the women's business relied upon by Minister Tickner for his decision to ban the construction of the bridge was fabricated.⁹⁷ There was “significant disagreement within the South Australian Aboriginal communities” about the existence of women's business. It was necessary to inquire into the allegations of fabrication for the following reasons. First, the inquiry would “provide a factual basis for the resolution of the disagreement within the South Australian Aboriginal Communities”. Second, the inquiry would enable the South Australian Government to determine whether or not the construction of the bridge should proceed. Third, the inquiry would enable the South Australian Government to determine whether it should make

⁹⁰ *Thomas Lincoln Chapman v The Honourable Robert Tickner* ([1995] FCA 1068).

⁹¹ HIBRC Report 1995: 1.

⁹² *Ibid*: 8

⁹³ *Ibid*: 234.

⁹⁴ *Ibid*: 236, 299.

⁹⁵ *Ibid*.

⁹⁶ *Ibid*: 1-2.

⁹⁷ These allegations were reported in the media during May 1995 (Mead 1995: 2).

representations to the Commonwealth Government in any further Commonwealth inquiry concerning the construction of the bridge.⁹⁸ The clear implication of that third reason for establishing the Royal Commission was that the South Australian Government was hoping that the Commission's findings would constitute a pre-emptive strike against a possible favourable outcome of a pre-announced possible second Federal inquiry under section 10 of the Heritage Protection Act.⁹⁹ The date of the first hearing by the Commission was 19 July 1995.¹⁰⁰ The hearing of evidence began on 24 July 1995.¹⁰¹

The Commission's inquiry – given its “nature” – was conducted along the lines of a trial in a court of law.¹⁰² In other words, witnesses were subject to examination and cross-examination by legal representatives.¹⁰³ However, the Commission was not bound by the rules of evidence applicable to a court of law.¹⁰⁴ Therefore, the Commission was able to, and did, receive hearsay evidence.¹⁰⁵ And, in contrast to a court of law, the Commission had no obligation to apply the standards of proof that a court of law is required to do so.¹⁰⁶ However, in the event, the Commission adopted the so-called Briginshaw Principle¹⁰⁷ as the standard of proof that it would apply.¹⁰⁸ This meant that the standard of proof that the Commission applied “was proof on the preponderance of probability with due regard to the importance of the particular issue being determined” and that facts “must be proved to the reasonable satisfaction of the Commissioner.”¹⁰⁹

⁹⁸ HIBRC Report 1995: 1-2.

⁹⁹ Minister Tickner had issued a press release on 20 May 1995, whilst *Tickner v Chapman* was in progress, that he had received a fresh application for a protective declaration. No action was taken on that application pending the outcome of *Tickner v Chapman*. Nonetheless, Minister Tickner announced on 8 June 1995 that a potential section 10 inquiry would be carried out by Justice Jane Mathews. In the event, the application that Justice Mathews was required to report upon was one that was received by Minister Tickner on 19 December 1995: *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 (Justice von Doussa's judgment: paragraph 134). See also Andrews 1998: 19.

¹⁰⁰ HIBRC Report 1995: 5.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*: 7.

¹⁰⁵ *Ibid.*: 6.

¹⁰⁶ *Ibid.*: 7.

¹⁰⁷ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

¹⁰⁸ HIBRC Report 1995: 7.

¹⁰⁹ *Ibid.*: 1.10 The Standard of Proof.

The Ngarrindjeri women, who were proponents of women's business, refused to participate in the proceedings of the Commission.¹¹⁰ They issued a statement expressing their non-recognition of the authority of the Commission to inquire into their spiritual beliefs. Their counsel read the statement before Commissioner Iris Stevens on the first day of the proceedings. I set out below parts of the statement:¹¹¹

We are deeply offended that a Government in this day and age has the audacity to order an inquiry into our secret, sacred, spiritual beliefs. Never before have any group of people had their spiritual beliefs scrutinised in this way.

...

We do not seek to be represented at this Royal Commission. We do not recognise the authority of this Royal Commission to debate and ultimately to conclude that women's business relating to Hindmarsh Island exists. We know women's business exists and is true.

We do not recognise you, Madam Commissioner, as a custodian of law in our society. We shall continue to practise our customs and law according to our customs and law as Aboriginal people have since time began and especially since the invasion.

...

We refuse outright to recognise your commission as having any right to decide whether we fabricated anything when we know that we have not.

A statement (supportive of the proponent women) by the Aboriginal and Torres Strait Islander Social Justice Commissioner at the time (Michael Dodson) was read at a public forum in Adelaide (organised by the Uniting Church) on 26 August 1995 (a month or so after the commencement of the Royal Commission's proceedings).¹¹² I reproduce below parts of the statement:¹¹³

The right to religious freedom and respect for spiritual beliefs lies at the heart of human rights. It is a right which all Australians are obliged to respect, and all Australians entitled to enjoy. And that principle holds irrespective of whose beliefs are at issue, or on what basis those beliefs are held. What we have in this Royal Commission is the abuse of the human rights of Aboriginal

¹¹⁰ Ibid: 20.

¹¹¹ Mead 1995: 3-4; Kartinyeri and Anderson 2008: 176-177.

¹¹² Mead 1995: vi.

¹¹³ Ibid: vii-viii.

people masquerading as a lofty legal procedure. Pull off the mask and what you see is nothing short of state sanctioned racism.

...

I find it increasingly difficult not to be cynical about the fine rhetoric of cultural diversity. We can freely sing our songs and tell our stories ... But the moment that the protection of those songs and stories may come into conflict with the economic interests of non-Indigenous society, we are told they have no place. Or in this case, a Royal Commission is set up to prove they do not even exist.

...

Religious and spiritual beliefs are not appropriate subjects for judicial scrutiny and faith cannot be proved in the dock of a court room.

... For those who have faith, no proof is required. For those who must doubt and destroy, no proof is sufficient

... our faith and knowledge about who we are can never be taken away.

The Royal Commission reported to the South Australian Government on 19 December 1995. Its conclusion was that the women's business asserted in relation to the site of the Bridge was a fabrication. In arriving at that conclusion, the Commission had "regard to the whole of the evidence, including the history of events, the anthropological evidence and the evidence of the dissident women".¹¹⁴ The purpose of the fabrication was to obtain a Commonwealth protective declaration under section 10 of the Heritage Protection Act to prevent the construction of the Hindmarsh Island Bridge.¹¹⁵ The Commission's findings that supported its conclusion were as follows (my numbering):¹¹⁶

- [1] The claim that there was 'women's business' in relation to Hindmarsh Island first emerged in 1994.¹¹⁷

¹¹⁴ HIBRC Report 1995: 298.

¹¹⁵ Ibid: 299. The Commission's "key findings" are set out on pages 287-298 of its report.

¹¹⁶ Ibid: 297-298.

¹¹⁷ The Commission noted that the person who first raised the notion of 'women's business' was an anthropologist, Lindy Warrell, who stayed at Camp Coorong on 26 March 1994. She mentioned the idea to Tom and Ellen Trevorrow. Tom Trevorrow was the manager of Camp Coorong (HIBRC Report 1995: 103-105).

- [2] It appears from Dr Fergie's evidence that there had emerged, from a single source,¹¹⁸ a claim of a secret oral tradition which, if true, put a completely different perspective on Ngarrindjeri tradition and culture.
- [3] The culture of the Ngarrindjeri nation has been the subject of intense historical and anthropological study commencing from the early days of the colony.
 - [a] In all the writings of the Ngarrindjeri nation, no reference can be found to the existence of 'women's business' specific to Hindmarsh and Mundoo Islands, the waters of the Goolwa Channel, Lake Alexandrina and the Murray Mouth.¹¹⁹
- [4] The existence of the 'women's business' described by Dr Fergie was completely unexpected prior to its emergence in 1994.
- [5] The 'women's business' emerged in response to a need of the anti-bridge lobby to provide something of sufficient cultural significance to warrant the making of a [protective] declaration by [Minister Tickner].
- [6] Not only was the 'women's business' unknown and unrecognised in the literature, the existence of the 'women's business' was not known to other Ngarrindjeri women.
 - [a] It was unknown to the twelve dissident Ngarrindjeri women who gave evidence and who were all credible witnesses.
 - [b] They had no interest in whether the bridge was or was not built.
 - [c] Their concern was for their culture.
- [7] If the 'women's business' existed and if it came from the sources nominated by Doreen Kartinyeri then it could not have been kept totally secret from the group of dissident Ngarrindjeri women.
 - [a] If the 'women's business' had existed they, or some of them, would have known it.
- [8] Support for [the] women who had spoken out [against the existence of the 'women's business'] came from Doug Milera [who was a member of the Lower Murray Aboriginal

¹¹⁸ Doreen Kartinyeri (HIBRC Report 1995: 125).

¹¹⁹ The principal publication relied upon by the Commission was a 1993 book by Ronald and Catherine Berndt, *A World That Was* (HIBRC Report 1995: 277).

Heritage Committee¹²⁰], with the public allegation¹²¹ that the ‘women’s business’ had been fabricated.

[9] Doug Milera made a considered decision to admit to a fabrication.¹²²

[a] He had ample time beforehand to reflect on what he was about to do.

[b] Afterwards he repeated his admissions to a number of persons.

[c] As late as 28 June 1995 Doug Milera confirmed his claim of fabrication.¹²³

Greg Mead had prepared a week-by-week summary of the oral evidence given during the Commission’s proceedings.¹²⁴ Based on that evidence, he wrote an “alternative Report”¹²⁵ before the publication of the Commission’s own report.¹²⁶ He was of the view that, “in spite of the absence of the proponent women’s evidence, there is still substantial support for the view that the secret women’s business does exist.”¹²⁷ He wrote that, in appointing the Commission, the South Australian Government was “pursuing a wider political agenda aimed at minimising the implications of the *Mabo* decision.”¹²⁸ According to him: “It is an inquiry that should never have been held.”¹²⁹

Neil Andrews shares Mead’s view that the appointment of the Commission was politically motivated. Andrews points out:¹³⁰

The appointment of Hindmarsh Island Bridge Royal Commission to report on the fabrication of Ngarrindjeri beliefs about Hindmarsh Island (Kumarangk) is unique. Government inquiries are never held to test the orthodoxy or validity of the spiritual beliefs of citizens. ... As the Commission progressed and reported, it revealed that the South Australian Government may have discovered a powerful weapon for Governments wishing to discredit indigenous peoples

¹²⁰ The Committee was the applicant for the protective declaration made by Minister Tickner (*Chapman v Tickner* [1995] FCA 1068, Justice O’Loughlin’s judgment: paragraph 15).

¹²¹ Milera’s admission was made in a filmed interview with Chris Kenny, a reporter for TV Channel 10, on 5 June 1995, which was shown on Channel 10 News on the evening of 6 June 1995 (HIBRC Report 1995: 5.9 Doug and Sarah Milera Speak Out – June 1995: 186-211).

¹²² HIBRC Report 1995: 186-211.

¹²³ Milera’s retraction, on 27 July 1995, of his claim to fabrication was not accorded any weight by the Commission (HIBRC Report 1995: 209-211).

¹²⁴ Mead 1995: 2, 3-105.

¹²⁵ Ibid: 107-192.

¹²⁶ Mead’s report was dated 3 December 1995.

¹²⁷ Mead 1995: 187.

¹²⁸ Ibid: 2.

¹²⁹ Ibid: 192.

¹³⁰ Andrews 1996: 62.

seeking to use legal procedures to protect their interests. It appeared to have achieved the political purpose for which it was set up.

Thus: “The Royal Commission into Hindmarsh Island ... demonstrated how differently Aboriginal people are treated in Australian politics and law.”¹³¹

Andrews was also of the view that the Commission’s finding of fabrication “became a fulcrum on which action” by the newly-elected Commonwealth Coalition Government (following a general election on 2 March 1996) “turned.”¹³² In other words, the finding provided the Government an invaluable political leverage for the enactment of the Bridge Act. In his speech, in support of his motion for the second reading of the Bill for the Act, the Parliamentary Secretary (Cabinet) to the Prime Minister (Chris Miles) referred to the Royal Commission’s finding of fabrication.¹³³ During the second reading debate, Ian McLachlan (Minister for Defence) attacked the Labor Party for supporting “a conspiracy of fabrications, concoctions, inventions, lies and deceit the like of which this country has hardly ever seen in its history”.¹³⁴ In the course of the debate, a number of other Coalition MPs and two Independent MPs also referred to the Royal Commission’s finding of fabrication.¹³⁵

Richard Nile points out:¹³⁶

In a number of important ways, the royal commission into the Hindmarsh Island Bridge controversy is a litmus test of indigenous claims to tradition and cultural practice in the highly charged post-Mabo environment ... But the case also raises basic questions concerning revivalist cultural movements.

¹³¹ Ibid: 6.

¹³² Andrews 1998: 19.

¹³³ House Hansard, 17 October 1976: 5801.

¹³⁴ House Hansard, 5 November 1996: 6560.

¹³⁵ Peter Slipper, House Hansard, 5 November 1996: 6565; House Hansard, 6 November 1996: 6646; Paul Filing (Independent), House Hansard, 6 November 1996: 6648; David Hawker, House Hansard, 6 November 1996: 6650; Graeme Campbell (Independent), House Hansard, 6 November 1996: 6686; Chris Miles (Parliamentary Secretary), House Hansard, 6 November 1996: 6689; Tony Smith, House Hansard, 6 November 1996: 6707; Wilson Tuckey, House Hansard, 6 November 1996: 6715)

¹³⁶ Nile 1996: Editorial.

In addition, as Lyndall Ryan has pointed out: “The Mabo judgment of 1992 and the federal native title legislation of December 1993, have enabled Aboriginal groups like the Ngarrindjeri to extend their claims to identity based on culture.”¹³⁷ And, as van Krieken has observed:¹³⁸

The struggles for and against the building of the [Hindmarsh Island Bridge] constituted one of the high points of the Australian culture wars, mobilizing key opponents of Aboriginal interests in land in the wake of the High Court’s *Mabo* ... decision ... with a particular ferocity and concentration of purpose.

Robert Tonkinson has drawn attention to “a deep-seated belief among non-indigenous Australians that the Aboriginal people of southern Australia, being predominantly of mixed descent, ... have long since ‘lost their culture’.”¹³⁹ Thus, it was not surprising that “public sentiment strongly supported” the finding of fabrication by the Commission.¹⁴⁰

Erich Kolig has pointed out: “In Australia, indigenous religion now forms a vital part of the construction of indigeneity. It becomes largely a defining ingredient of what constitutes traditional culture and of the identity based on it.”¹⁴¹ This proposition is well illustrated in the proponent women’s acceptance of ‘women’s business’ as aspects of the traditional religion of the Ngarrindjeri people and of their identity as Ngarrindjeri based on that religion. Kolig makes the further point that the “Hindmarsh affair and its sharp division into proponent and dissident women demonstrated that beliefs are not unanimously held among people entitled to hold them.”¹⁴²

All the dissident women identified as Ngarrindjeri. No commentators have denied them that identity.¹⁴³ The Hindmarsh Island Bridge Royal Commission had certainly accepted them as Ngarrindjeri. And so did Justice von Doussa in the case of *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 (discussed below). In contrast to the proponent women, the dissident women did not accept ‘women’s business’ as being part of their cultural heritage.¹⁴⁴ As one of

¹³⁷ Ryan 1996: 1.

¹³⁸ Van Krieken 2011: 126.

¹³⁹ Tonkinson 1997: 12.

¹⁴⁰ Ibid.

¹⁴¹ Kolig 2003: 211.

¹⁴² Ibid: 219.

¹⁴³ See, for example, Stanford 1996; Partington 1996; Callick 1996; Kenny 1996; Gelder and Jacobs 1997; Simons 2003: 305-313, 346-347; Kolig 2003: 211; Rowse 2006: 194.

¹⁴⁴ Stanford 1996; Partington 1996; Callick 1996; Kenny 1996; Gelder and Jacobs 1997; Simons 2003: 305-306, 346-347; Kolig 2003: 211; Rowse 2006: 194.

the dissident women, the late Dulcie Wilson, had asserted (in her book, *The Cost of Crossing Bridges*): “The Ngarrindjeri people of my generation are not tribal people and, for that matter, neither were our grandparents.”¹⁴⁵ In other words, the dissident women did not base their identity on traditional Ngarrindjeri culture, whatever their perception of that culture was. Their Indigeneity was simply anchored to their Ngarrindjeri ancestry and, it would appear, to a continually evolving First Nations culture that could incorporate, for example, Christianity. Geoffrey Partington (a critique of ‘women’s business’) noted: “The ‘dissident’ Ngarrindjeri women who gave testimony to the Royal Commission are all Christian, mostly belonging to the Uniting Church, successor to the Methodist Church which established a mission at Point McLeay, the focal centre of the Ngarrindjeri during the 19th century.”¹⁴⁶ There were thus two contrasting groups of Ngarrindjeri women. The proponent women sought to reconnect to their ancestral homeland through revival of their traditional culture and spiritual beliefs. The dissident women demonstrated their acceptance of an evolving cultural identity. However, both of the groups were exercising their rights to freely pursue their social and cultural development.

Following the enactment of the *Hindmarsh Island Bridge Act* on 12 May 1997 (receiving Royal assent on 22 May 1997),¹⁴⁷ the Chapmans commenced court proceedings – *Chapman v Luminis Pty Ltd (No 5)*¹⁴⁸ – against Luminis Pty Ltd (“Luminis”), Deane Fergie and Cheryl Saunders on 23 May 1997,¹⁴⁹ claiming damages against the three respondents. Later, in September 1997, the proceedings were amended to include the Chapmans’ claim for damages against Robert Tickner and the Commonwealth.¹⁵⁰ The Chapmans alleged that their company, Binalong Pty Ltd (“Binalong”), the developer of the marina and residential allotments complex on Hindmarsh Island, suffered financial losses because of the delay in the construction of the Hindmarsh Island Bridge. The Chapmans claimed that, if Minister Tickner had not made the final protective declaration against it, the construction of the Hindmarsh Island Bridge would have commenced in about July 1997.¹⁵¹ In the event, construction of the Bridge only began in late October 1999 (and was completed in March 2001).¹⁵²

¹⁴⁵ Wilson 1998: 40.

¹⁴⁶ Partington 1996.

¹⁴⁷ Justice von Doussa’s judgment, paragraph 140, in *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106.

¹⁴⁸ [2001] FCA 1106.

¹⁴⁹ Ibid: paragraph 142.

¹⁵⁰ Ibid: paragraph 145.

¹⁵¹ Ibid: paragraph 146.

¹⁵² Ibid: paragraph 148.

The Chapmans alleged that each of the respondents “failed to do their respective jobs properly”.¹⁵³ If the respondents had discharged their duties properly, construction of the Bridge would not have been delayed.¹⁵⁴ The Chapmans claimed that Luminis and Deane Fergie had engaged in misleading or deceptive conduct contrary to the relevant provisions of the (then) *Trade Practices Act 1974* (Cth),¹⁵⁵ arising from the report provided by Fergie (“Fergie Report”) to statutory reporter Saunders.¹⁵⁶ The Chapmans also claimed that Deane Fergie was negligent in the performance of her consultancy role, and Luminis was vicariously responsible.¹⁵⁷ The Chapmans claimed that statutory reporter Saunders had, similarly, engaged in misleading or deceptive conduct arising from her report to Minister Tickner,¹⁵⁸ and was negligent in the performance of her duties as statutory reporter.¹⁵⁹ Additionally, the Chapmans claimed that she had accessorial liability, in that she aided and abetted Luminis and Fergie in their misleading or deceptive conduct, by forwarding the Fergie Report to Minister Tickner.¹⁶⁰ Furthermore, statutory reporter Saunders had acted in breach of her statutory duty under section 10 of the *Heritage Protection Act*,¹⁶¹ and she committed misfeasance in public office (that is, she had misused or abuse her power) as statutory reporter. The Chapmans’ claim against Minister Tickner was that he was negligent in the performance of his duties pursuant to section 10 of the *Heritage Protection Act*,¹⁶² he breached his statutory duty under that provision,¹⁶³ and he committed misfeasance in public office.¹⁶⁴ The Chapmans’ claim against the Commonwealth was that the Commonwealth – by virtue of Minister Tickner’s emergency and final protective declarations – had acquired Binalong’s property otherwise than on just terms.¹⁶⁵ The judge in the case, Justice von Doussa, found that the Chapman’s “claims fail in their entirety.”¹⁶⁶

The Royal Commission’s conclusion that the ‘women’s business’ relied upon by Minister Tickner, in issuing the final protective declaration against construction of the

¹⁵³ *Ibid*: paragraph 149.

¹⁵⁴ *Ibid*.

¹⁵⁵ That Act was replaced by the *Competition and Consumer Act 2010* (Cth).

¹⁵⁶ Justice von Doussa’s judgment, paragraph 150, in *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106.

¹⁵⁷ *Ibid*: paragraph 151.

¹⁵⁸ *Ibid*: paragraph 152.

¹⁵⁹ *Ibid*: paragraph 154.

¹⁶⁰ *Ibid*: paragraph 153.

¹⁶¹ *Ibid*: paragraph 155.

¹⁶² *Ibid*: paragraph 157.

¹⁶³ *Ibid*: paragraph 158.

¹⁶⁴ *Ibid*: paragraph 159.

¹⁶⁵ *Ibid*: paragraph 160.

¹⁶⁶ *Ibid*: paragraph 853.

Hindmarsh Island Bridge, was a fabrication, and the Commission's findings in support of that conclusion, became significant issues in relation to the Chapmans' claim for misleading or deceptive conduct against Luminis/Fergie and Saunders. Justice von Doussa ruled that to succeed in that claim it was necessary for the Chapmans to "establish that the restricted women's knowledge¹⁶⁷ was not part of genuine Aboriginal tradition within the meaning of the [Heritage Protection Act]".¹⁶⁸ In other words, the Chapmans had to establish that the 'restricted women's knowledge' as reported by Dr Fergie and Professor Saunders was fabricated.¹⁶⁹ Justice von Doussa found that on the balance of probabilities the Chapmans had failed to do so.¹⁷⁰ As van Krieken has observed, Justice von Doussa's judgment constituted a "thorough demolition" of the findings of the Royal Commission.¹⁷¹ The proponent women regarded Justice von Doussa's judgment as a vindication of their stance.¹⁷²

The appointment, by the South Australian Government, of the Hindmarsh Island Bridge Royal Commission to inquire into the religious and spiritual beliefs of the proponent women was a particularly ruthless exercise of settler-colonial power. The Commission could be described as a settler-colonial force deployed to counter a perceived surging tide of cultural revivalism¹⁷³ – a manifestation of the ripple effect of the Mabo decision¹⁷⁴ – among First Nations peoples who were thought to have long assimilated into settler society.¹⁷⁵ The Commission could also be viewed as a particularly repressive form of settler-colonial imposition. It delved into the spiritual and religious beliefs of the proponent women. A person's spiritual and religious beliefs are fundamental aspects of their culture and, therefore, their cultural identity.¹⁷⁶ As the New Zealand Ministry of Social Development had pointed out: "Cultural identity is an important contributor to people's wellbeing."¹⁷⁷ Joanna Bourke has described the story of the proponent women as a manifestation of "the legacy of dispossession, colonialism and state of intrusion into the private lives of Aboriginal people, which make it

¹⁶⁷ The term 'restricted women's knowledge' was Justice von Doussa's preferred description for 'women's business', the expression used by the Commission.

¹⁶⁸ Justice von Doussa's judgment: paragraph 198.

¹⁶⁹ *Ibid*: paragraph 199.

¹⁷⁰ *Ibid*: paragraphs 199, 400.

¹⁷¹ Van Krieken 2011: 135.

¹⁷² Kartinyeri and Anderson 2008: 199.

¹⁷³ Nile 1996: Editorial.

¹⁷⁴ Mead 1995: 2; Ryan 1996: 1; van Krieken 2011: 126.

¹⁷⁵ Tonkinson 1997: 12.

¹⁷⁶ Cutri 2009: 56.

¹⁷⁷ NZ Ministry of Social Development 2003: 82.

both more difficult and, at the same time, more imperative, that traditions and sacred beliefs be maintained.”¹⁷⁸ The Commission’s investigation into the proponent women’s cultural identity was a demonstration of the repressively obstructive behaviour of the dominant group of South Australian society, to prevent a nascent traditional cultural revivalism by a minority group. More generally, the Royal Commission was an example of the kind of political and legal arsenal possessed by the dominant settler society that could be deployed at any time against assertion by First Nation peoples of their Indigenous difference and Indigenous rights.

The proponent women’s refusal to participate in the proceedings of the Commission demonstrated a determined, but ultimately futile, resistance to settler-colonial impositions. Justice von Doussa’s rejection of the Commission’s finding of fabrication vindicated their stance. However, in relation to the protection of their claimed cultural heritage, that rejection was, in effect, a mere postscript. It had been pre-empted by the enactment (on 12 May 1997) of the *Hindmarsh Island Bridge Act 1997* (Cth) (assented to on 22 May 1997). This legislation discriminated against the Ngarrindjeri people in relation to their claimed heritage site. It permitted the construction of the Bridge by prohibiting the Minister from considering any application for a protective declaration under the Heritage Protection Act against the construction (see below, section 5).

The next section is a brief examination of the fate of another application for a protective declaration against the construction of Hindmarsh Island Bridge, received by Minister Tickner in December 1995. The statutory reporting process on this application was not completed until after the Federal election of 2 March 1996, which saw the Paul Keating Labor Government defeated.

4 Application for another protective declaration

Minister Tickner received an application by Ngarrindjeri women, dated 19 December 1995,¹⁷⁹ for a protective declaration against the construction of the Hindmarsh Island Bridge. This was 12 days after the handing down of the decision of the Full Court of Federal Court affirming the quashing of Tickner’s 25-year ban by Justice O’Loughlin. It was received by the Minister on the same day the Royal Commission delivered its report to the South Australian Government.

¹⁷⁸ Bourke 1997: 334.

¹⁷⁹ Mathews 1996: 5.

In response, and having regard, clearly, to Justice Burchett's suggestion referred to earlier,¹⁸⁰ as well as to the request by the applicants,¹⁸¹ the Prime Minister appointed, on 22 December 1995, a female Minister, Senator Rosemary Crowley, to act on behalf of Minister Tickner, to consider the application.¹⁸² On 16 January 1996, Crowley appointed a female judge of the Federal Court, Justice Jane Mathews, in her personal capacity,¹⁸³ to prepare the required statutory report.¹⁸⁴ Justice Mathews accepted the appointment.¹⁸⁵

Justice Mathews commenced her task on 19 January 1996.¹⁸⁶ Whilst Justice Mathews was carrying out her inquiry, a federal election took place on 2 March 1996, and the Coalition, under John Howard, won government. Justice Mathews delivered her report on 27 June 1996 to Senator John Herron, the new Minister for Aboriginal and Torres Strait Islander Affairs.¹⁸⁷

Justice Mathews stated in her report that the applicants (for the protective declaration that was the subject of her report) had written twice (in March 1996) to Senator Herron requesting the appointment of a female Minister to consider their application on his behalf. However, the Minister refused to accede to their requests.¹⁸⁸ Minister Herron did not act on the applicants' request. They were not prepared to divulge to Minister Herron the contents of the restricted women's knowledge.¹⁸⁹ They therefore withdrew the confidential material that they had provided to Justice Mathews in support of their application.¹⁹⁰ In the circumstances, Justice Mathews was of the opinion that: "As a result there was no content of any tradition relating to restricted women's knowledge and thus no basis upon which this tradition could be used as a ground for making a declaration."¹⁹¹

¹⁸⁰ See above, section 2.

¹⁸¹ Mathews 1996: 7.

¹⁸² *Ibid*: 8.

¹⁸³ Paragraph 6 of the joint judgment of Chief Justice Brennan and Justices Dawson, Toohey, McHugh and Gummow in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1996] HCA 18.

¹⁸⁴ Mathews 1996: 8.

¹⁸⁵ Paragraph 1 of the joint judgment of Chief Justice Brennan and Justices Dawson, Toohey, McHugh and Gummow in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1996] HCA 18; paragraph 5 of Justice Kirby's judgment in the same case.

¹⁸⁶ Mathews 1996: 8.

¹⁸⁷ *Ibid*: i (letter to Senator John Herron dated 27 June 1996 forwarding the report).

¹⁸⁸ *Ibid*: 27-28.

¹⁸⁹ Mathews 1996: 27-28.

¹⁹⁰ Mathews 1996: 32.

¹⁹¹ Mathews 1996: 32, 41-48. The appointment of Justice Mathews as statutory reporter was declared invalid by the High Court in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1996] HCA 18. The

The appointment of Justice Mathews was declared invalid by a 6-1 majority of the High Court (on 6 September 1996) in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*.¹⁹² According to the majority, her appointment (notwithstanding that it was in her personal capacity) had breached the constitutional separation of powers between the executive and the judiciary. One of the plaintiffs in the case was Dorothy Wilson. She was one of the “dissident women” (those who did not subscribe to the existence of women’s business). Justice Mathews’ report was therefore deprived of its statutory status. Nevertheless, it had its political value (see below, section 5).

The application for a protective declaration by the proponent women showed their resoluteness in asserting their cultural heritage rights. The refusal of Minister Herron to arrange for the appointment of a female Minister to act on his behalf, to consider the proponent women’s application, was a manifestation of an uncompromising settler-colonial stance. The withdrawal by the proponent women of the confidential material that they had provided to Justice Mathews in support of their application was, in turn, like their refusal to participate in the proceedings of the Royal Commission, a reflection of their determined resistance to settler-colonial impositions. Because of the proponent women’s refusal to divulge to Minister Heron the contents of the restricted women’s knowledge, the validity or otherwise of Justice Mathews’ appointment became immaterial.

I now proceed to deal with the final notable event of the Hindmarsh Island Bridge chronicle that I wish to examine, the enactment of the *Hindmarsh Island Bridge Act 1997* (Cth). The passing of this legislation was another ruthless exercise of settler-colonial power, this time by the John Howard Coalition Government in its determination to enable the construction of the Hindmarsh Island Bridge without any hindrance from the Heritage Protection Act statutory reporting and ministerial decision-making processes.

proceedings were initiated by Dorothy Wilson, one of the so-called “dissident women”, that is, who did not subscribe to women’s business.

¹⁹² [1996] HCA 18.

5 *Hindmarsh Island Bridge Act 1997 (Cth)*

On 17 September 1996, Minister Herron tabled Justice Mathews' report in the Senate.¹⁹³ In tabling the report, he announced that the Coalition Government "would introduce special legislation to prevent a further protective declaration application under the [Heritage Protection Act], and to authorise the construction of the [Hindmarsh Island Bridge]."¹⁹⁴ Announcing the Government's intention to introduce such legislation whilst tabling Justice Mathews' report would seem to suggest that Herron perceived that the report had added political value, that is, on top of the findings of the Hindmarsh Island Bridge Royal Commission (noted above, in section 3). The intended legislation was duly enacted as the *Hindmarsh Island Bridge Act 1997* (Cth) (Bridge Act) on 12 May 1997¹⁹⁵ and was assented to on 22 May 1997.¹⁹⁶

Doreen Kartinyeri challenged the constitutional validity of the Bridge Act (*Kartinyeri v The Commonwealth*).¹⁹⁷ She commenced proceedings on 27 May 1997¹⁹⁸ (that is, five days after the Bridge Act received Royal Assent). The question that the High Court had to consider was whether the Bridge Act was invalid because it was not supported by section 51(xxvi) of the Constitution.¹⁹⁹ The provision reads:²⁰⁰

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... (xxvi) the people of any race for whom it is deemed necessary to make special laws.

The original provision read:²⁰¹

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... (xxvi) the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.

¹⁹³ See paragraph 138 of Justice von Doussa's judgment in the case of *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 ("Justice von Doussa's judgment").

¹⁹⁴ Justice von Doussa's judgment: paragraph 138.

¹⁹⁵ *Ibid*: paragraph 140.

¹⁹⁶ See Bridge Act.

¹⁹⁷ [1998] HCA 22.

¹⁹⁸ Justice von Doussa's judgment: paragraph 143.

¹⁹⁹ The question was reserved for consideration by the Full Court, by Chief Justice Brennan sitting alone, pursuant to section 18 of the *Judiciary Act 1903* (Cth).

²⁰⁰ Commonwealth of Australia 2010 (Australia's Constitution).

²⁰¹ Commonwealth of Australia 2010 (Australia's Constitution): Note 14.

The plaintiffs' contention was that the deletion of the expression "other than the aboriginal race in any State" from section 51(xxvi) – following the 1967 Constitutional Referendum – had the effect that, in relation to First Nations peoples, only beneficial laws were authorised by the amended section 51(xxvi).

The High Court, by a 5–1 majority decision (delivered on 1 April 1998), upheld the validity of the Bridge Act.²⁰² The majority consisted of Chief Justice Brennan, Justices Gaudron, McHugh, Gummow and Hayne. Chief Justice Brennan and Justice McHugh delivered a joint judgment, as did Justice Gummow and Justice Hayne. Justice Kirby delivered the dissenting judgment.

Chief Justice Brennan and Justice McHugh were able to come to their conclusion that the Bridge Act was valid without needing to consider the scope and meaning of the power conferred by section 51(xxvi) of the Commonwealth Constitution. In other words, they found it unnecessary to address the plaintiffs' contention that, in relation to First Nations peoples, only beneficial laws were authorised by the amended section 51(xxvi). They put the constitutional question that had to be answered in two forms.²⁰³ The first:

... given that the Parliament had the power to enact Part II of the Heritage Protection Act in the exercise of the legislative power conferred by section 51(xxvi), did the Parliament have power subsequently to restrict the operation of the Act?

The second:

... are the restrictions on the operation of Part II of the Heritage Protection Act created by the Bridge Act so connected with the subject matter of section 51(xxvi) of the Constitution that the Bridge Act can properly be described as a law 'with respect to ... the people of any race for whom it is deemed necessary to make special laws'?

The answer given by them to either form of the question was "yes". On the first: "the Parliament exercised its power under s51(xxvi) to enact the Heritage Protection Act and it has had at all times the same power to amend or repeal that Act."²⁰⁴ As the Bridge Act "has no effect or

²⁰² The hearing commenced before all seven justices. But subsequently the case was heard by only 6 members of the Court. The seventh member, Justice Callinan, was forced to recuse himself. The circumstances surrounding Justice Callinan's recusal are set out in Simons 2003: 416-418.

²⁰³ Joint judgment of Chief Justice Brennan and Justice McHugh: paragraph 11.

²⁰⁴ Ibid: paragraph 17.

operation other than reducing the ambit of the Heritage Protection Act, s51(xxvi) supports it.”²⁰⁵ Therefore, “the Bridge Act is valid.”²⁰⁶ On the second: as “the Heritage Protection Act is a law with respect to the subject matter of s51(xxvi), a law which governs the area of its operation has a direct connection with that subject matter.”²⁰⁷ Therefore, “the Bridge Act is itself a law with respect to the subject matter of s51(xxvi).”²⁰⁸ It “can have no character different from, and must have the same validity as, the Heritage Protection Act.”²⁰⁹

In contrast to Chief Justice Brennan and Justice McHugh, Justice Gaudron took up the plaintiffs’ contention that, in relation to First Nations peoples, only beneficial laws were authorised by the amended section 51(xxvi). The plaintiffs’ argument in support of their contention was that the deletion of the expression “other than the aboriginal race in any State” had that effect. Justice Gaudron rejected the plaintiffs’ contention. She said: “As a matter of language and syntax,” the amendment did no more than place First Nations peoples “in precisely the same constitutional position as the people of other races”.²¹⁰ In other words, all that the amendment did was to empower the Commonwealth Parliament, thereafter, to enact special laws for First Nations peoples in the same way that it could in relation to people of other races. She was of the view that “it is not possible ... to treat s51(xxvi) as limited to laws which benefit Aboriginal Australians if it is not similarly limited with respect to the people of other races.”²¹¹

However, Justice Gaudron went on to point out that section 51(xxvi) “does not simply confer power to legislate with respect to ‘the people of any race’.” The section, she said, “confers power to legislate with respect ‘to people of any race for whom it is deemed necessary to make special laws’.”²¹² She argued that “the words ‘for whom it is deemed necessary to make special law’ must be given some operation.”²¹³ Those words, she said, “can only operate to impose some limit on what would otherwise be the scope of [section] 51(xxvi).”²¹⁴ Thus, the “criterion for the exercise of power under [the section] is that it be deemed *necessary* – not

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid: paragraph 19.

²⁰⁸ Ibid.

²⁰⁹ Ibid: paragraph 20.

²¹⁰ Justice Gaudron’s judgment: paragraph 29.

²¹¹ Ibid: paragraph 30.

²¹² Ibid: paragraph 33.

²¹³ Ibid: paragraph 34.

²¹⁴ Ibid.

expedient or appropriate – to make a law which provides differently for the people of a particular race or, if it is a law of general application, one which deals with something of special significance or importance to the people of that particular race.”²¹⁵ On this basis, she was able to reject the plaintiffs’ argument against the validity of the Bridge Act, that is, section 51(xxvi) “only authorises laws which operate with respect to all persons of the race in question ...”²¹⁶ She upheld the validity of the Bridge Act on the basis that it merely limited “the field in which the Heritage Protection Act operates”.²¹⁷ In doing so, the Bridge Act had effected a partial repeal of the Heritage Protection Act. This partial repeal was authorised by section 51(xxvi). Section 51(xxvi) “not only authorises the Heritage Protection Act but, also, authorises its partial repeal.”²¹⁸ The “Heritage Protection Act as amended by the Bridge Act remains a law for the protection and preservation of areas and objects of significance in accordance with Aboriginal tradition and ... continues to be a valid enactment under [section] 51(xxvi).”²¹⁹

Justice Gaudron went on to express her view that section 51(xxvi) would ordinarily not extend to support legislation that discriminated against First Nations peoples. She said:²²⁰

Although the power conferred by [section] 51(xxvi) is, in terms, wide enough to authorise laws which operate either to the advantage or disadvantage of the people of a particular race, it is difficult to conceive of circumstances in which a law presently operating to the disadvantage of a racial minority would be valid. It is even more difficult to conceive of a present circumstance pertaining to Aboriginal Australians which could support a law operating to their disadvantage. To put the matter another way, *prima facie*, at least, the circumstances which presently pertain to Aboriginal Australians are circumstances of serious disadvantage, which disadvantages include their material circumstances and the vulnerability of their culture. And *prima facie*, at least, only laws directed to remedying their disadvantage could reasonably be viewed as appropriate and adapted to their circumstances.

Continuing, Justice Gaudron said the test of the constitutional validity of a law enacted under section 51(xxvi)] is whether the law “is reasonably capable of being viewed as appropriate and adapted to a real and relevant difference which the Parliament might reasonably judge to exist.”²²¹ She argued: “It is the application of [this] test to today’s circumstances, so far as they are known, that leads to the conclusion that *prima facie*, at least, [section] 51(xxvi)

²¹⁵ Ibid: paragraph 39 (emphasis in original).

²¹⁶ Ibid: paragraph 46.

²¹⁷ Ibid: paragraph 48.

²¹⁸ Ibid: paragraph 49.

²¹⁹ Ibid: paragraph 49.

²²⁰ Ibid: paragraph 44.

²²¹ Ibid: paragraph 45.

presently only authorises laws which operate to the benefit of Aboriginal Australians.”²²² Her reasoning here may hold the key to future jurisprudence on this issue.

In their joint judgment, Justice Gummow and Justice Hayne identified the constitutional question that had to be answered in terms of the second form stipulated in the joint judgment of Chief Justice Brennan and Justice McHugh. Therefore, if there was a connection between the subject matter of the Bridge Act and that of section 51(xxvi) of the Constitution, then the Bridge Act would be “with respect to” the head of power in section 51(xxvi)²²³ and would therefore be valid. They – like Chief Justice Brennan and Justice McHugh – found there was such a connection.²²⁴

In his dissenting judgment, Justice Kirby dealt with the constitutional question that the Court had to consider “on a basis which construes the Constitution as making no distinction between races”.²²⁵ He did this because “that is now the form in which [section 51(xxvi)] appears”.²²⁶ His finding was that section 51(xxvi) of the Constitution “does not extend to the enactment of laws detrimental to, or discriminating against, the people of any race (including the Aboriginal race) by reference to their race.”²²⁷ The Bridge Act was therefore invalid. It was “detrimental to, and adversely discriminatory against people of the Aboriginal race of Australia by reference to their race.”²²⁸

Justice Kirby pointed out that the words “deemed necessary” and “special” in the text of section 51(xxvi) had “the purpose of putting a limitation on what would otherwise be an unbridled race power.”²²⁹ The words “combine to impose a control on the laws which may be made under the [section].”²³⁰ They “are consistent with an operation that is non-detrimental and has no adverse discrimination about it.”²³¹ Therefore: “The fact that any law made under the race power must be deemed ‘necessary’ and must answer to the description ‘special’ marks such a law out from all other laws that may be made by the Parliament. It tenders to the

²²² Ibid.

²²³ Joint judgment of Justice Gummow and Justice Hayne: paragraph 73.

²²⁴ Their reasoning is set out in paragraphs 74-86 of their joint judgment.

²²⁵ Justice Kirby’s judgment: paragraph 168.

²²⁶ Ibid.

²²⁷ Ibid: paragraphs 152, 165, 168.

²²⁸ Ibid: paragraph 176.

²²⁹ Ibid: paragraph 153.

²³⁰ Justice Kirby’s judgment: paragraph 155.

²³¹ Ibid.

Parliament, and ultimately to this Court, criteria of limitation which must be given meaning according to the understanding of the Constitution read today.”²³²

Justice Kirby found the word “for” – in the text, “the people of any race for whom it is deemed necessary to make special laws”, of section 51(xxvi) – was ambiguous.²³³ He said the word could mean “for the benefit of”, or it could mean “in respect of”.²³⁴ He resolved this ambiguity by employing this interpretive principle: “Where the Constitution is ambiguous, this Court should adopt the meaning which conforms to the principles of universal and fundamental rights rather than an interpretation which would involve a departure from such rights.”²³⁵ He pointed out: “Where there is ambiguity in the common law or a statute, it is legitimate to have regard to international law.”²³⁶ It was, he argued, equally legitimate to have regard to international law where there was ambiguity in “the Australian Constitution, which is a special statute”.²³⁷ He noted: “If there is one subject upon which the international law of fundamental rights resonates with a single voice it is the prohibition of detrimental distinctions on the basis of race.”²³⁸ Thus, by applying the international law prohibition of detrimental distinctions on the basis of race to resolve the perceived ambiguity in section 51(xxvi), the word “for” would mean “for the benefit of”. Therefore, section 51(xxvi) would not authorise the enactment of special laws that were detrimental to, or discriminating against, the people of any race (including First Nations peoples) by reference to their race. Thus, the connection of the Bridge Act to the Heritage Protection Act did not have the effect of extending to the former the constitutional validity of the latter.²³⁹

Justin Malbon has analysed the interpretive approaches of the judges in this case.²⁴⁰ He observes that “the majority retreated into the plain fact and extreme textualist interpretation approaches.”²⁴¹ “The majority,” he argues, “read the Constitutional text devoid of its social, historical and even Constitutional context.”²⁴² He is particularly critical of the deliberate

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.*: paragraph 166.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*: paragraph 167.

²³⁹ Justice Kirby’s judgment: paragraphs 169-175.

²⁴⁰ Malbon 2002.

²⁴¹ *Ibid.*: 42.

²⁴² *Ibid.*

avoidance by Chief Justice Brennan and Justice McHugh in addressing the scope and meaning of section 51(xxvi).²⁴³ He approves of “the way in which Kirby J placed s51(xxvi) within its historical and social context.”²⁴⁴ He characterises the interpretive methods adopted by Justice Kirby as “non-extremist originalism and progressivism”.²⁴⁵ Originalism refers to finding the meaning of the text, in this case, of section 51(xxvi), by reference to the intention of the drafter, at the time of its enactment and at the time of its amendment following the 1967 constitutional referendum.²⁴⁶ Progressivism refers, in this case, to interpreting the Constitution as a “living force”, that is, by taking “full account of contemporary social and political circumstances and perceptions”.²⁴⁷

John Williams and John Bradsen²⁴⁸ examined the scope and meaning of section 51(xxvi) before the handing down of the judgments in this case. They looked at the constitutional convention debates,²⁴⁹ the parliamentary debates over the bill for the 1967 amending Act,²⁵⁰ and the explanatory material (that is, the bipartisan ‘yes’ case) distributed by the Commonwealth Chief Electoral Officer to electors concerning the purposes of the referendum.²⁵¹ They contended that the result of the referendum “could give rise to one of three views”, as follows:

- (a) The “removal of the words ‘other than the aboriginal race in any State’ meant the power reverted to its original intention as a power to make special laws for both the benefit and detriment of any particular race.”²⁵² In this case, this was the finding of Justice Gaudron and of Justice Gummow/Justice Hayne.
- (b) The “power remains a power to pass both beneficial and detrimental laws with respect to *all* races *other than* the ‘aboriginal race’.”²⁵³ In this case, this was a contention of the plaintiffs. According to Williams and Bradsen, this contention “is perhaps the most historically accurate conclusion to be drawn from the 1967 referendum.”²⁵⁴ However, it was rejected by Justice

²⁴³ Ibid: 43.

²⁴⁴ Ibid: 44.

²⁴⁵ Ibid: 65.

²⁴⁶ Ibid: 46.

²⁴⁷ Ibid: 50, citing *Theophanous v Herald & Weekly Times Ltd* (1993) 182 CLR 104 at 174 (per Justice Deane).

²⁴⁸ Williams and Bradsen 1997.

²⁴⁹ Ibid: 105-118.

²⁵⁰ Ibid: 119-123.

²⁵¹ Ibid: 123-126.

²⁵² Ibid: 127.

²⁵³ Ibid.

²⁵⁴ Ibid.

Gaudron and by Justice Gummow/Justice Hayne. Justice Kirby found it unnecessary to address it because of his finding in (c) below.

- (c) The “power is now wholly a beneficial one as to its operation.”²⁵⁵ In this case, this was the finding of Justice Kirby.

Williams and Bradsen pointed out: “The status of being an outsider, in the constitutional sense, for Aboriginal Australians was overcome in 1967.”²⁵⁶ In hopeful anticipation of a favourable outcome in *Kartinyeri*, they said:²⁵⁷

It would be a perversion of the hopes and aspirations of the people of Australia if thirty years later we celebrated their contribution to our constitutional history by suggesting that s51(xxvi) is a means by which yet another round of dispossession may be visited upon Australia’s indigenous people.

That is exactly the fundamental outcome of *Kartinyeri*.

Like the establishment of the Hindmarsh Island Bridge Royal Commission by the South Australian Government, the enactment by the Commonwealth Parliament of the Bridge Act was a particularly ruthless exercise of settler-colonial power. The challenge to the validity of the Bridge Act was a manifestation of a determined assertion by the Ngarrindjeri people of their cultural heritage rights. The majority decision in *Kartinyeri* has the effect of upholding settler-colonial power relations. Section 51(xxvi) of the Commonwealth Constitution, in its amended form, does not recognise Indigenous difference. Under the provision, First Nations peoples will not be treated differently from people of other races. They are, in the words of Justice Kirby, to be simply lumped “in with other races as potential targets for detrimental or adversely discriminatory laws.”²⁵⁸

6 Conclusion

Judicial review, pursuant to the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), of Ministerial decisions, under the *Aboriginal and Torres Strait Island Heritage Act 1984* (Cth), can contribute to the maintenance of settler-colonial power relations. That proposition is well illustrated by *Tickner v Chapman* and the *Broome Crocodile Farm Case*.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*: 140.

²⁵⁷ *Ibid.*

²⁵⁸ Justice Kirby’s judgment: paragraph 157.

Applications by First Nations peoples for protection of their cultural heritage will not be entertained if they are not prepared to reveal not only to the Minister, but also to all other persons whose interests are directly affected by their applications, the full details (including secret knowledge) of why protection should be granted. In other words, the introduced settler system will only provide legal remedies upon its own terms. The rights and interests of First Nations peoples will be treated in exactly the same way as the rights and interests of other citizens. These principles have the effect of upholding the dominance of the settler legal system and maintaining it as a force for the assimilation of First Nations peoples into settler society.

Tickner v Chapman and Broome Crocodile Farm Case also clearly demonstrated the subjugation of First Nations peoples' cultural heritage rights to the proprietary and pecuniary interests of proponents of economic development. The introduced settler system conceives of First Nations peoples' cultural heritage rights as possessing no tangible property rights, being basically spiritual or religious in nature, in contrast to the financially and economically valuable property rights of proponents of economic development.

The Hindmarsh Island Bridge Royal Commission was an example of the kind of political and legal arsenal possessed by the dominant settler society that could be deployed at any time against assertion by First Nations peoples of their Indigenous difference and Indigenous rights. The Commission was a particularly repressive form of settler-colonial impositions. The refusal of the proponent women to participate in the proceedings of the Commission demonstrated a determined resistance to settler colonialism. The proponent women were vindicated by Justice von Doussa's rejection of the Commission's finding of fabrication. However, in relation to the protection of their claimed cultural heritage, that rejection was, in effect, a mere postscript. It had been pre-empted by the enactment of the Bridge Act 1997.

The application for a protective declaration by the proponent women – following the ultimate failure of the first one by the Aboriginal Heritage Committee, brought about by a judicial review process on the protective declaration issued by Minister Tickner – was a proclamation of their resoluteness in asserting their cultural heritage rights. The refusal of Minister Herron to arrange for the appointment of a female Minister to act on his behalf, to consider the proponent women's application, was a manifestation of an uncompromising settler-colonial stance. The withdrawal by the proponent women of the confidential material

that they had provided to Justice Mathews in support of their application was, in turn, like their refusal to participate in the proceedings of the Royal Commission, a reflection of their determined resistance to settler-colonial impositions.

The enactment by the Commonwealth Parliament of the Bridge Act, like the establishment of the Hindmarsh Island Bridge Royal Commission by the South Australian Government, was a particularly brutal exercise of settler-colonial power. The Bridge Act discriminated against the Ngarrindjeri people in relation to their claimed heritage site. It permitted the construction of the Bridge by prohibiting the Minister from considering any application for a protective declaration under the Heritage Protection Act against the construction. The challenge to the validity of the Act was a determined assertion of Ngarrindjeri cultural heritage rights. The majority decision in *Kartinyeri* has the effect of upholding settler-colonial power relations. Section 51(xxvi) of the Commonwealth Constitution, in its amended form, does not recognise Indigenous difference. Under the provision, First Nations peoples cannot be treated differently from people of other races.

Insofar as the protection of First Nations peoples' cultural heritage rights is concerned, the Hindmarsh Island Bridge chronicle produced a spectacular victory of settler-colonial impositions over a First Nations people's hope of retaining their traditional relationship to their ancestral homeland.

The Hindmarsh Island Bridge epic demonstrated: (a) First Nations peoples enduring resistance to, and demand to be free from, settler colonialism and settler-colonial impositions; (b) how judicial adjudication can contribute to the maintenance of settler-colonial power relations; and (c) that judicial processes are thus not a suitable tool for decolonisation.

I examine in the next chapter (Chapter 5) a Federal Court case, *Eaton v Bolt* [2011] FCA 1103. The case was a manifestation in the judicial arena of a contestation of Indigenous difference against the forces of assimilationist settler nationalism and settler-colonial impositions. The case produced a successful outcome for the First Nations applicant, and illustrates that litigation can be useful in certain circumstances.

Chapter 5

Asserting the Indigeneity of First Nations Peoples: *Eatock v Bolt* [2011] FCA 1103

1 Introduction

This chapter is an examination of the case of *Eatock v Bolt*¹ and the issues raised by it. The case concerned assertion by First Nations individuals of an aspect of their Indigenous difference, their Indigenous identity, in circumstances where First Nations individuals, with fair skin and who are urban-dwelling, face a constant challenge to the authenticity of their Indigeneity. The chapter's aim is to highlight the continuing salience of the assimilative forces of settler colonialism and the enduring resistance by First Nations peoples to the settler-colonial logic of elimination. *Eatock v Bolt* is an eminently useful case to explore those issues. According to the settler-colonial logic of elimination (discussed in Chapter 1), such individuals would have been assimilated into the dominant settler society. Instead, they continue to defy that logic.

Eatock v Bolt was a Federal Court of Australia case. The applicant was the late Pat Eatock, and the respondents were Andrew Bolt (a newspaper columnist) and The Herald & Weekly Times Pty Ltd (HWT). Eatock brought the proceeding “on her own behalf and on behalf of people like her who have fairer, rather than darker, skin and who by a combination of descent, self-identification and communal recognition are, and are recognised as, Aboriginal persons.”² The judge was Justice Bromberg, who delivered his judgment on 28 September 2011.

Eatock alleged that Bolt and HWT had breached section 18C of the *Racial Discrimination Act 1975* (Cth) (“RDA”). She based her allegation on the contents of two newspaper articles written by Bolt and published in the *Herald Sun*³ on 15 April 2009 and 21 August 2009.⁴ The first article was titled *It's so hip to be black* and the second, *White fellas in the black*. Together, the articles (“Newspaper Articles”) named 18 First Nations persons –

¹ [2011] FCA 1103.

² Justice Bromberg's judgment: paragraph 1.

³ The *Herald Sun* is a Melbourne daily newspaper published by HWT.

⁴ Justice Bromberg's judgment: paragraph 13.

including Eatock – “who have a fairer, rather than darker, skin”⁵. The articles also included photographs of most of the identified people.⁶ The remedies sought by Eatock were:⁷

- (1) a declaration that the writing and publication of the Newspaper Articles by Bolt and HWT was unlawful;
- (2) an order restraining Bolt and HWT from republishing or further publishing the Newspaper Articles or articles whose content was substantially the same as, or substantially similar to, that contained in the Newspaper Articles;
- (3) an order requiring Bolt and HWT to remove the Newspaper Articles from any online site under their control or direction;
- (4) an order that HWT publish an apology; and
- (5) costs.

Section 18C of the RDA (which Eatock alleged Bolt and HWT had breached) provides:

18C Offensive behaviour because of race, colour or national or ethnic origin

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
 - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.
- (2) For the purposes of subsection (1), an act is taken not to be done in private if it:
 - (a) causes words, sounds, images or writing to be communicated to the public; or
 - (b) is done in a public place; or
 - (c) is done in the sight or hearing of people who are in a public place.
- (3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

In their defence, Bolt and HWT relied upon section 18D, which reads:

18D Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or

⁵ Ibid: paragraph 1.

⁶ The articles are attached to Justice Bromberg’s judgment as annexures 1A and 2A respectively.

⁷ Justice Bromberg’s judgment: paragraph 454.

- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

In formal legal terms, Eatock's action was an application for a declaration, injunctions and an apology. However, it was, in fundamental terms, an assertion by First Nations persons "who have fairer, rather than darker, skin"⁸, of their Indigenous difference, their Indigenous identity. As my examination of some of Bolt's other articles below (in section 4) indicates, the Newspaper Articles were manifestations of an ongoing opposition by Bolt to maintenance by First Nations of their Indigenous difference. The case itself demonstrates a contestation in the judicial arena of Indigenous difference against the forces of assimilationist settler nationalism and of settler-colonial impositions.

Besides Eatock, eight of the other individuals named in the Newspaper Articles appeared as witnesses. They were Anita Heiss, Bindi Cole, Geoff Clark, Wayne Atkinson, Graham Atkinson, Larissa Behrendt, Leeanne Enoch, and Mark McMillan.⁹ I have transcribed the Newspaper Articles into two appendices: Appendix 5 and Appendix 6.

The structure of the rest of this chapter is as follows. Section 2 looks at the contents of the Newspaper Articles and Bolt's argument concerning the imputations conveyed by the Articles. Section 3 deals with Eatock's contention concerning the imputations of the Newspaper Articles. Section 4 discusses the contestation of Indigenous difference against the forces of assimilationist settler-nationalism in the broader socio-political arena. Section 5 concludes the chapter by noting the continuing salience of the settler-colonial logic of elimination and the equally enduring resistance of First Nations peoples to the assimilative forces of settler colonialism.

⁸ Ibid: paragraph 1.

⁹ Ibid: paragraphs 67-164.

2. The Newspaper Articles

The first article¹⁰ referred to sixteen First Nations individuals (with accompanying statements): Bindi Cole, Annette Sax, Tara June Winch, Larissa Behrendt, Anita Heiss, Pat Eatock, Leeanne Enoch, Kim Scott, Geoff Clark, Lowitja O'Donoghue, Michael Mansell, Mick Dodson, Wayne Atkinson, Graham Atkinson, Mark Rose, and Daniel Browning.

The second article¹¹ referred (with accompanying statements) to two individuals not mentioned in the first article: Danie Mellor and Mark McMillan, and to six persons (with accompanying statements) identified in the first article: Larissa Behrendt, Bindi Cole, Anita Heiss, Annette Sax, Tara Jane Winch, and Graham Atkinson.

The Newspaper Articles' statements concerning Eatock and the other eight witnesses, their reaction to the statements, and Justice Bromberg's findings about their ancestry and identity, and response to the statements are set out in Appendix 7.

To illustrate the nature and tone of the Newspaper Articles, I set out their statements concerning Pat Eatock, Anita Heiss, Larissa Behrendt and Mark McMillan, as follows:

Pat Eatock – First Article¹²

In 1972, Pat Eatock, founding secretary of the Aboriginal Tent Embassy, officially became the first Aborigine to stand for federal parliament in the ACT, even though she looked as white as her Scottish mother, or some of her father's British relatives.

Indeed, Eatock only started to identify as Aboriginal when she was 19, after attending a political rally, so little did any racial difference matter to her before her awakening to far-Left causes.

But she thrived as an Aboriginal bureaucrat, activist and academic...

Anita Heiss – First Article¹³

Meet now Associate Professor Anita Heiss, who says she's a 'member of the Wiradjuri nation' who prays to Biami, the tribe's creator spirit.

¹⁰ Appendix 5.

¹¹ Appendix 6.

¹² Appendix 5.

¹³ Appendix 5.

Heiss's father was Austrian, and her mother only part-Aboriginal. What's more, she was raised in Sydney and educated at Saint Claire's Catholic College. She, too, could identify as a member of more than one race, if joining up to any at all was important.

As it happens, her decision to identify as Aboriginal, joining four other 'Austrian Aborigines' she knows, was lucky, given how it's helped her career.

Heiss not only took out the Scanlon Prize for Indigenous Poetry, but won plum jobs reserved for Aborigines at Koori Radio, the Aboriginal and Torres Strait Islander Arts Board and Macquarie University's Warawara Department of Indigenous Studies.

Larissa Behrendt

First Article¹⁴

Larissa Behrendt has also worked as a professional Aborigine ever since leaving Harvard Law School, despite looking almost as German as her father.

She chose to be Aboriginal as well, a member of the 'Euralayai and Kammillaroi nations', and is now a senior professor at the University of Technology in Sydney's Indigenous House of Learning.

She's won many positions and honours as an Aborigine, including the David Unaipon Award for Indigenous Writers, and is often interviewed demanding special rights of 'my people'.

But which people are 'yours' exactly, mein liebchen? And isn't it bizarre to demand laws to give you more rights as a white Aborigine than your own white dad?

Second Article¹⁵

... Jumbunna Indigenous House of Learning of the University of Technology, Sydney – an 'indigenous' outfit run by the very pale Prof Larissa Behrendt, who may have been raised by her white mother but today, as a professional Aborigine, is chairman of our biggest taxpayer-funded Aboriginal television service.

Mark McMillan – Second Article¹⁶

Sydney law academic Mark McMillan, has won one of our richest prizes for Aboriginal students – the Fulbright Indigenous Scholarship.

If, studying the faces of these two 'Aboriginal' men [the other person referred to here is Danie Mellor] you think this is surely the most amazing stretch of definition, you're wrong.

¹⁴ Ibid.

¹⁵ Appendix 6.

¹⁶ Ibid.

McMillan has ... also won the Black Women's Action in Education Foundation Scholarship, originally intended to help educate black women, not white men.

Hear that scuffling at the trough? That's the sound of black people being elbowed out by white people shouting 'but I'm Aboriginal, too'. *Hark!* – is that a man's voice I now hear bellowing: 'And I'm an Aboriginal woman.'

They [that is, McMillan and Danie Mellor] are 'white Aborigines' – people who, out of their multi-stranded but largely European genealogy, decide to identify with the thinnest of all those strands, and the one that's contributed least to their looks. Yes, the Aboriginal one now so fashionable among artists and academics.

McMillan ... has received all the special help you once thought, when writing the taxman another cheque, would at least go to people who *looked* Aboriginal, but which is increasingly lavished on folk as pink in face as they are in politics.

This trained lawyer has not just won several prizes intended for Aborigines, but has worked for Aboriginal groups such as ATSIC, and is the Aboriginal representative on several boards, including that of a local land council.

Now he's a researcher at Jumbunna Indigenous House of Learning of the University of Technology, Sydney – an 'indigenous' outfit run by the very pale Prof Larissa Behrendt, who may have been raised by her white mother but today, as a professional Aborigine, is chairman of our biggest taxpayer-funded Aboriginal television service.

When a man as white as I, already a lawyer with a job, wins a prize meant to encourage and inspire hard-struggle black students, what must those Aborigines conclude?

Bolt argued that the aims of the Newspaper Articles were to bring to public attention his contention that:¹⁷

- (a) racism is abhorrent and a gravely divisive social force, which is perpetuated by emphasising racial differences;
- (b) in modern Australia, there is a discernible trend whereby persons of mixed genealogy, where that genealogy includes Aboriginality, identify as Aboriginal persons, where they could identify with another race or races, or with no race at all;
- (c) the Applicant and the other individuals named in [the Newspaper Articles] illustrate that trend, in that they ... identify as Aboriginal persons, even though they could identify with another race or races, or with no race at all; and
- (d) the trend is an undesirable social phenomenon because it emphasises racial differences, rather than common humanity.

¹⁷ Justice Bromberg's judgment: paragraph 360.

He argued that the Newspaper Articles were concerned with a matter of public interest, which was:¹⁸

whether fair skinned-persons who, by reason of their genealogy are Aboriginal persons, tend to choose to identify as Aboriginal persons even if they could choose to identify as a member of another race or other races, or with no race at all; and if so whether that tendency is socially undesirable because of the emphasis it places on racial differences rather than common humanity.

In other words, he claimed that it was in the public interest that attention should be drawn to the abovementioned “trend” and its supposedly undesirable social consequences of emphasising racial differences rather than “common humanity”.

It is apparent that Bolt was opposed to First Nations individuals, with fair skin and urban-dwelling, asserting their Indigeneity. He was calling on them to forsake their Indigeneity. He wanted First Nations peoples to be part of “common humanity”. The Newspaper Articles were a demonstration of the assimilative forces of settler colonialism, a reflection of the settler-colonial logic of elimination.

The next section examines Eatock’s contention concerning the imputations of the Newspaper Articles and Justice Bromberg’s findings.

3 Settler-colonial logic of elimination

The court action taken by Eatock against Bolt and HWT was a display of the determination of First Nations peoples to assert their right to maintain their Indigenous difference, their Indigeneity, and of their resistance to the settler-colonial logic of elimination.

Eatock contended that the articles conveyed the following offensive, insulting, humiliating and intimidatory imputations:¹⁹

- (a) The persons identified in the Articles and any other persons who like them have some Aboriginal descent and fairer rather than darker skins, were not genuinely Aboriginal and were not bona fide in claiming to be, and identifying as, Aboriginal persons.

¹⁸ Ibid: paragraphs 361.

¹⁹ Justice Bromberg’s judgment: paragraph 22. I have rendered each of the beginning letters of the paragraphs in upper case, and substituted a ‘full-stop’ for the ‘semi-colon’ mark at the end of paragraphs (a), (b) and (c).

- (b) The persons described in (a) merely pretend to be Aboriginal persons so they can access the benefits that are only available to Aboriginal persons.
- (c) The only genuine Aboriginal persons, and the only persons who may be treated as making a bona fide claim to be, and to identify as, Aboriginal persons are persons whose parents are both of Aboriginal descent and who have darker rather than fairer skin.
- (d) Under Bolt's criteria, persons having some Aboriginal descent but who are fairer rather than darker skinned are disqualified from, and cannot properly be regarded as, genuinely self-identifying as, and being, Aboriginal.

Much of the evidence before Justice Bromberg was uncontested and he found that the Newspaper Articles contained many factual errors concerning Eatock and the other witnesses.²⁰ All of them were offended, humiliated and insulted by Bolt's use of skin colour to denote that they were not genuinely Indigenous, and that they were only identifying as Indigenous to gain benefits. They saw the articles as manifesting a "blood quantum" approach to racial identity, and reinforcing the stereotype of the "black" Indigenous person. They accused Bolt of denying them their Indigeneity because of the way they looked. In their view, Bolt was refusing to recognise the diverse features and attributes of contemporary Indigenous Australia.

Justice Bromberg found that Eatock and each of the other witnesses:²¹

- (a) had been raised as Aboriginal and genuinely identified as Aboriginal;
- (b) had Aboriginal ancestry and communal recognition as an Aboriginal person;
- (c) was an Aboriginal person and entitled to regard himself/herself as an Aboriginal person within the conventional understanding of that description;
- (d) did not consciously choose to be Aboriginal;
- (e) had not improperly used his/her Aboriginal identity to advance his/her career;
- (f) was a person committed to his/her Aboriginal community and was entitled to regard his/her achievements as well deserved rather than opportunistically obtained; and
- (g) felt offended, humiliated and insulted by the articles.

Justice Bromberg determined that both the first article²² and the second article²³ conveyed imputations that included the following:²⁴

- [1] There are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the identified individuals are examples, who are not sufficiently Aboriginal to be genuinely identifying as Aboriginal persons but who, motivated by career

²⁰ See Appendix 7.

²¹ Ibid.

²² Appendix 5.

²³ Appendix 6.

²⁴ Justice Bromberg's judgment: paragraphs 37 and 55; my numbering. I have substituted a 'full-stop' for the semi-colon' mark at the end of [1]. I have also deleted the word 'and' after [1].

opportunities available to Aboriginal people or by political activism, have chosen to identify as Aboriginal.

- [2] Fair skin colour indicates a person who is unlikely to be sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

Additionally, in relation to the second article, Justice Bromberg also found that:²⁵

There is in this article a stronger contrast made between the group of people challenged and those who are to be regarded as ‘real’ Aboriginal persons. An imputation is conveyed that opportunities which should have been conferred on genuine Aboriginal persons have instead been taken by people like those exemplified. The suggested motivation conveyed as the reason why the people in the ‘trend’ identify as Aboriginal is confined to career aspirations.

Thus, Justice Bromberg’s findings on the imputations of the Newspaper Articles were consistent with Eatock’s contention. He pointed out that the imputations, which he found were conveyed by the Newspaper Articles, were separate and distinct from those claimed by Bolt.²⁶ The imputations he had to assess against the exemption provisions of section 18D of the RDA were not those asserted by Bolt. The relevant imputations were those found by him to have been conveyed by the Newspaper Articles.²⁷

Justice Bromberg found that Bolt and HWT had indeed breached section 18C of the RDA. The imputations, which he found were conveyed by the Newspaper Articles, were reasonably likely to offend, insult, humiliate or intimidate the people named in the articles. The articles were written and published by Bolt and HWT about those people because of their race, colour or ethnic origin. The conduct of writing and publishing the Newspaper Articles was not exempted from being unlawful by section 18D because they were not written and published, as required by section 18D, reasonably and in good faith. They contained erroneous facts, distortions of the truth and inflammatory and provocative language.²⁸

²⁵ Ibid: paragraph 55.

²⁶ Ibid: paragraph 366.

²⁷ Ibid: paragraphs 368, 370.

²⁸ Ibid: paragraph 8. His reasonings for his conclusions are set out in paragraphs 241-302 (reasonable likelihood that the articles would offend), paragraphs 303-335 (whether the articles were written and published because of race, colour or ethnic origin), and paragraphs 336-451 (whether the imputations found by him were exempted by section 18D).

Justice Bromberg made the declarations, as shown in Appendix 8, and the following orders (aside from orders for costs):²⁹

- (a) HWT must publish a corrective notice – in the format shown in Appendix 8 – in the *Herald Sun* (both in print and online) in a position immediately adjacent to Bolt’s regular column. The notice had to be published on two occasions within 14 days of the date of this order.
- (b) Bolt and HWT must not further publish or republish the Newspaper Articles or “any substantial parts” of them. However, HWT was not prevented by this order from continuing to publish the Newspaper Articles on the *Herald Sun* website “for historical or archival purposes”. But such publication must be accompanied by the corrective notice referred to in (a) above, to be placed immediately adjacent to the Newspaper Articles.

Justice Bromberg did not make an order, as applied for by Eatock, that HWT publish an apology. He did not do so because such an order, in his opinion, would compel HWT “to articulate a sentiment that is not genuinely held.”³⁰ He made the abovementioned order for a corrective notice in lieu of an apology. He pointed out: “By reference to the orders I have determined to make, Ms Eatock has not achieved contrition from Mr Bolt or HWT but has achieved, through the publication of a corrective notice, the publication of the Court’s acknowledgment that they were involved in wrongdoing.”³¹

The above remedies, according to Adrienne Stone, were insubstantial.³² She said (I have conflated her paragraphing):³³

The result of [the] order [that HWT could continue to publish the Newspaper Articles on the *Herald Sun* website for historical or archival purposes] is that the offending articles remain available online. ... The ideas in [those] articles continue [therefore] to be communicated to those who seek them out.³⁴ ... The sum total in effect of the measure imposed on [Bolt and HWT] is that the articles are *labelled* as having infringed the [RDA].³⁵ ... [T]he [judiciary] signals its disapproval of the message conveyed – labelling it as contrary to the [RDA] – but does not prevent its communication.³⁶

²⁹ *Eatock v Bolt (No 2)* [2011] FCA 1180 (19 October 2011).

³⁰ Justice Bromberg’s judgment in *Eatock v Bolt* [2011] FCA 1103: paragraph 465.

³¹ Justice Bromberg’s judgment in *Eatock v Bolt (No 2)* [2011] FCA 1180: paragraph 51.

³² Stone 2015: 938.

³³ *Ibid*: 938-939.

³⁴ *Ibid*: 938.

³⁵ *Ibid*: 939.

³⁶ *Ibid*.

However, in my view, the orders can be properly characterised as being supportive of free speech provided it is not premised upon erroneous facts and distortions of the truth.

On 28 September 2011, outside the Federal Court building in Melbourne, after delivery of judgment in *Eatock v Bolt* by Justice Bromberg, Bolt declared:³⁷

This is a terrible day for freedom of speech in this country. It is particularly a restriction on the freedom of all Australians to discuss multiculturalism and how people identify themselves. I argued then and I argue now that we should not insist on differences between us but focus instead on what unites us as human beings.

Bolt elaborated on the above theme, in his denunciation of Justice Bromberg's judgment, in two *Herald Sun* articles on the following day, respectively titled *Silencing me impedes unity, says Andrew Bolt*³⁸ and *This is a sad day for free speech*.³⁹ However, as some commentators pointed out, his characterisation of the judgment as being anti-free speech misrepresented its effects.⁴⁰ As Justice Bromberg stated:⁴¹

The intrusion into freedom of expression [of his judgment] is of no greater magnitude than that which would have been imposed by the law of defamation if the conduct in question and its impact upon the reputations of many of the identified individuals had been tested against its compliance with that law.

Furthermore, Justice Bromberg made it very clear that his judgment did not make it “unlawful for a publication to deal with racial identification including challenging the genuineness of the identification of a group of people.”⁴² He did not find “Mr Bolt and HWT to have contravened [section] 18C [of the RDA] simply because the Newspaper Articles dealt with [racial identification].”⁴³ He “found a contravention because of the manner in which that subject was

³⁷ Reported in *The Australian* 28 September 2011 (Bodey 2011).

³⁸ Bolt 2011a.

³⁹ Bolt 2011b.

⁴⁰ See Bahnisch 2011a; Joseph 2011b; Aggarwal 2012; Hirst and Keeble 2012; Gelber and McNamara 2013, HRLC 2014; Bond 2014; Stone 2015.

⁴¹ Justice Bromberg's judgment: paragraph 423.

⁴² *Ibid*: paragraph 461.

⁴³ *Ibid*.

dealt with.”⁴⁴ The Newspaper Articles contained erroneous facts, distortions of the truth and inflammatory and provocative language.⁴⁵

Commenting on Bolt’s above pronouncement, Mark Bahnisch argued “free speech is *not* at issue here”.⁴⁶ What was at issue, he said, was Bolt’s “position of privilege”.⁴⁷ Bahnisch is right. Bolt is a member of the dominant sector of Australian society, and he “has massive access to public speech”⁴⁸. In other words, what is at issue is white “racial privilege”, which Bolt “seeks to exercise almost as of right”⁴⁹. Individuals possessing such privilege consider themselves to be empowered and rightfully entitled to preach to First Nations peoples and to members of other ethnic minorities about proper socio-cultural affiliations. In the words of Ghassan Hage, “people from ... the dominant culture [believe] in their centrality ... as ‘governors’ of the nation”.⁵⁰ They consider First Nations peoples and members of other ethnic minorities as objects to be governed.⁵¹ Anthony Moran has made the same point.⁵² Michael Griffiths has pointed out that Bolt’s offending articles “act as a hypermediated solicitation of a more pervasive and abiding tendency among non-indigenous inhabitants of settler colonial spaces to arrogate the right to decide who is indigenous and how indigenous peoples belong together and to the nation.”⁵³

I turn next to examining the issues raised in *Eatock v Bolt* in the context of the contest between Indigenous difference and assimilationist settler-nationalism in the broader Australian socio-political context.

⁴⁴ Ibid.

⁴⁵ Ibid: paragraph 8. His reasonings for his conclusions are set out in paragraphs 241-302 (reasonable likelihood that the articles would offend), paragraphs 303-335 (whether the articles were written and published because of race, colour or ethnic origin), and paragraphs 336-451 (whether the imputations found by him were exempted by section 18D).

⁴⁶ Bahnisch 2011a.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Hage 1998: 16.

⁵¹ Ibid.

⁵² Moran 1999: 104.

⁵³ Griffiths 2012: 419.

4 Indigenous difference and assimilationist settler-nationalism

Michael Dodson (who was Aboriginal and Torres Strait Islander Social Justice Commissioner at the time) asserted the right of First Nations peoples to determine their own identity in his 1994 Wentworth Lecture.⁵⁴ He said:⁵⁵

[The] right to control one's own identity is part of the broader right to self-determination ... [The right to self-determination] is a right guaranteed to all peoples in international law, by the first articles of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. It is also the right at the forefront of international Indigenous struggles. Indigenous peoples throughout the world recognise that, at the core of the violation of our rights as peoples, lies the desecration of our sovereign right to control our lives, to live according to our own laws, and determine our futures. And at the heart of the violation has been the denial of our control over our identity and the symbols through which we make and remake our cultures and ourselves.

Louise Taylor has taken a position similar to Dodson.⁵⁶ She said: "As I see it our rights to formulate our own identities is tightly bound up in our right to self-determination" (and she referred to the same international covenants mentioned in the above-quoted statement by Dodson).⁵⁷

As Sarah Maddison has pointed out: "The struggle to retain an explicitly Indigenous identity has been crucial to the survival of Aboriginal and Torres Strait Islander peoples."⁵⁸ That this struggle is ongoing "confirm[s] the continued salience of a settler colonial mentality to Australian political culture and institutions."⁵⁹ The "settler colonial mentality" that Maddison speaks of is, in essence, what Anthony Moran has described as "assimilationist settler-nationalism".⁶⁰

Assimilationist settler-nationalism is one of two forms of settler national consciousness that Moran has identified. Assimilationist settler-nationalism "works to keep Aboriginality out of the nation, and can only allow Aborigines into the national community as full moral members

⁵⁴ Dodson 1994.

⁵⁵ Ibid: 5.

⁵⁶ Taylor 2003.

⁵⁷ Ibid: 90.

⁵⁸ Maddison 2013: 289.

⁵⁹ Ibid: 289.

⁶⁰ Moran 1999: 127.

if they give up their claim to Aboriginality.”⁶¹ Assimilationist settler-nationalists imagine the national community as culturally homogeneous.⁶² Moran characterises the other form of settler national consciousness as “indigenising settler-nationalism”. This form of settler-nationalism “attempts to bring Aboriginality in, in the service of a rapprochement between settler and indigene that will, at the same time, reassert the legitimacy of the nation.”⁶³ The nation is imagined by indigenising settler-nationalists “as a diverse community with the capacity to tolerate, and even promote, different cultural aspirations and forms of life.”⁶⁴ As Moran has pointed out: “Aboriginality is valued [by indigenising settler-nationalists], not only because it is (just) one more example of the rich tapestry of the nation, but because it can bring specific gifts to the nation: most potently, the connection between nation and land at the heart of the nationalist dream, to have been in a place from time immemorial.”⁶⁵ Indigenising settler-nationalism “is evident in the discourse surrounding multiculturalism, the Reconciliation process, the Mabo judgement, and the Aboriginal land rights movement more generally.”⁶⁶

Assimilationist settler-nationalism imbues Bolt, which explains his campaign against Indigenous difference and Indigenous rights. The Newspaper Articles were particular manifestations of Bolt’s campaign. An earlier pointer to Bolt’s project is his newspaper article, entitled *One land, one tribe*, dated 10 June 2005.⁶⁷ It was published about four years before the Newspaper Articles (dated 15 April 2009 and 21 August 2009 respectively). He objected to the common practice in Australia of outsider-participants at a public function acknowledging the traditional owners of the land where the function is held. Such an acknowledgment is a symbolic recognition of the ancestral country of a First Nation people.⁶⁸ It is a symbolic “affirmation of the entitlement and belonging of [First Nations] persons or groups to a place”.⁶⁹ The article includes the following statements:

When even the Prime Minister now does it, we know this divisive New Tribalism has spread too far. I’ve had enough, and finally snapped the other day at yet another forum on

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Bolt 2016a: 99-100. The article is one of a collection of Bolt’s articles (previously published in the *Herald Sun* and other newspapers owned by News Corp Australia) in Bolt 2016a (first published in 2005).

⁶⁸ Kowal 2015: 174.

⁶⁹ Merlan 2014: 298.

reconciliation. I had sat quietly as speaker after speaker prefaced their talk with the kind of incantation that has become so fashionable: ‘I wish to acknowledge the traditional owners of this land ...’⁷⁰

[T]his ritual ... gives respect to some tribal traditions best left behind, and treats all those who aren’t Aborigines as intruders in what’s now for all born here our own and only land.⁷¹

It is, at heart, profoundly racist.⁷²

This is now land, whatever the injustices of the past, that belongs to all of us, whether you or your ancestors have been here for two years, 20 years, 200 or 20,000. It is a land that belongs to us all, whether you or your ancestors were Aboriginal, English, Vietnamese or Greek. Whether you believe in the Great Bunjil, Christ, Allah or merely in fate.⁷³

Our past is not perfect, but our ideals are great. Perhaps the greatest of those ideals is that we now come together as equals, judged by what we do, and not where we’re from. We do not divide by race, or class, or history or ancestry. We do not divide into tribes or into First Australians or Last.⁷⁴

The crux of Bolt’s objection was that an acknowledgment of country was a “ritual” that “treats all those who aren’t Aborigines as intruders in what’s now for all born here our own and only land.”⁷⁵

Bolt attempted to counter the symbolic significance of the acknowledgment for First Nations peoples by proposing his form of wording, as follows:

Ladies and gentlemen, symbols do indeed matter. And so, I, too, would like to acknowledge – acknowledge that we meet on land that is yours, mine and every Australian’s.⁷⁶

Bolt’s form of acknowledgment of country is a rejection of Indigenous difference and Indigenous rights. It is an assertion that the expropriation of First Nations land by settler-colonisers were injustices of the past, which are “best left behind”. According to him, descendants of the settler-colonisers should not be blamed for what their forefathers did. He would appear to have misconstrued the fundamental purpose of an acknowledgment of country.

⁷⁰ Bolt 2016a: 99.

⁷¹ Ibid.

⁷² Ibid: 100.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Bolt 2016a: 99.

⁷⁶ Ibid: 100.

An acknowledgment of country does not blame. It does not treat non-Indigenous Australians as intruders. It is, for First Nations peoples, a statement of their belongingness to their ancestral country. It is also a memorial to their ancestors and the past that was. As Michael Mansell has pointed out:⁷⁷

It is not surprising that Aboriginals remember the past. The past is relevant to the future, and if the future looks constantly bleak it is hardly surprising that the past is referred to more often than what lies ahead. There cannot be a commitment to healing the wounds of the past if the past cannot be mentioned.

Mansell has also pointed out: “Australians need not feel personal guilt about the past but they have a moral responsibility to deal with its consequences.”⁷⁸ Perhaps, being reminded of that moral responsibility is what Bolt is really objecting to?

Bolt’s assimilationist settler-nationalist mindset is further illustrated by his newspaper article of 29 June 2011, entitled *Who stole Australia?*⁷⁹ This article was published two months after the hearing (28-31 March 2011 and 1, 4-6 April 2011) of *Eaton v Bolt* and three months before the judgment (28 September 2011). Bolt was objecting to a resolution of the Sydney City Council (reported the day before) “to henceforth refer in official documents to European settlement of Australia as an ‘invasion’.”⁸⁰ He categorised this resolution as “self-loathing from within the depths of the town hall of our oldest, biggest and most tightly packed metropolis.”⁸¹ His use of the term “self-loathing” indicates he was referring to white Sydney city councillors. He said: “it’s fashionable among the urban elite to say sorry for white man’s works here.”⁸² “But how mad it is now,” he continued, “to make the European presence seem illegitimate – a stain on the landscape and a blot on our history.”⁸³ White Australians had nothing to be sorry about, according to him. European colonisation brought progressive and modern civilisation to the Australian continent. If not for European settlement of Australia and for “white man’s works”, Australia would have been left undeveloped, populated only by nomadic hunter-gatherers. There would have been no economic development, no Australian metropolises, no

⁷⁷ Mansell 2016a: 2.

⁷⁸ Ibid: 106.

⁷⁹ Bolt 2016b: 58-61. This book is another collection of Bolt’s articles that were published previously in the *Herald Sun* and other News Corp newspapers.

⁸⁰ Ibid: 59.

⁸¹ Ibid: 58.

⁸² Ibid: 59.

⁸³ Ibid.

nothing. Bolt's assertion is an ideological justification for First Nations peoples' dispossession and displacement by settler-colonisers. It is also a denigration of First Nations peoples' cultures and cultural productions. The claim reflects, in the words of Moran, the "animated conviction" of assimilationist settler-nationalists "that real progress has been achieved through settler development."⁸⁴

Bolt's two other newspaper articles: *Say no to this racism*, dated 9 January 2014,⁸⁵ and *Making our constitution racist*,⁸⁶ dated 13 February 2016, also demonstrate his abiding campaign against Indigenous difference and Indigenous rights. Bolt wrote/published the first article about five years after the Newspaper Articles and nearly three years after the judgment in *Eatock v Bolt*. He wrote/published the second article about seven years after the Newspaper Articles and about five years after the decision in *Eatock v Bolt*. In the first article, Bolt denounced the proposal by the then Prime Minister, Tony Abbott, for a referendum on constitutional recognition of First Nations. In the second article, Bolt criticised the proposal, spearheaded by Noel Pearson, for an amendment to the Commonwealth Constitution to provide for a First Nations parliamentary advisory body. Bolt was also critical, in the second article, of certain proposed changes to the Constitution recommended by the Expert Panel on Constitutional Recognition of Indigenous Australians in its 2012 report.⁸⁷

The first article – *Say no to this racism* – includes the following statements:

We are Australians together, equal under the law and equal in our right as citizens to be here.⁸⁸

But this Australia is now under severe threat [because of a proposal] by Prime Minister Abbott ... to change the Constitution to recognise Aborigines as the 'first Australians'.⁸⁹

Changing the Constitution to divide Australians between the 'first' and the rest – on the basis of the 'race' of our ancestors – is not just immoral and an insult to our individuality.⁹⁰

⁸⁴ Moran 1999: 130.

⁸⁵ Bolt 2016b: 108-110.

⁸⁶ Ibid: 115-119.

⁸⁷ Expert Panel 2012.

⁸⁸ Bolt 2016b: 108.

⁸⁹ Ibid: 109.

⁹⁰ Ibid.

Worse, it is socially dangerous. This will not ‘reconcile’ us but permanently divide. It would do no good to a single Aboriginal in bush camps, but would concede a critical point: that Australians in our most fundamental legal document are now to be divided by ‘race’.⁹¹

Stop now. Say no to racism. Say no to racial division. Say no to changing our Constitution.⁹²

The article illustrates clearly how assimilationist settler-nationalism and the ideology of liberal individualism impel Bolt to reject the concept of ‘unity in diversity’, which underpins Australian multiculturalism. Tom Calma (who was Racial Discrimination Commissioner at the time) explained the idea in the following way:⁹³

‘unity’ refers to oneness, of being formed of parts that make a whole – essentially around a consensus of shared values as they relate to the whole state

‘diversity’ refers to variety and difference – as these relate to individuals living within communities, and

‘unity in diversity’ suggests a happy equilibrium, or harmony, between these seeming dichotomies, spanning the community to national levels.

Roxanne Lalonde conceived of the concept “as an expression of unity without uniformity and diversity without fragmentation”.⁹⁴

For Bolt, constitutional recognition of Indigenous difference and Indigenous rights would wreak havoc on liberal individualism and civic equality. It would be “socially dangerous”. It would not “reconcile” First Peoples and non-Indigenous Australians. It would permanently entrench a “racial” divide between them. Constitutional recognition of First Nations is “racist”, “immoral and an insult to our individuality”. Bolt’s notion of “reconciliation” between First Nations peoples and non-Indigenous Australians is a one-way process. Rather than emphasising their First Nations identity, First Nations peoples must assimilate into the dominant culture and be content with individual rights and civic equality. Given Bolt’s assimilationist settler-colonialist mindset, such a thought process is not surprising.

⁹¹ Ibid.

⁹² Ibid: 110.

⁹³ He was delivering his keynote speech at the International Conference on Unity in Diversity Conference in Townsville, Queensland on 14 August 2008 (Calma 2008).

⁹⁴ Lalonde 1994.

Assimilationist discourse and liberal individualism also underpin his rejection, in the second article – *Making our constitution racist* – of the proposal for the constitutional establishment of a First Nations parliamentary advisory body and two amendments to the Constitution suggested by the Expert Panel. The first of the two recommended amendments that Bolt took exception to was the insertion of a new section 51A. This proposed provision would empower the Commonwealth Parliament to “make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal peoples and Torres Strait Islander peoples.”⁹⁵ The second proposed amendment that Bolt objected to was the insertion of a new section 127A. This amendment would provide for the recognition of: (1) English as the “national language of the Commonwealth of Australia”; and (2) the “Aboriginal and Torres Strait Islander languages” as “the original Australian languages, a part of our national heritage.”⁹⁶

Bolt condemned the proposal for the constitutional establishment of a First Nations parliamentary advisory body in the following terms:⁹⁷

Aborigines will get not just the say in government common to all Australian citizens – a vote in their state and federal parliaments. They will also get an extra vote and extra say through this Aboriginal-only consultative body. No other ‘race’ of people will have such a taxpayer-funded representative body guaranteed in our Constitution to advance the interests of their ‘race’. Aborigines alone will have not just the common power of their votes in elections for state and federal governments, but an extra say as members of a ‘race’ – a divisive and provocative step towards the tribalisation of Australia.

He denounced the Expert Panel’s proposed amendments to the Constitution (insertion of new section 51A and new section 127A), as follows:⁹⁸

Australians with Aboriginal ancestry would be the only Australians who could have laws made for them to advantage their ‘race’...

Australians with Aboriginal ancestry would be the only Australians who could have the culture of their ‘race’ – however that culture is imagined – protected under the Constitution...

⁹⁵ Expert Panel 2012: 133. This proposal was made on the basis that section 51 (xxvi) – the ‘race’ power – would be repealed.

⁹⁶ Expert Panel 2012: 133.

⁹⁷ Bolt 2016b: 117.

⁹⁸ Ibid: 118.

Australians with Aboriginal ancestry would be the only Australians who could have the language of their ancestors protected under the Constitution.

Bolt's discursive mantras of civic equality, individual rights and impermissible "racial" division of Australia shine strongly through the above statements. For him, constitutional recognition of Indigenous difference and Indigenous rights must never be allowed. He told his readers (as he had done in the first article): "Say no to racism. Say no to attempts to divide us by race. Say no to changing the Constitution."

Katharine Gelber and Luke McNamara examined, in 2013, "the role [*Eatock v Bolt*] has played in broader public discourse."⁹⁹ They identified three central themes that emerged in the aftermath of the case. First, there was "encouragement of scepticism about the authenticity of fair-skinned Aboriginal persons and of judgment by non-Aboriginal persons about the legitimacy of Aboriginal identity according to skin colour."¹⁰⁰ Second, there was a questioning of "the legitimacy of racial vilification laws."¹⁰¹ Third, "closely related to the second, there was an argument that free speech ought to be understood in libertarian terms, and relatedly that racial vilification laws are an illegitimate restriction of free speech."¹⁰² The second and third themes arose because of the way that Bolt and HWT and their supporters had misrepresented the effects of Justice Bromberg's judgment. As pointed out by Gelber and McNamara:¹⁰³

They framed the main issues in a way that inaccurately characterised the decision and its effects, and positioned Bolt as the victim whose rights were violated instead of as the violator of the rights of others.

Such "Misrepresentations ... have gained purchase due to the visibility and power of the elites that advanced them and because they spoke to suspicion in Australia regarding Aboriginality, hate speech and free speech."¹⁰⁴ Regarding the first theme, as Gelber and McNamara have observed, "There is little doubt that in Australia, there is an audience for Bolt's scepticism about

⁹⁹ Gelber and McNamara 2013: 471.

¹⁰⁰ Ibid: 472.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid: 474.

¹⁰⁴ Ibid: 476.

the authenticity of fair-skinned Aboriginal persons.”¹⁰⁵ Justice Bromberg has made the point in *Eatock v Bolt*,¹⁰⁶ and so have Dodson,¹⁰⁷ Taylor,¹⁰⁸ Fredericks,¹⁰⁹ and Maddison.¹¹⁰

In both of the abovementioned *Herald Sun* articles,¹¹¹ Bolt rhetorically asked: “Is someone with even just 1/128th Aboriginal ancestry forever an Aborigine and Aborigine only?” The question is clearly premised upon a blood-quantum approach to the determination of identity. It is a manifestation of the mindset of those who “shaped government policies of absorption and assimilation from the late 1930s to the early 1960s.”¹¹² In other words, Bolt’s frame of mind mirrors – in the words of Chelsea Bond – the “aspirational goal of a white Australia [during that period that] demanded erasure of the ‘Aborigine’ from the Australian landscape.”¹¹³ Paul Hasluck (the Minister for Territories at the time) succinctly expressed that “aspirational goal” in the following statement in the House of Representatives on 20 April 1961:¹¹⁴

The policy of assimilation means in the view of all Australian governments that all aborigines and part-aborigines are expected eventually to attain the same manner of living as other Australians and to live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, hopes and loyalties as other Australians.

It would seem that Bolt sees himself as a twenty-first century champion of social cohesion and stability in Australia – “silencing me impedes unity”, he says.¹¹⁵ For him, a cohesive and harmonious society can only be maintained if there is cultural homogeneity. As an assimilationist settler-nationalist, there is, for him, no such thing as ‘unity in diversity’, a concept, as Moran has pointed out (as noted earlier on in this section), that indigenising settler-nationalists subscribe to.¹¹⁶

¹⁰⁵ *Ibid*: 479.

¹⁰⁶ Justice Bromberg’s judgment: paragraph 190.

¹⁰⁷ Dodson 1994.

¹⁰⁸ Taylor 2003.

¹⁰⁹ Fredericks 2004.

¹¹⁰ Maddison 2013.

¹¹¹ Bolt 2011a and 2011b.

¹¹² Moran 1999: 88.

¹¹³ Bond 2014.

¹¹⁴ Commonwealth of Australia 1961: 1. See also Moran 1999: 116.

¹¹⁵ Bolt 2011a.

¹¹⁶ Moran 1999: 127.

In Bolt's discursive frame of mind, First Nations peoples' demand for recognition of their Indigenous difference and Indigenous rights is divisive and a threat to the integrity of the Australian nation-state. That demand must be uncompromisingly opposed and resisted. He seeks to apply – in the words of Maddison – “a relentless pressure on Aboriginal people to simultaneously defend their ‘authenticity’ *and* assimilate into the ‘mainstream’ of society.”¹¹⁷ His positing of the notion of ‘common humanity’ against Indigenous difference is – to borrow the words of Hage – “effectively a call for the reassertion of the old [White-]Australian order and for assimilation.”¹¹⁸

Thus, fair-skin First Nations persons face a constant challenge to their Indigeneity. They are subjected to an ongoing ‘structural violence’ concerning the authenticity of their Indigeneity. The term ‘structural violence’ (coined by Johan Galtung, a Norwegian sociologist who is regarded as the “father of peace studies”¹¹⁹) “describes social structures – economic, political, legal, religious, and cultural – that stop individuals, groups, and societies from reaching their full potential.”¹²⁰ The concept of ‘structural violence’, in the context of First Nations peoples’ existential circumstances, is essentially similar to the notion of ‘settler-colonial impositions’ that I have referred to in Chapter 1. That is (adopting the concept of ‘American colonial impositions’ that Kevin Bruyneel examined in relation to the Indigenous peoples of the United States¹²¹), “the efforts of the citizens, institutions, and governments” of the Australian nation-state “to restrain [First Nations peoples] who are seeking to maintain and secure their cultural, economic, and political practices over time.” Bolt’s anti-Indigenous difference and anti-Indigenous rights campaign is a particular manifestation of the structural violence that emanates from the structure of settler colonialism that encompasses First Nations peoples. In other words, Bolt’s campaign is an aspect of settler-colonial impositions that First Nations peoples have to contend with in their struggle to maintain their Indigenous difference and assert their Indigenous rights.

Fair-skin First Nations persons are invariably urban-dwelling. All the individuals who were subjected to Bolt’s offending articles are city dwellers. As Maddison has observed: “One

¹¹⁷ Maddison 2013: 299.

¹¹⁸ Hage 1998: 204.

¹¹⁹ The Right Livelihood Foundation [n.d.].

¹²⁰ Farmer et al. 2006: 1686. See also Maddison 2013: 289-290.

¹²¹ Bruyneel 2007: 6.

of the most visible forms of contemporary structural violence relating to Indigenous authenticity concerns Aboriginal and Torres Strait Islander people in Australian cities.”¹²² Indeed, as Michael Dodson has pointed out: “The obsession with distinctions between the offensively named ‘full bloods’ and ‘hybrids’, or ‘real’ and ‘inauthentic’ Aborigines, continues to be imposed on us today.”¹²³ And so: “There would be few urban Aboriginal people who have not been labelled as culturally bereft, ‘fake’ or ‘part-Aborigines’, and then expected to authenticate their Aboriginality in terms of percentages of blood or clichéd ‘traditional’ experiences.”¹²⁴

Bronwyn Fredericks has made the same point.¹²⁵ She said (I have conflated her paragraphing):¹²⁶

It seems that some people assume that Aboriginal people don’t belong in the city or big regional centres. ... I know as an urban Aboriginal woman that if I don’t fit the images that some people hold, I may be perceived as having no culture, as not being ‘real’, as ‘unauthentic’ or a ‘fake’.

She pointed out:¹²⁷

The constant exchanges, interaction and dialogue with non-Indigenous urban society can present challenges to our identity. It can be a struggle to live a life within the dominant culture, while at the same time trying to honour and protect our own heritage, institutions and worldview.

However, she said:¹²⁸

Urban Aboriginal people are not ‘hybrids’ or alienated from the Aboriginal experience. Aboriginal culture is dynamic and new Aboriginal identities have developed in response to urban life. Urban [Aboriginal] identities will keep developing and adapting ... [Such adaptation] is about our survival.

First Nations peoples have largely accepted a three-part test to determine the Indigeneity of a person, comprising descent, self-identification and community recognition.¹²⁹ It is derived from

¹²² Maddison 2013: 293.

¹²³ Dodson 1994: 3.

¹²⁴ Dodson 1994: 3.

¹²⁵ Fredericks 2004.

¹²⁶ Ibid: 30.

¹²⁷ Ibid.

¹²⁸ Ibid: 31.

¹²⁹ Dodson 1994: 6; Langton 1994: 97; Gardiner and Bourke 2000: 44; Taylor 2003: 93; Carlson 2016: 263.

a working definition – “determining eligibility to some services and benefits” – that was first proposed in 1981 by the then Commonwealth Department of Aboriginal Affairs.¹³⁰ It reads:¹³¹

An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he (she) lives.

Therefore, from the standpoint of First Nations peoples who subscribe to the three-part test of Indigeneity, an individual is Indigenous if he or she is of Indigenous descent, identifies as Indigenous, and is recognised as Indigenous by the First Nations community in which he or she lives. It is transparently clear that, for so long as a person has some Indigenous ancestry, neither the fractional size of that ancestry nor the person’s skin colour is an element of the test. Therefore, as Justice Bromberg had pointed out in *Eatock v Bolt*:¹³²

A person possessing all three attributes identified by the three-part test clearly satisfies the conventional understanding of an Aboriginal person. ... [And] such a person would be entitled to expect that other Australians would recognise and respect his or her identification as an Aboriginal Australian.

However, as Justice Bromberg went on to observe:¹³³

The conventional understanding is not, however, the universal understanding. The perception of many Australians of an Aboriginal person will no doubt be influenced by stereotypical images of dark-skinned Aboriginal persons in outback Australia. It is likely that a person with each of the attributes of the three-part test and fair skin colour will, from time to time, be challenged as to his or her Aboriginality. The evidence from the witnesses called by Ms Eatock demonstrates that to be so. Other material tendered is confirmatory. That material also shows that from time-to-time prominent people, amongst others, have raised concerns that identification by others as Aboriginal people involves opportunism.

Alison Whittaker has pointed out that the three-part test has become a “universal model of Aboriginality”.¹³⁴ She view the test as a highly problematic one. In her opinion, with the test being premised on “settler conceptualisations and law, ... its entrenchment in Aboriginal self-constitution and identity bears a risk of wounding the core of Aboriginal epistemologies of the

¹³⁰ Gardiner-Garden 2003: 4; Justice Bromberg’s judgment: paragraph 172.

¹³¹ Gardiner-Garden 2003: 4; Justice Bromberg’s judgment: paragraph 172.

¹³² Justice Bromberg’s judgment: paragraph 189.

¹³³ Ibid: paragraph 190.

¹³⁴ Whittaker 2017: 4-5.

self, in addition to shaping an expedient Aboriginal legal subject.”¹³⁵ She contends “there is a deep colonising link between the three-tier model and Aboriginal institutions as its primary arbiters.”¹³⁶ This link is the outcome “of turning Aboriginality upon itself to investigate itself through legal constructs disguised as decolonial methodologies”.¹³⁷ This “lateral audit of Aboriginality” takes place when First Nations organisations, which are statutorily empowered to do so, conduct “Confirmation of Aboriginality” for individuals seeking formal recognition as Indigenous. These organisations carry out the process “on white legal principles.”¹³⁸ Therefore, “reliance on Aboriginal arbitration and contestation by no means confers any meaningful self-determination or focus on Aboriginal epistemologies of self.”¹³⁹ The “deep colonising impact” of this process “is made through both the prioritisation of settler evidence, [and] the subjection of Aboriginal epistemologies to the scepticism and scrutiny of white burdens of probity.”¹⁴⁰

The fundamental outcome of judicial consideration of the three-part test, according to Whittaker, is that the test has become “a vector through which biological race, as perceived through settler epistemologies, can be re-centred.”¹⁴¹ She described this process as a “macabre fascination with tracing biological race”, which has “effectively [corrupted] the communal- and self-identity limbs of Aboriginality and minimise their value beyond the probative weight they give to biological race.”¹⁴² In their role as arbiters of the Indigeneity of individuals, First Nations organisations have been conducting that role on settler terms.¹⁴³ “We have,” Whittaker asserts, “entrenched [these settler terms] so deeply into a contested space of Aboriginal arbitration and community decision-making, that they have become our own.”¹⁴⁴ There is a need, Whittaker argues, for “the process of defining Aboriginality [to] be rehabilitated.”¹⁴⁵ It is necessary, she said, for “legal and operational Aboriginality” to be untethered from “the deep

¹³⁵ Ibid: 5.

¹³⁶ Whittaker here is drawing upon Deborah Bird-Rose’s definition of “deep colonisation”, in the latter’s article, Land Rights and Deep Colonising: The Erasure of Women, in *Aboriginal Law Bulletin* (1996) 3(85). The concept was defined by Bird-Rose as: “colonising practices ... embedded within decolonising institutions which may conceal, naturalise, or marginalise continuing colonising practices.”: *ibid*: 11.

¹³⁷ Ibid.

¹³⁸ Ibid: 11-12.

¹³⁹ Ibid: 26.

¹⁴⁰ Ibid: 41.

¹⁴¹ Ibid: 42.

¹⁴² Ibid.

¹⁴³ Ibid: 43.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid: 43-44.

colonisation of the three-tier model” and for First Nations peoples to embark upon “substantively decolonial projects of defining themselves”.¹⁴⁶ In this regard, it should be noted here that Article 33 of the *United Nations Declaration on the Rights of Indigenous Peoples* provides for the empowerment of First Nations peoples to do just that. That provision reads:

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Despite the criticism levelled against it by Whittaker, the three-part test of Indigeneity, as demonstrated by *Eatock v Bolt*, does provide First Nations peoples with a powerful counter discursive tool against the structural violence perpetrated on their identity by the forces of assimilationist settler-nationalism. That said, it is certainly within the self-determination right of First Nations peoples to define themselves in accordance with their customs and traditions, that is, according to their own epistemologies of the self.

5 Conclusion

This chapter has highlighted the continuing salience of the assimilative forces of settler colonialism and the enduring resistance by First Nations peoples to the settler-colonial logic of elimination. *Eatock v Bolt* is a manifestation, in the judicial arena, of a contestation of Indigenous difference against assimilationist settler-nationalism. This contestation is ongoing in the broader socio-political arena.

Bolt’s anti-Indigenous difference and anti-Indigenous rights campaign is a particularly abiding manifestation of the forces of assimilationist settler-nationalism. His positing of the notion of ‘common humanity’ against Indigenous difference is a call for the (re)development of a culturally homogeneous nation, the kind that was imagined by assimilationist settler-nationalists in the period from the 1930s to the 1960s. He is calling for a reassertion of the old ‘white’ Australian order.

¹⁴⁶ Ibid: 44.

Eatock v Bolt was a successful court action for First Nations peoples. It illustrates that litigation can be useful in certain circumstances. However, in its aftermath, there was “encouragement of scepticism about the authenticity of fair-skin Indigenous persons and of judgment by non-Indigenous persons about the legitimacy of Indigenous identity according to skin colour.”¹⁴⁷ In certain cases, where the rights involved are not connected to significant political or economic resources, Indigenous rights may be met with success, and could be leveraged alongside political calls for treaty. However, the reality is that even after a treaty is agreed, if individuals like Bolt were to do the same kind of thing, litigation would need to be pursued to address it. A treaty would not this kind of particular issue. Nevertheless, the Bolt case reflects the determination of First Nations peoples to counter the structural violence perpetrated on their identity by assimilationist settler-nationalists. It demonstrates the preparedness of First Nations peoples to take all legitimate steps available to them to regain control of their Indigenous identity. They are prepared to meet head-on the forces of assimilationist settler-nationalism. To ensure the continuing survival of their identity as First Nations peoples, they fully realise that they must maintain and sustain their resistance to settler-colonial impositions. They must carry on an enduring struggle against the settler-colonial logic of elimination, the forces of settler colonialism that seek to eliminate their Indigeneity. This continued determined resistance provides the impetus for First Nations to seek a broader resolution of a range of issues by way of a treaty or treaties. And it might be one reason why governments would see some benefit in negotiating a treaty or treaties so that outstanding issues which give rise to such resistance are resolved and more harmonious communities are created.

I have dedicated three chapters to examining the utility of the judicial arena as a forum for the decolonisation objective of First Nations. I have done this because understanding the limits of the judicial system in relation to a comprehensive restructuring of the political, social, and economic relationships of Indigenous Australia and the Australian nation-state is important to my central thesis contention. I examined court cases dealing with different aspects of Indigenous rights in each of those chapters. Chapter 3 dealt with assertion of First Nations sovereignty and challenge to the legitimacy of British annexation of the Australian continent. Chapter 4 is about First Nations right to cultural heritage. This chapter is concerned with the Indigeneity of urban-dwelling and fair-skin First Nations individuals.

¹⁴⁷ Gelber and McNamara 2013: 479.

Court cases have their place in attempts to implement broader social and political change. A loss or a victory is not necessarily the ultimate outcome. For example, although the plaintiffs lost in the *Gove Land Rights Case*¹⁴⁸ in 1971, the result was political pressure, which led to the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976*. This legislation benefitted not only the plaintiffs but also many other First Nations groups throughout the Northern Territory. By comparison, the *Mabo* litigation did not by itself provide the complete native title law. Furthermore, even though *Mabo* was a watershed moment, and in many ways a successful outcome for First Nations peoples, it did not deal with issues concerning First Nations sovereignty, self-determination and self-government. In relation to native title, in the absence of legislation, any other group asserting native title would have to go to court and separately litigate their case. The common law of native title would have developed on a case-by-case basis. Following the *Mabo* case, the enactment of the *Native Title Act 1993* (Cth) answered many of the questions that the High Court had not answered in *Mabo* (No 2). However, that legislation was then tested, and the law of native title developed in a combination of court cases exploring such things as the nature of native title, whether native title could be partially extinguished, whether native title could revive, what extinguishment meant, and so on. Amendments to the *Native Title Act 1993* (Cth) followed judicial rulings. Therefore, there was a dynamic exchange between the judiciary and the legislature. Indeed, in appropriate cases, as George Williams and Harry Hobbs have observed: “litigation is a legitimate strategy for anyone to consider” in order to “resolve controversial issues by reference to legal principle”.¹⁴⁹

The *Mabo* litigation has certainly assisted the process of decolonisation, in that it led to the High Court declaring the existence of native title recognisable by the common law. Nevertheless, in the final analysis, litigation is of limited use for a range of reasons. Courts can only hear and rule on justiciable issues. In other words, there has to be a cause of action known at law before a matter will be heard. Broader issues of social, economic and political relationships are not justiciable. A court has to have jurisdiction to resolve the issues pleaded (an obstacle on the sovereignty point in the *Coe* litigation). A court will only rule on the issues pleaded before it, so that the case has to be properly pleaded (another issue in the *Coe* litigation). Australian courts will not give an advisory opinion on broader issues or on issues that it does

¹⁴⁸ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

¹⁴⁹ Williams and Hobbs 2020: 9.

not have to decide in order to dispose of the dispute before it.¹⁵⁰ In short, courts are, fundamentally, not a suitable forum for seeking a comprehensive restructuring of social, economic or political relationships between people. Thus, as Williams and Hobbs have argued: “negotiation is the preferred process for achieving outcomes in Indigenous affairs and the primary means of resolving outstanding issues from the past and challenges for the future.”¹⁵¹ They contend:

Negotiation reduces the risk that the rights and interests of any significant group will be ignored. It brings relevant information and perspectives to the decision-making process in a direct way. It recognises that winner-takes-all processes are unlikely to endure or produce good policy. It allows sophisticated, flexible and tailored solutions to be worked out by the parties with a direct interest in the outcome.¹⁵²

Nonetheless, it would be a false dichotomy if the political and the judicial were to be viewed as oppositional rather than complementary arenas for First Nations peoples to have recourse to in the struggle to decolonise the Australian nation-state. In the Canadian context, Shin Imai had pointed to “the importance of integrating adjudication and negotiation” in cases involving “Aboriginal rights to lands and resources”¹⁵³ In other words, Imai saw the judicial and political processes as complementary. He emphasised the significance of judicial rulings/directions in ensuring the effectiveness of such negotiations, in particular the need for judicial adjudication “to break deadlocks or to ensure fairness in the negotiation process.”¹⁵⁴ In my view, the potential/power of judicial pronouncements to advance or underpin negotiations is equally applicable in the Australian context.

Having examined some of the limitations of the judicial arena as the best space to realise First Nations’ claims, I examine in the next chapter (Chapter 6) the suitability of the political arena for decolonising the Australian nation-state in the sense defined in Chapter 1.

¹⁵⁰ It should be noted that this is not true of all courts. For example, the Supreme Court of Canada provides advisory opinions in response to reference questions submitted to it by the Federal Government. Similarly, top-most Provincial/Territorial courts give advisory opinion to Provincial or Territorial Governments (Centre for Constitutional Studies [n.d.]).

¹⁵¹ *Ibid.*: 10.

¹⁵² *Ibid.*: 11.

¹⁵³ Imai 2003: 589.

¹⁵⁴ *Ibid.*

Chapter 6

Decolonising Australia: Selected Calls for Treaties by First Nations Peoples in the Political Realm

1 Introduction

To determine the suitability of the political arena as a forum for decolonising the relationship between Indigenous Australia and the Australian nation-state, I examine, in this chapter, four sets of proposals by First Nations organisations. The first set comprises the proposals contained in the 1988 Barunga Statement. The second set is ATSIC's 1995 recommended "social justice measures". The third set consists of the measures recommended by CAR in 2000 for settling "unresolved reconciliation measures". The fourth set comprises the proposals by the National Constitutional Convention of First Nations delegates at Uluru in May 2017 for the establishment of a "Voice to Parliament" and a Makarrata Commission, with the latter being responsible for initiating and managing national treaty-making and truth-telling processes.

The proposals were demands for restructuring the political, social and economic relationships between Indigenous Australia and the Australian nation-state. They were demands for recognition of First Nations peoples' right to internal self-determination and right to self-government. The common imagining that underpinned the proposals was that a treaty approach was the preferred avenue for attaining a more comprehensive decolonisation of the Australian nation-state. However, the Uluru Statement could perhaps be viewed as placing relatively greater emphasis, in terms of priority of implementation, on the establishment of a Voice to Parliament than on the setting up of a Makarrata Commission.

At the same time as seeking to assess the comparative suitability of the political arena for calls for decolonising the Australian nation-state, this chapter's other fundamental objective is to demonstrate the usefulness of UNDRIP as a content guide for a tripartite treaty. To determine the suitability of the proposals in meeting First Nations peoples' decolonising aspirations, I analyse them against the rights affirmed in UNDRIP. I do this because UNDRIP – if adopted as a content guide for tripartite treaty negotiation – would have the potential to contribute to the decolonisation of the Australian nation-state in the sense defined in Chapter 1.

Calls by First Nations peoples for a treaty or treaties between them and the Australian nation-state emerged following the 1967 Constitutional Referendum,¹ and, despite lack of success, have persisted ever since, as follows:²

- (1) In 1972, the Larakia people of the Northern Territory petitioned Prime Minister William McMahon for a treaty “to suit each tribe”.³ They also petitioned the Queen for land rights, treaty and political representation.⁴
- (2) In 1979, the National Aboriginal Conference proposed to the Malcolm Fraser Government a national treaty that covered a wide range of issues.⁵
- (3) In 1987, the late Kevin Gilbert conducted a treaty campaign premised upon the recognition of a “Sovereign Aboriginal Nation State”.⁶
- (4) In 1988, the Northern Land Council and the Central Land Council presented the “Barunga Statement” to Prime Minister Bob Hawke, calling for a treaty premised upon the recognition of First Nations’ Indigenous difference and Indigenous rights.⁷
- (5) In 1995, in response to a request by Prime Minister Paul Keating, ATSIC recommended to the Government a set of social justice measures intended to lead to the granting of self-determination and self-government rights to First Nation peoples by way of a treaty or treaties.⁸
- (6) In 1999, during his Vincent Lingiari Memorial Lecture, Patrick Dodson called for a treaty that would vest First Nations peoples with rights substantially similar to those subsequently contained in UNDRIP.⁹
- (7) In 2000, CAR recommended a treaty or treaties to settle “unfinished reconciliation issues”.¹⁰
- (8) In the same year, during his Wentworth Lecture, Patrick Dodson called for the implementation of CAR’s recommendation for a treaty or treaties and the establishment of a Treaty Commission to undertake treaty development.¹¹

¹ See Williams and Hobbs 2020: 26-64.

² Wright 1985: 14-15; Langton 2000:32-34; McGlade 2003 [2004 reprint]: 130-136; Bradfield 2006: 82-83; Mansell 2016a: 97-99; Lino 2018: 16-24; Petrie and Graham 2018: 1-6; Maddison 2019: 22-29; Williams and Hobbs 2020: 26-64.

³ Wright 1985: 14-15.

⁴ National Archives of Australia [n.d.].

⁵ Williams and Hobbs 2020: 35-36; AIATSIS [n.d.]. See Senate Standing Committee 1983: Appendix 3 (proposed treaty contents).

⁶ Brennan et al. 2005: 15; Gilbert 2015: 108-140 (proposed treaty contents).

⁷ Williams and Hobbs 2020: 37-38; AIATSIS [n.d.(a)], [n.d.(b)].

⁸ ATSIC 1995.

⁹ Dodson 2000a.

¹⁰ CAR 2000a and 2000b.

¹¹ Dodson 2000b.

- (9) Reconciliation Australia, in its 2016 report – *The State of Reconciliation in Australia* –urged the continuation of dialogues about ‘treaty and agreement-making’.¹²
- (10) In conjunction with 2016 federal election, First Nations peak organisations produced a pamphlet (*The Redfern Statement*) calling on “the next Federal Government” to commit to, among others, “implementing the recommendations of the Council for Aboriginal Reconciliation, which includes an agreement making framework (treaty) ...”¹³
- (11) In 2016, Michael Mansell published his book, *Treaty and Statehood: Aboriginal Self-determination*, in which he called for a national treaty that would grant self-determination and self-government rights to First Nations peoples. He also proposed the establishment of a First Nations State within the Australian federation.¹⁴
- (12) In 2017, the National Constitutional Convention – of First Nations delegates – issued the Uluru Statement from the Heart. The Statement called for the establishment of a First Nations parliamentary advisory body to be enshrined in the Commonwealth Constitution (“Voice to Parliament”) and the establishment of a Makarrata Commission to supervise a process of treaty making and truth-telling.¹⁵

From the above list, I have chosen to examine the joint call for a treaty by the Northern Land Council and the Central Land Council of the Northern Territory, made by way of what is now famously known as the Barunga Statement; ATSIC’s recommended “social justice measures”; CAR’s proposed measures for settling “unresolved reconciliation issues”; and the First Nations National Constitutional Convention’s call for the establishment of a “Voice to Parliament” and a Makarrata Commission. My reasons for selecting these four sets of proposals are:

- (a) The Barunga Statement was a direct response to a disclosure, on 2 September 1987, by Prime Minister Bob Hawke of his Government’s preparedness to consider a treaty between First Nations peoples and the Commonwealth.¹⁶ The Statement was issued in the bicentenary of the settler-colonisation of the Australian continent, and was in that context a powerful political statement. It was “the culmination of years of engagement and discussion between Aboriginal groups in the Northern Territory and the Australian

¹² Reconciliation Australia 2016a: 79.

¹³ The Redfern Statement 2016 (issued in conjunction with the 2016 federal election): 9.

¹⁴ Mansell 2016a.

¹⁵ Appendix 11 (Uluru Statement for the Heart).

¹⁶ PM Transcripts 1987. See also Gardiner-Garden 1999: 11.

Government.”¹⁷ The Commonwealth Opposition’s response to the contemplated treaty reflected the discourse of assimilationist settler-nationalism.

- (b) ATSIC’s social justice measures covered “an extraordinarily wide spectrum”.¹⁸ There were 113 recommendations.¹⁹ The package of measures would appear to encompass all the core issues for which Indigenous Australia has lobbied for nationally since the 1970s.²⁰
- (c) The CAR proposed agenda for decolonisation and the response to it by the John Howard Government provides an eminently suitable case for exploring the salience of the contestation of First Nations’ demand for decolonisation against the forces of assimilationist settler-nationalism in the political arena.
- (d) The First Nations’ aspirations embodied in the National Constitutional Convention’s Uluru Statement from the Heart, and the response to it by the Malcolm Turnbull Coalition Government, present another eminently suitable and more recent case for examining the continuing contestation of Indigenous difference and Indigenous rights against the forces of assimilationist settler-nationalism.

The structure of the rest of this chapter is as follows. Section 2 deals with the Barunga Statement. Section 3 looks at ATSIC’s social justice measures. Section 4 examines CAR’s measures for settling the unresolved reconciliation issues and the John Howard Coalition Government’s response to them. Section 5 deals with the decolonising proposals contained in the Uluru Statement from the Heart and the respective response to them by the Turnbull Government and the Scott Morrison Government. Even though the first three sets of decolonising proposals are pre-UNDRIP, I analyse them, together with the Uluru Statement, as if they were post-UNDRIP, against the rights affirmed in UNDRIP to determine their (as well as the Uluru Statement’s) suitability in meeting First Nations peoples’ decolonising aspirations. In other words, I deal with those pre-UNDRIP proposals by analysing whether, if they had been advanced post-UNDRIP, they would have the requisite decolonising capacity in UNDRIP terms. Section 6 affirms that the political arena is the most appropriate forum for First Nations

¹⁷ AIATSIS [n.d.(b)].

¹⁸ ATSIC 1995: 145.

¹⁹ ATSIC 1995: 151-173.

²⁰ On the spectrum of issues that are of concern to First Nations peoples, see Behrendt 2003: 86-117.

peoples to utilise in their struggle to decolonise the Australian nation-state and that UNDRIP is highly suitable as a content guide for tripartite treaty negotiations.

2 The Barunga Statement

In an interview with Louise Maher of ABC Northern Territory, on 2 September 1987 at Alice Springs, Prime Minister Bob Hawke intimated his Government's willingness to consider a treaty between First Nations peoples and the Commonwealth.²¹ It would appear that Hawke saw his announcement of the possibility of such a treaty as paving the way for "celebrations that are appropriate in 1988".²²

The Barunga Statement was presented to Prime Minister Hawke – by Galarrwuy Yunupingu (Chair, Northern Land Council) and Wenten Rubuntja (Chair, Central Land Council) – during the Barunga sports and cultural festivals on 12 June 1988.²³ Following the presentation, Prime Minister Hawke met with First Nations leaders who were present, to discuss the issue and the way forward.²⁴ At the conclusion of the meeting, he announced the outcome:²⁵

Firstly, that there shall be a treaty negotiated between the Aboriginal people and the Government on behalf of all the people of Australia. Secondly, that the next step is that you the Aboriginal people should decide what it is that you want to see in that treaty. The third step is that I have agreed that we should provide you with assistance to establish those consultation processes and in particular that there should be a committee of seven of your traditional elders who will have the responsibility for organising at the end of the consultations an Australia-wide convention which will represent the culmination of your own negotiations and discussions. Fourthly, that when you have conducted these processes of consultation that we as a government should then be prepared to receive and to consider the results of your thinking and your consultation. And fifthly, that we agreed that these processes should start before the end of this year and that we would expect and hope and work for the conclusion of such a treaty before the end of the life of this Parliament [that is, 1990].

Leader of the Opposition, John Howard, was swift in his rejection of the proposed treaty. In a statement issued on 13 June 1988, Howard said:²⁶

²¹ PM Transcripts 1987.

²² Ibid.

²³ AIATSIS [n.d.(b)].

²⁴ *The Canberra Times* 13 June 1988.

²⁵ PM Transcripts 1988: 2.

²⁶ *The Canberra Times* 14 June 1988.

It is an absurd proposition for a nation to make a treaty with some of its citizens. ... It will spawn a form of apartheid. Regrettably, it will increase rather than diminish hostility amongst some white Australians towards our Aborigines. The Aborigines are Australian citizens and should be treated as such.

The above statement reflects the discourse of assimilationist settler-nationalism. Gerry Hand, the Minister for Aboriginal Affairs, pointed out that “Aboriginal and government leaders were talking about unity, and only the Opposition was talking about division and disunity.”²⁷ Talking about national division and disunity is a form of settler-colonial impositions, to obstruct First Nations peoples’ decolonising aspirations, so as to overcome obstacles to the settler-colonial logic of elimination. Paul Malone commented:²⁸

In adopting this position Mr Howard has sailed dangerously close to whipping up racist elements in Australian society. ... The unfortunate thing is that if Mr Howard continues to maintain the position he has outlined, he could make what he has said a self-fulfilling prophecy. He will be the one dividing the community.

Malone’s observation identified the discursive dilemma of assimilationist settler-nationalism in the face of enduring First Nations peoples’ resistance to the settler-colonial logic of elimination and persistence in seeking affirmation of their Indigenous difference and Indigenous rights. As Galarrwuy Yunupingu had pointed out, in an article, published in December 1988, entitled “Why a Treaty”:²⁹

There has been a total failure to recognise that we are unlike the other peoples who have come to live in Australia as willing or unwilling migrants bringing their own cultures and ways. Our culture and our ways have always been here, in this land, our mother. Australia can no longer afford to ignore this reality and pretend it is otherwise.

The problem that have arisen are largely due to the fact that we have not been involved in making decisions about where we fit in this new Australia. ... We feel there is no respect for who we are and a conscious evasion of what has happened to us over the past 200 years and is still happening to some of us today.

This has created tensions and division. We don’t like that anymore than anyone else does. We believe that if justice is done, we can all remove this tension and division.

²⁷ *The Canberra Times* 15 June 1988.

²⁸ *The Canberra Times* 18 June 1988.

²⁹ Yunupingu 1988: 11-12.

Thus, impliedly, for Yunupingu, “justice” would only be done, and “tension and division” removed if the proposed treaty came into being.

The Barunga Statement reads [my numbering]:³⁰

- [1] We, the Indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights:
 - [a] to self-determination and self-management, including the freedom to pursue our own economic, social, religious and cultural development;
 - [b] to permanent control and enjoyment of our ancestral lands;
 - [c] to compensation for the loss of use of our lands, there having been no extinction of original title;
 - [d] to protection of and control of access to our sacred sites, sacred objects, artefacts, designs, knowledge and works of art;
 - [e] to return of the remains of our ancestors for burial in accordance with our traditions;
 - [f] to respect for and promotion of our Aboriginal identity, including the cultural, linguistic, religious and historical aspects, and including the right to be educated in our own languages and in our own culture and history;
 - [g] in accordance with the universal declaration of human rights, the international covenant on economic, social and cultural rights, the international covenant on civil and political rights, and the international convention on the elimination of all forms of racial discrimination, rights to life, liberty, security of person, food, clothing, housing, medical care, education and employment opportunities, necessary social services and other basic rights.
- [2] We call on the Commonwealth to pass laws providing:
 - [a] A national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander affairs;
 - [b] A national system of land rights;
 - [c] A police and justice system which recognises our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interfere with our freedom of expression or association, or otherwise

³⁰ Glynn-McDonald 2021; AISTSIA [n.d.(b)].

prevent our full enjoyment and exercise of universally recognised human rights and fundamental freedoms.

- [3] We call on the Australian Government to support Aborigines in the development of an international declaration of principles for indigenous rights, leading to an international covenant.
- [4] And we call on the Commonwealth Parliament to negotiate with us a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedom.

Sections [1] and [4] constitute the linchpin of the Statement. Section [1] expresses a demand for restructuring the political, social and economic relationships of First Nations peoples and the Australian nation-state. And section [4] states the method for achieving such fundamental reorganisation. Subsection [1][a] manifests First Nations peoples' aspirations to exercise their inherent rights to self-determination and self-government, and the treaty demanded in section [4] would be the framework for realising those rights. In the circumstances in which the Barunga Statement was issued and its acceptance by Prime Minister Hawke, what the Northern Land Council and the Central Land Council were demanding for First Nations peoples was recognition of their inherent rights to self-determination and self-government within the constitutional and governmental framework of the Australian nation-state. Rights to self-determination and self-government are foundational requirements for decolonising the Australian nation-state. In UNDRIP terms, these foundational rights are affirmed by Article 3 (right to self-determination) and Article 4 (right to self-government).³¹ These rights are manifestations of internal sovereignty. The negotiation and adoption of a treaty, to vest First Nations peoples with Article 3 and Article 4 rights – and flow-on rights that appertain to them – are within the contemplation of Article 38 (measures to achieve the ends of UNDRIP).³²

Subsection [1][b] of the Statement is about First Nations peoples' rights to their lands, resources and territories. Specifically, it demands permanent control and enjoyment by First Nations peoples of their lands, territories and resources. In UNDRIP terms, these rights are affirmed by:

³¹ For a discussion of Article 3 and Article 4, see APF/UNHR 2013: 19-23; Weller 2018: 134-138.

³² For a discussion of Article 38, see van Genugten and Lenzerini 2018: 555-556.

- (a) Article 25 – right to maintain and strengthen their spiritual relationship with their lands, territories and resources;
- (b) Article 26 – right to own, use, develop and control their lands, territories and resources;
- (c) Article 29 – right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources;
- (d) Article 32 – right to determine and develop priorities and strategies for the development or use of their lands or territories and resources.³³

It should also be noted that Article 10 prohibits forced removals of First Nations peoples from their lands or territories.³⁴ Subsection [1][c] of the Barunga Statement demands compensation for loss of use of First Nations peoples' lands. This is affirmed by UNDRIP Article 28 (right to restitution or compensation for loss of their lands, territories and resources).³⁵

The Statement's subsection [1][d] is about First Nations peoples' (a) right to maintain, protect and have access to their religious and cultural sites; (b) right to the use and control of their ceremonial objects; and (c) right to maintain, control, protect and develop their intellectual property over their artefacts, designs, knowledge and works of arts. The respective right in (a) and (b) is affirmed by UNDRIP Article 12(1).³⁶ The right in (c) is covered by UNDRIP Article 31(1).³⁷ Subsection [1][e], concerning First Nations peoples' right to the repatriation of their ancestral remains, is also provided for by UNDRIP Article 12(1).

The Statement's subsection [1][f] is about maintenance and promotion of First Nations peoples' distinct identity and cultural integrity. The rights demanded in this regard are affirmed by the following UNDRIP provisions:³⁸

³³ For a discussion of these provisions, see AFP/UNHR 2013: 33-34; Charters 2018: 401-424; Errico 2018: 432-454.

³⁴ For a discussion of Article 10, see Charters 2018: 407-410.

³⁵ For a discussion of Article 28, see AFP/UNHR 2013: 35; Lenzerini 2018: 590-595.

³⁶ For a discussion of the provision, see Xanthaki 2018: 290-291.

³⁷ For a discussion of the provision, see Stoll 2018: 306-307.

³⁸ For a discussion of these provisions, see AFP/UNHR 2013: 13-14; Hohmann 2018: 160-176; Gover 2018: 180-188; Imai and Gunn 2018: 219-237; Xanthaki 2018: 283-297; Stoll 2018: 303-309; Graham and Van Zyl-Chavarró 2018: 358-367.

- (a) Article 2 – First Nations peoples’ right not to be discriminated against because of their indigeneity;
- (b) Article 5 - First Nations peoples’ right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions;
- (c) Article 11 – First Nations peoples’ to practise and revitalise their cultural traditions and customs;
- (d) Article 12 – First Nations peoples’ right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies;
- (e) Article 13 – First Nations peoples’ right to revitalise, use, develop and transmit to future generations their histories, languages, and oral traditions;
- (f) Article 14 – First Nations peoples’ right to establish and control their educational systems and institutions and to provide education in their own languages;
- (g) Article 15 – First Nations peoples’ right to the dignity and diversity of their cultures, traditions, histories and aspirations;
- (h) Article 31 – First Nations peoples’ right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions;
- (i) Article 33 – First Nations peoples’ right to determine their own identity or membership in accordance with their customs and traditions;
- (j) Article 34 – First Nations peoples’ right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and juridical systems or customs, in accordance with international human rights standards.

Subsection [1][g] of the Barunga Statement is concerned with the rights of First Nations peoples to (a) life, liberty and security of person; and (b) improvement of their economic and social conditions, including, among others, in education, employment, housing, health and

social security. The rights specified in (a) are affirmed by UNDRIP Article 7 and those in (b) are met by UNDRIP Article 21. It should also be noted that, in relation to the premising by subsection [1][g] of the rights in (a) upon the international human rights instruments listed in the subsection, UNDRIP Article 1 specifies:

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

In other words, UNDRIP Article 1 affirms that First Nations peoples are covered by relevant international human rights instruments and international human rights law.

Moving on to Section [2] of the Barunga Statement, the call for Commonwealth legislation – in subsection [2][a] – to provide for an elected national First Nations organisation “to oversee” First Nations affairs received a positive answer from the Hawke Government, with the enactment of the Commonwealth *Aboriginal and Torres Islander Commission Act 1989*. ATSIC came into being in March 1990 and was abolished, by the Howard Government (with the support of the Labor Opposition³⁹), in 2005.⁴⁰ Regarding the call, made in subsection [2][b] of the Barunga Statement, for the Commonwealth to legislate for a national land rights scheme, it would appear that it was an attempt by the Northern Land Council and the Central Land Council to reboot the Hawke Government’s collapsed proposal for such a scheme. The Government had announced the proposal in March 1983.⁴¹ What Broome has described as “a bold land rights program”⁴² was met with “a powerful media campaign”⁴³ initiated by Western Australian Chamber of Mines in 1984.⁴⁴ The Hawke Government abandoned its national land rights proposal in 1986.⁴⁵ Prime Minister Paul Keating was, however, eventually able to answer the call, with the enactment of the Commonwealth *Native Title Act 1993*. In this regard, however, the Keating Government was prompted by the High Court’s 1992 *Mabo* decision.⁴⁶

³⁹ Pratt and Bennett 2004: 11.

⁴⁰ Effected by the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005*.

⁴¹ Broome 2019: 241.

⁴² Ibid.

⁴³ Ibid: 242.

⁴⁴ Ibid: 242-243.

⁴⁵ Brennan 2004: 149.

⁴⁶ *Mabo v Queensland (No 2)* [1992] HCA 23.

The Barunga Statement's call for recognition of First Nations customary laws – made in subsection [2][c] – has remained largely unfulfilled to this day.⁴⁷

Section [3] of the Barunga Statement was a call on the Commonwealth Government to support the development of an international covenant on the rights of Indigenous peoples. In other words, the Statement envisaged the development of a binding international instrument, a multilateral treaty binding upon parties to it. In the event, in 2007, a non-binding declaration came into being, that is, UNDRIP, which the Howard Government, in its dying days, had voted against. The ABC reported – on 15 September 2007 – Prime Minister Howard as having said, in defence of his Government's refusal to support UNDRIP, that "it is wrong to support something that argues the case of separate development inside one country".⁴⁸ The future, he said, of "The Indigenous people of Australia ... lies in being part of the mainstream of this country".⁴⁹ This defensive argument is assimilationist settler-nationalism discourse.

In the face of "concerted political opposition",⁵⁰ the Hawke Government abandoned its commitment to negotiate a treaty with First Nations peoples. By way of an attempt, it would appear, to ameliorate the extreme disappointment of First Nations peoples in being denied a treaty, the Government went on to establish CAR.⁵¹ CAR's fundamental proposal, adoption of a treaty approach to effect reconciliation between Indigenous Australia and settler Australia, met, as we shall below (section 4), with total rejection by the Coalition Government under Prime Minister Howard.

The next section examines ATSIC's package of social justice measures that was intended to lead to the granting of self-determination and self-government rights to First Nations peoples, to be implemented by way of a treaty or treaties.

⁴⁷ See ALRC [n.d.]; ATSIC 1995: 110-116.

⁴⁸ ABC News 15 September 2007.

⁴⁹ Ibid.

⁵⁰ Brennan 2004: 150.

⁵¹ Ibid.

3 Social Justice Measures

ATSIC came into being as a body corporate in March 1990. The Bob Hawke Labor Government established it under the *Aboriginal and Torres Strait Islander Commission Act 1989* (“ATSIC Act”)⁵² ATSIC’s fundamental responsibility was:⁵³

- (a) to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them;
- (b) to promote the development of self-management and self-sufficiency among Aboriginal persons and Torres Strait Islanders;
- (c) to further the economic, social and cultural development of Aboriginal persons and Torres Strait Islanders; and
- (d) to ensure co-ordination in the formulation and implementation of policies affecting Aboriginal persons and Torres Strait Islanders by the Commonwealth, State, Territory and local governments, without detracting from the responsibilities of State, Territory and local governments to provide services to their Aboriginal and Torres Strait Islander residents.

In 1994, the Commonwealth Labor Government under Paul Keating requested ATSIC to submit proposals for a ‘Social Justice Package’ that the Government was considering as the third component of its three-part response to the 1992 *Mabo* decision.⁵⁴ ATSIC’s recommendations are contained in its 1995 report to the Prime Minister: *Recognition, Rights and Reform: Report to Government on Native Title Social Justice Measures*.⁵⁵ The report was prepared following an “extensive consultation process ... with indigenous community representatives in each of ATSIC’s 17 zones.”⁵⁶

The “social justice measures” contained in the report cover “an extraordinarily wide spectrum” of issues.⁵⁷ There is a total of 113 recommendations. The report was prepared under the auspices of ATSIC’s Native Title Social Justice Advisory Committee, which was chaired by the late Charles Perkins (Deputy Chair of ATSIC). As pointed out by Perkins: “The report

⁵² Section 6(1).

⁵³ Section 3.

⁵⁴ The first component was the *Native Title Act 1993*; the second was the establishment in 1995 of the Indigenous Land Corporation and the National Aboriginal and Torres Strait Land Fund (ATSIC 1995: xi). With the defeat of the Keating Government in 1996, the ‘Social Justice Package’ was not implemented (Sullivan 2009: Abstract).

⁵⁵ ATSIC 1995.

⁵⁶ Ibid: iii (report-submission covering letter by the Chairperson of ATSIC).

⁵⁷ Ibid: paragraph 8.1.

represents a negotiating platform.”⁵⁸ The recommended measures cover both the rights of First Nations peoples as citizens of Australia and their unique rights as Indigenous peoples. The proposed measures are grouped under five categories: (1) rights, (2) recognition and empowerment, (3) citizenship entitlements, (4) cultural integrity and heritage protection, and (5) economic development.

Category (1) (rights) deals with both First Nations peoples’ citizenship or equality rights and Indigenous rights. On citizenship rights, the report argued that access to these rights by First Nations peoples were not on par with that enjoyed by non-Indigenous Australian citizens.⁵⁹ The report pointed out: “it is well documented that indigenous Australians do not in fact enjoy equal access to even basic services provided by Government, and that rights to equality are not in fact achieving equality in outcomes.”⁶⁰ The report went on to assert:⁶¹

Basic social rights, such as the right to employment, education, training, a minimum income and access to basic health, housing and community services, are integral to full participation and contribution to Australia’s economic and social development. Social justice requires a systematic and coordinated approach to reform which will redress the structural inequality experienced by Aboriginal and Torres Islander peoples. The linkage between citizenship rights and the responsibility of citizens to contribute to the economic and social life of the nation is widely recognised.

On Indigenous rights, the report classified these into three groups: (1) autonomy rights, (2) peoplehood or identity rights, and (3) territory and resource rights. Group (1) (autonomy rights) is about the right of First Nations peoples “to determine the way in which they live and control their social, economic and political development”.⁶² The report argued:⁶³

There is no right more fundamental for indigenous people than that of self-determination. It is central to addressing the general disadvantaged and oppressed condition of Aboriginal and Torres Strait Islander peoples.

⁵⁸ Ibid: xii.

⁵⁹ Ibid: paragraphs 3.6-3.20.

⁶⁰ Ibid: paragraph 3.10.

⁶¹ Ibid: paragraph 3.14.

⁶² Ibid: paragraph 3.4.

⁶³ Ibid: paragraph 3.24.

The report viewed “indigenous self-determination”⁶⁴ as necessarily implying a flow-on right to self-government for First Nations peoples within the constitutional and governmental framework of the Australian nation-state. The report pointed out:⁶⁵

Indigenous self-government is becoming an increasing reality in other federal systems of government, and is a desirable option for Australia. That new self-governing entities exercising a certain degree of sovereignty can be accommodated within our federal system has already been demonstrated in the case of Norfolk Island, and the establishment of the Torres Strait Regional Authority has been a major step along the road of regional self-determination for indigenous Australians.

Group 2 (peoplehood or identity rights) is concerned with “the right to exist as distinct peoples with distinct cultures”.⁶⁶ In other words, group 2 is about the maintenance of Indigenous difference, in opposition to the assimilationist forces of settler colonialism. It is a counter discourse to the settler-colonial logic of elimination. Group 3 (territory and resource rights) is concerned with First Nations peoples’ land rights, including the right to own and use the resources of their lands⁶⁷ The report asserted: “The rights which indigenous peoples can exercise over their land should not be constrained by existing models of non-indigenous land ownership.”⁶⁸ This statement appears to be referring, among other things, to the general rule governing ownership of subsurface resources in Australia. As the Crown owns such resources,⁶⁹ the land ownership rights asserted here by ATSIC for First Nations peoples would include ownership of subsurface resources, as opposed to Crown ownership of them. This means that petroleum and mineral resources legislation (including land rights legislation) reserving ownership of such resources to the Crown will have to be amended so as not to be applicable to collectively-owned First Nations (statutory title/native title) land.

Category 2 (recognition and empowerment) comprises eight groups of issues: (1) constitutional reform, (2) political representation, (3) reparations and compensation, (4) regional agreements, (5) First Nations peoples self-government, (6) treaty, (7) symbolism and First Nations peoples, and (8) information and awareness. Group (1) seeks constitutional recognition of First Nations peoples and their attendant rights as the Indigenous peoples of

⁶⁴ Ibid: paragraph 3.23.

⁶⁵ Ibid: paragraph 3.31.

⁶⁶ Ibid: paragraph 3.4; paragraphs 3.34-3.41.

⁶⁷ Ibid: paragraph 3.4.

⁶⁸ Ibid: paragraph 3.42.

⁶⁹ Davies 2015: 17. See also Hepburn 2011.

Australia.⁷⁰ Group (2) argues for First Nations peoples to be accorded reserved representation in the Commonwealth Parliament and in State/Territory Parliaments, and in Local Government councils.⁷¹ Group (3) demands compensation for “past dispossession of land and dispersal of the indigenous population.”⁷² Group (4) advocates the suitability of regional agreements in “settling a range of social justice issues on a regional basis.”⁷³ Group (5) raises the issue of First Nations self-government again (in the context of the report’s Category (2) recommendations)⁷⁴ Group 6 asserts the need for a treaty approach in setting out “the ground rules for relationships between indigenous and non-indigenous Australians based on justice and equity and the proper recognition of indigenous rights.”⁷⁵ Group (7) deals with symbolic issues: recognition of First Nations flags and the adoption of a First Nations national day.⁷⁶ Group (8) is about measures to promote positive awareness among non-Indigenous communities about First Nations issues.⁷⁷

Category (3) (citizenship entitlements) comprises four groups of issues relating to citizenship entitlements: (1) access and equity, (2) reform of Commonwealth/State financial relations, (3) functional areas, (4) other priority areas. Group (1) is concerned with ensuring that First Nations peoples do in fact benefit equally from the Commonwealth Government’s “commitment to the principle that every resident of Australia should have equal access to and an equitable share of the resources managed by Government on behalf of the community”.⁷⁸ Group (2) argues for reforming Commonwealth/State financial relations, so as to ensure that funding strategies for Commonwealth/State governmental programs and services facilitate equal access to and enjoyment of such programs and services by First Nations peoples.⁷⁹ Group (3) is concerned with equality of treatment and outcome for First Nations peoples in what the

⁷⁰ ATSIC 1995: paragraphs 4.1-4.18.

⁷¹ Ibid: paragraphs 4.19-4.31.

⁷² Ibid: paragraph 4.32, paragraphs 4.33-4.46.

⁷³ Ibid: paragraph 4.49, paragraphs 4.47-4.58.

⁷⁴ Ibid: paragraphs 4.59-4.78.

⁷⁵ Ibid: paragraph 4.79, paragraphs 4.80-4.87.

⁷⁶ Ibid: paragraphs 4.88-4.96. First Nations flags were recognised in 1995 under the provisions of the Commonwealth *Flags Act 1953*.

⁷⁷ Ibid: paragraphs 4.97-4.106.

⁷⁸ Ibid: paragraph 5.1, paragraphs 5.2-5.6.

⁷⁹ Ibid: paragraphs 5.7-5.41.

report described as “functional areas”: housing and infrastructure; health; law and justice; and sport and recreation.⁸⁰ Group (4) deals with specific issues concerning First Nations women.⁸¹

Category (4) (cultural integrity and heritage protection) comprises seven groups of issues relating to the maintenance of First Nations peoples’ cultural integrity and protection of their heritage. These are (1) protection of culturally significant areas and sites, (2) protection of movable cultural property, (3) protection of intellectual property, (4) recognition of customary laws, (5) environmental protection, (6) maintenance and revival of languages, and (7) media and communications services. Group (1) is about ensuring adequate protection of First Nations culturally significant areas and sites, and the need for First Nations to be involved in the management and control of such areas and sites.⁸² Group (2) is concerned with ownership and control and return of First Nations peoples’ movable cultural material or property, including ancestral remains.⁸³ Group (3) seeks to ensure adequate protection of both individual (artists, authors and designers) and communal intellectual property rights. Communal intellectual property right would cover “images expressed in cave art, weaving techniques and forms of technology, traditional designs and motifs, forms of ceremonial practice, traditional knowledge [concerning] flora and fauna, conservation techniques [and] traditional medicine.”⁸⁴ Group 4 asserts the need for recognition of First Nations peoples’ customary laws,⁸⁵ viewed by the report as constituting “an integral and central part” of First Nations peoples’ cultures and identities.⁸⁶ Group (5) is about ensuring adequate participation by First Nations peoples in environmental management and protection, including involvement in public management of land and resources, and wildlife conservation.⁸⁷ Group (6) asserts the need for maintenance and revival of First Nations languages, viewed by the report as constituting “an integral part of cultural identity.”⁸⁸ Group (7) argues for the need to establish “a viable broadcasting and communications infrastructure”, which the report regarded as “a vital element in the promotion

⁸⁰ Ibid: paragraphs 5.42-5.80.

⁸¹ Ibid: paragraphs 5.81-5.85.

⁸² Ibid: paragraphs 6.6-6.21.

⁸³ Ibid: paragraphs 6.22-6.33.

⁸⁴ Ibid: paragraph 6.34, paragraphs 6.35-6.38.

⁸⁵ Ibid: paragraphs 6.39-6.59.

⁸⁶ Ibid: paragraph 6.39.

⁸⁷ Ibid: paragraphs 6.60-6.75.

⁸⁸ Ibid: paragraph 6.76, paragraphs 6.77-6.88.

and protection” of First Nations peoples “cultural identities, and in ensuring [their] equitable access ... to culturally appropriate media and communications services.”⁸⁹

Category (5) (economic development) argues for the establishment of appropriate strategies, including funding-support and incentives, “to increase the participation of [First Nations peoples] in Australian economic life.”⁹⁰ Such strategies must recognise that an “important element” in this issue “is the link between sovereign control of Aboriginal lands and economic development.”⁹¹ However, as the report pointed out: “A particular difficulty is faced by indigenous people in developing enterprises on Aboriginal land because of its inalienability.”⁹² This is because: “It is impossible to raise funds using land as collateral.”⁹³ Thus, as the report acknowledged: “There are no easy answers to indigenous economic development.”⁹⁴ The report saw the Commonwealth Government as having a fundamental role in this regard. It stated: “The implications of greater levels of indigenous autonomy or sovereign control of Aboriginal lands for economic development in both urban and rural areas warrant serious consideration by the Commonwealth Government.”⁹⁵

In UNDRIP terms, ATSIC’s dual approach to asserting First Nations’ peoples’ citizenship rights as well as their Indigenous rights in within the express contemplation of UNDRIP Article 5.⁹⁶ The provision reads:

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

As noted above, ATSIC asserted the entitlement of First Nations peoples, as Australian citizens, to equitable enjoyment of such goods and services as health, housing, employment, education and training, economic development, and democratic rights, and to an equitable share of public financial resources. This assertion finds express support in the following UNDRIP provisions:

⁸⁹ Ibid: paragraph 6.89, paragraphs 6.90-6.97.

⁹⁰ Ibid: paragraph 7.1, paragraphs 7.2-7.71.

⁹¹ Ibid: paragraph 7.8.

⁹² Ibid: paragraph 7.13.

⁹³ Ibid.

⁹⁴ Ibid: paragraph 7.18.

⁹⁵ Ibid: paragraph 7.19.

⁹⁶ See Maguire 2014: 110; Weller 2018: 145.

- (a) Article 21(1) – First Nations peoples’ right, without discrimination, to improvement of economic and social conditions including in education, employment, vocational training and retraining, housing, sanitation, health and social security.⁹⁷
- (b) Article 23 – First Nations peoples’ right to determine and develop priorities and strategies in exercising their right to development.⁹⁸
- (c) Article 24 – First Nations individuals’ right, without discrimination, to all social and health services.⁹⁹

The underlying aim of ATSIC’s proposed package of social justice measures was to set out a program for restructuring the social, economic and political relationships between the Australian nation-state and Indigenous Australia. The following statements make this fundamental decolonisation objective quite clear:

This report is about recognition, rights and reform.¹⁰⁰

It is about recognition of the unique place of Aboriginal and Torres Strait Islander peoples in Australian history and society today. It is about the rights of Australia’s indigenous peoples. It is about the further reforms necessary to secure and underpin those rights and to ensure they can be exercised and enjoyed by Aboriginal and Torres Strait Islander peoples.¹⁰¹

Our focus is on institutional, structural, collaborative, cooperative reform. It is about a fundamental shift from welfare to basic rights, from dependence to autonomy, from government assistance to power. Central to the social justice agenda is self-determination.¹⁰²

There is no right more fundamental for indigenous peoples than that of self-determination.¹⁰³

It is central to a social justice package that policies, institutional structures and legislation should operate to empower indigenous peoples and provide for collective rights of indigenous peoples.¹⁰⁴

⁹⁷ See Pérez-Bustillo and Hohmann 2018: 483-485.

⁹⁸ See Ibid.

⁹⁹ See Ibid.

¹⁰⁰ ATSIC 1995: ix.

¹⁰¹ Ibid.

¹⁰² Ibid: ix-x.

¹⁰³ Ibid: paragraph 3.24.

¹⁰⁴ Ibid: para. 3.25.

The implementation of the decolonising agenda was to be guided and sustained by a set of principles – described as *Principles for Indigenous Social Justice and the Development of Relations Between the Commonwealth Government and Aboriginal and Torres Strait Islander Peoples*¹⁰⁵ – which ATSIC proposed should be legislated.¹⁰⁶ I have reproduced these principles in Appendix 9. The principles may be classified into three sets of stipulations. The first set (principle 1) provides for the acceptance and recognition of the Indigenous difference and Indigenous rights of First Nations peoples. Indigenous difference and Indigenous rights are to be accorded constitutional recognition.¹⁰⁷ The second set (principles 2-4) requires the participation by First Nations peoples in decision-making on matters affecting their rights. The third set (principle 5) specifies the attainment of “an agreed and durable settlement of issues” between Australia’s Indigenous and non-Indigenous peoples “as a paramount national objective.” Such a “durable settlement of issues” is to be achieved by means of “a treaty underpinned by regional agreements”.¹⁰⁸ Treaties between First Nations peoples and the Australian nation-state is well within the contemplation of UNDRIP Article 38,¹⁰⁹ which provides:

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

As noted above, ATSIC classified Indigenous rights into three groups under the “overarching principle of self-determination”: (1) “autonomy rights”, (2) “peoplehood or identity rights”, and (3) “territory and resource rights”.¹¹⁰ In the non-secessionist context of ATSIC’s package of proposals, the autonomy rights asserted by ATSIC for First Nations peoples were limited to internal self-determination and self-government in their internal affairs. In other words, First Nations peoples would have their rights to self-determination and self-government recognised within the constitutional and governmental framework of the Australian nation-state. Such rights are affirmed by UNDRIP Article 3, Article 4 and Article 46(1), which respectively provides:

¹⁰⁵ Ibid: 10-11.

¹⁰⁶ Ibid: x, paragraph 1.24 and paragraph 1.26.

¹⁰⁷ Ibid: paragraphs. 4.1-4.18; Recommendations 19-24 (Constitutional Reform): 155-156.

¹⁰⁸ Ibid: paragraphs. 4.79-4.87; Recommendations 46-49 (Negotiation of a Treaty): 160. See also Recommendations 35-37 (Regional Agreements): 158.

¹⁰⁹ See Van Genugten and Lenzerini 2018: 545-546, 555-556.

¹¹⁰ ATSIC 1995: para. 3.4.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 46(1)

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

The conjunctive effect of the above provisions is that Indigenous peoples have the right to internal self-determination and right to self-government in their internal affairs.¹¹¹

On the stand-alone effect of the injunction in Article 46(1) against “any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”, Martin Scheinin and Mattias Åhrén see it as merely a practical solution to overcome “one obstacle for having the UNDRIP adopted.”¹¹² The provision, they argue, is contrary to international law, which does not prohibit a people or group from seeking to secede from the nation-state in which they are residing if the situation they find themselves in “is grave enough”.¹¹³ Marc Weller is of the same view: the “injunction only applies within the terms of [UNDRIP] itself. [It] does not affect the rights and status of Indigenous peoples in general international law.”¹¹⁴

The “peoplehood or identity rights” asserted by ATSIC for First Nations peoples are rights to maintain their Indigenous difference. These rights are affirmed by the following UNDRIP provisions:

¹¹¹ See Quane 2011: 269; Davis 2012a: 461; Maguire 2014: 110; Scheinin and Åhrén 2018: 64-67, 70-73; Weller 2018: 136-137.

¹¹² Scheinin and Åhrén 2018: 66.

¹¹³ Ibid: 72.

¹¹⁴ Weller 2018: 137.

- (a) Article 7(2) – right to live in freedom, peace and security as distinct peoples.¹¹⁵
- (b) Article 8(1) – right not to be subjected to forced assimilation or destruction of culture.¹¹⁶
- (c) Article 11(1) – right to practise and revitalise cultural traditions and customs.¹¹⁷
- (d) Article 12(1) – right to manifest, practise, develop and teach spiritual and religious traditions, customs and ceremonies.¹¹⁸
- (e) Article 13(1) – right to revitalise, use, develop and transmit to future generations histories, languages, oral traditions, and philosophies.¹¹⁹
- (f) Article 31(1) – right to maintain, control, protect and develop cultural heritage.¹²⁰
- (g) Article 33 – right to determine own identity or membership.¹²¹
- (h) Article 34 – right to promote, develop and maintain institutional structures and customs, traditions, procedures, practices and juridical systems.¹²²

Other pertinent UNDRIP cultural rights provisions, supportive of the ATSIC asserted rights of First Nations peoples to exist as distinct peoples with distinct cultures, are:

- (a) Article 14(1) – right to establish and control own educational systems.¹²³
- (b) Article 15(1) – right to dignity and diversity of cultures, traditions, histories and aspirations.¹²⁴

¹¹⁵ See Hohmann 2018: 150-152, 160-163.

¹¹⁶ See Ibid.

¹¹⁷ See Xanthaki 2018: 286-289.

¹¹⁸ See Ibid: 291-293.

¹¹⁹ See Ibid: 291-293.

¹²⁰ See Stoll 2018: 299-300, 303-307.

¹²¹ See Imai and Gunn 2018: 213-214, 230-232.

¹²² See Xanthaki 2018: 294-297.

¹²³ See Graham and Van Zyl-Chavarro 2018: 354-362.

¹²⁴ See Xanthaki 2018: 293-294.

(c) Article 16(1) – right to establish own media in own languages.¹²⁵

Concerning the apparent demand by ATSIC – noted above – for First Nations ownership of subsurface resources as an integral part of their “territory and resource rights”, UNDRIP Article 26(2) would appear to support it. The provision stipulates:

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

However, according to Stefania Errico, as the provision does not expressly specify the resources over which Indigenous peoples have the right “to own, use, develop and control”, it “is bound to be interpreted fairly narrowly, restricting its meaning exclusively to surface resources”.¹²⁶ Errico reached her conclusion “by juxtaposing the language finally adopted in the relevant provisions of [UNDRIP], in the light of their drafting history, with current international, regional and national practice regarding the issue.”¹²⁷ She points out that “international, regional and national practice suggest that ...States do retain ownership of subsoil resources...”¹²⁸ This, as noted above, is the case in Australia. As to the drafting history of UNDRIP, she notes that “indigenous representatives made various [futile] attempts [in the course of the drafting process] at introducing into the text of the [draft UNDRIP] an express reference to subsoil resources.”¹²⁹ Erica-Irene Daes¹³⁰ – in her final report (2004) as the Special Rapporteur for a UN study on the applicability of the concept of permanent sovereignty over natural resources to Indigenous peoples – made a strong, but ultimately unavailing, recommendation that:¹³¹

The draft [UNDRIP] should be amended to include express recognition of indigenous peoples’ permanent sovereignty over natural resources. At a minimum, articles 25 and 26 of the draft should include an express reference to subsurface resources ...

¹²⁵ See Joyce 2018: 329-331.

¹²⁶ Errico 2011: 346.

¹²⁷ Ibid: 331.

¹²⁸ Ibid: 337. See also Charters 2018: 420.

¹²⁹ Errico 2011: 338-340.

¹³⁰ She was the Chair of the Working Group on Indigenous Populations (1984-2001). In this capacity, she “played a major role in developing the draft [UNDRIP] (IWGIA [International Working Group for Indigenous Peoples]: <<https://www.iwgia.org/en/focus/global-governance/2487-in-memory-of-ericairene-daes>>). See also Allen and Xanthaki 2011: 3.

¹³¹ United Nations 2004: paragraph 71.

Therefore, in the light of the drafting history of UNDRIP, there is, according to Errico, “very little room left for arguing that [UNDRIP] differentiates itself from the general practice denying indigenous peoples control over subsoil resources.”¹³²

UNDRIP Article 26(2) would appear to have been intentionally left ambiguous because there was not agreement on its terms. It is capable of different interpretation. It indicates one of the complexities of using UNDRIP (an international declaration drafted for use around the world in different cultural and legal contexts) as a basis for a treaty in one particular jurisdiction. But this potential limitation should not prevent First Nations peoples from raising the issue of control over subsoil resources at the treaty-negotiation table. Article 26(2) could be seen as an example where UNDRIP sets out minimum standards, which should be seen as a floor or platform not as a ceiling.

Daes had argued that the ability of Indigenous peoples “to own, use, develop and control”¹³³ all the natural resources of their land is part of their right to self-determination. She said: “In order to be meaningful this modern concept of self-determination [that is, internal self-determination, as the term is understood in UNDRIP] must logically and legally carry with it the essential right to permanent sovereignty over natural resources.”¹³⁴ Daes defined the term ‘sovereignty’, in relation to “the principle of permanent sovereignty over natural resources”, to mean “legal, governmental control and management authority over natural resources”.¹³⁵ She argued that the principle is applicable to Indigenous peoples for the following reasons:¹³⁶

- (a) Indigenous peoples are colonized peoples in the economic, political and historical sense;
- (b) Indigenous peoples suffer from unfair and unequal economic arrangements typically suffered by other colonized peoples;
- (c) The principle of permanent sovereignty over natural resources is necessary to level the economic and political playing field and to provide protection against unfair and oppressive economic arrangements;
- (d) Indigenous peoples have a right to development and actively to participate in the realization of this right; sovereignty over their natural resources is an essential prerequisite for this; and
- (e) The natural resources originally belonged to the indigenous peoples concerned and were not, in most situations, freely and fairly given up.

¹³² Errico 2011: 340-341.

¹³³ Article 26(2), UNDRIP.

¹³⁴ United Nations 2004: paragraph 17.

¹³⁵ Ibid: paragraph 18.

¹³⁶ Ibid: paragraph. 32.

Daes was highly critical of “legal regimes” that stipulate “subsurface resources ... to be the property of the State”. She said:¹³⁷

Such legal regimes have a distinct and extremely adverse impact on indigenous peoples, because they purport to unilaterally deprive the indigenous peoples of the subsurface resources that they owned prior to colonial occupation and the creation of the present State. Other property owners in the State never owned such resources and thus were never deprived of them. Thus, the system of State ownership of subsurface resources is distinctly discriminatory in its operation as regards indigenous peoples.

In short, what Daes was describing is a significant form of settler-colonial impositions on Indigenous peoples. It deprives Indigenous peoples of meaningful economic and political self-determination.¹³⁸

It should be noted that private ownership of minerals (other than gold and silver¹³⁹) and petroleum were permitted in Australia until towards the end of the nineteenth century.¹⁴⁰ As pointed out by Samantha Hepburn:¹⁴¹

Towards the end of the nineteenth century the private ownership of minerals and petroleum was rejected in Australia in favour of state ownership. Commencing in New South Wales, all states and territories passed legislation reserving all minerals in land for future Crown grants. This legislation operated prospectively, although some jurisdictions introduced retrospective vesting legislation. Retrospective legislation, vesting minerals in the state, exists in South Australia, the Northern Territory, and Victoria. ... In the states where prospective legislation has been introduced, some minerals continue to be owned privately, as a consequence of Crown grants issued in the nineteenth century.

Daes’ above argument/reasoning is applicable to First Nations peoples. Before the settler-colonisation of Australia by the British, First Nations owned all the land/natural resources (including gold and silver) of Australian continent. They were colonised and deprived of ownership of their land/natural resources without their consent.

¹³⁷ Ibid: paragraph 43.

¹³⁸ Ibid: paragraph 58.

¹³⁹ Gold and silver have been treated by the common law as royal minerals since 1568, that is, the Crown retains the prerogative right of ownership in them (Hepburn 2015: 18). Thus, non-Indigenous private landholders in Australia have never owned gold and silver on their land.

¹⁴⁰ Hepburn 2015: 10.

¹⁴¹ Ibid.

There is a strong moral justification for treating the circumstances of First Nations peoples differently from non-Indigenous landholders who have been legislatively deprived of ownership of subsurface resources on their land. And compared to non-Indigenous landholders, whose ownership of subsurface resources on their land has not been legislatively rendered null and void, why should, morally speaking, First Nations landholders be treated differently? Moreover, in relation to gold and silver, why should they be deprived of ownership of these minerals?

Stefania Errico has pointed out the significance of UNDRIP Article 32 in this context.¹⁴² The provision reads:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

According to Errico, the provision “can be said to represent the compromise reached between Indigenous peoples and States with regard to the control and use of natural resources existing in Indigenous territories.”¹⁴³ Article 32(1) is inextricably linked with First Nations peoples’ right to self-determination (Article 3) and the associated right to self-government (Article 4).¹⁴⁴ Errico argues that a proper understanding of the scope of Article 32 requires the following to be borne in mind:

- (1) First Nations peoples have “profound cultural and spiritual relationship” with their lands.¹⁴⁵

¹⁴² Errico 2018.

¹⁴³ Ibid: 432.

¹⁴⁴ Ibid: 432, 446.

¹⁴⁵ Ibid: 433.

- (2) Protection of First Nations peoples’ “rights of ownership and use of their traditional lands, territories, resources is closely related to the need to preserve [their] social, cultural, and economic integrity”.¹⁴⁶

Article 32 reflects the right of a nation-state (if the owner) to extract subsurface resources on First Nations lands. However, as Errico has pointed out, the Article imposes conditions that must be met for extraction of those resources to proceed.¹⁴⁷ Before extraction can take place, as Article 32(2) specifies, First Nations landowners concerned must be consulted and their free and informed consent obtained. Although Article 32(2) does not confer on First Nations landowners the right to veto the extraction,¹⁴⁸ a nation-state must, nonetheless, pay full regard to their right, under Article 32(1), to decide priorities/strategies for developing their lands. Errico argues that this right and the matters referred to above (cultural and spiritual relationship of First Nations peoples with their lands, and preservation of their social, cultural and economic integrity) constitute a substantial constraint on the right of a nation-state to extract subsurface resources on First Nations lands.¹⁴⁹

Errico has also referred to two issues, in this context, about which UNDRIP is silent. These are: (1) the participation of First Nations landowners in impact assessment studies on extraction of subsurface resources on their land,¹⁵⁰ and (2) benefit-sharing arrangements over those resources.¹⁵¹ She argues that both issues are properly part of the matters to be taken into account in the consultation process under Article 32(2).¹⁵² In other words, First Nations people should be involved in impact assessment studies and should be entitled to benefit-sharing arrangements.

James Anaya, in his then capacity as the UN Special Rapporteur on the rights of Indigenous peoples, has commented on the effect of UNDRIP Article 32(1) in relation to the extraction and development of subsurface resources. He said:¹⁵³

¹⁴⁶ Ibid.

¹⁴⁷ Ibid: 436.

¹⁴⁸ Ibid: 440.

¹⁴⁹ Ibid: 446-447.

¹⁵⁰ Ibid: 448.

¹⁵¹ Ibid: 450.

¹⁵² Ibid: 456.

¹⁵³ United Nations 2013: paragraph 9.

As part of their right to self-determination, ‘indigenous peoples have the right to determine priorities and strategies for the development or use of their lands and territories’. This right necessarily implies a right of indigenous peoples to pursue their own initiatives for resource extraction within their territories if they so choose. In cases in which indigenous peoples retain ownership of all the resources, including mineral and other subsurface resources, within their lands, ownership of the resources naturally includes the right to extract and develop them. But even where the State claims ownership of subsurface or other resources under domestic law, indigenous peoples have the right to pursue their own initiatives for extraction and development of natural resources within their territories, at least under the terms generally permitted by the State for others.

Therefore, in line with the provision of UNDRIP Article 32(1), Anaya made the following recommendations:¹⁵⁴

80. A preferred model for natural resource extraction within indigenous territories is one in which indigenous peoples themselves control the extractive operations, through their own initiatives and enterprises. Indigenous peoples may benefit from partnerships with responsible, experienced and well-financed non-indigenous companies to develop and manage their own extractive enterprises.

81. When indigenous peoples choose to pursue their own initiatives for natural resource extraction within their territories, States and the international community should assist them to build the capacity to do so, and States should privilege indigenous peoples’ initiatives over non-indigenous initiatives.

ATSIC’s assertion of the rights of First Nations peoples to ownership and control of *all* resources of their collectively-owned (statutory title/native title) land was a demand for the removal of a significant impediment to a decolonisation of the power relationship between the Australian nation-state and Indigenous Australia in relation to management and control of their lands.

The Keating Government could not attend to ATSIC’s recommended social justice measures as it lost power at the general election in March 1996. And such proposals were not pursued by the incoming Coalition Government under John Howard.¹⁵⁵

The next section examines the reconciliation program drawn up by CAR. This program was essentially similar to ATSIC’s. As in the case of ATSIC’s social justice measures, CAR

¹⁵⁴ Ibid: paragraphs 80 and 81.

¹⁵⁵ ATSI Social Justice Commissioner 2001: 46; Appleby and Brennan 2017. The Howard Government was in power until 24 November 2007 (<<http://primeministers.naa.gov.au/timeline/results.aspx>>).

advocated equitable enjoyment by First Nations peoples of all goods and services available to other Australian citizens, and a treaty approach to decolonising the Australian nation-state.

4 Reconciliation Measures

The Bob Hawke Labor Government established the CAR as a statutory authority in September 1991 – for a 10-year term – under the *Council for Aboriginal Reconciliation Act 1991* (CAR Act).¹⁵⁶ CAR’s fundamental task was “to promote a process of reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community”.¹⁵⁷ CAR carried out most of its work during the term of the Labor Government under Paul Keating, who took over from Bob Hawke as Prime Minister on 20 December 1991, and during part of the tenure of the succeeding Commonwealth Coalition Government under John Howard as from March 1996 (in power until December 2007). CAR submitted its final report to the Howard Government and Commonwealth Parliament on 4 December 2000.¹⁵⁸

One of the specific functions that CAR was required to perform in order to discharge its responsibility was “to consult Aborigines and Torres Strait Islanders and the wider Australian community on whether reconciliation would be advanced by a formal document or formal documents of reconciliation”.¹⁵⁹ Following such consultation, CAR was “to report to the Minister [in this case the Prime Minister]¹⁶⁰ on the views of Aborigines and Torres Strait Islanders and of the wider Australian community as to whether such a document or documents would benefit the Australian community as a whole”.¹⁶¹ If CAR considered “there would be such a benefit”, CAR was obliged to “make recommendations to the Minister on the nature and content of, and manner of giving effect to, such a document or documents”.¹⁶² CAR found that its “very extensive public consultation process”¹⁶³ had produced positive outcomes.¹⁶⁴ CAR

¹⁵⁶ In force from 2 September 1991 to 1 January 2001 (section 4).

¹⁵⁷ CAR Act: section 5.

¹⁵⁸ CAR 2000b.

¹⁵⁹ CAR Act: section 6(1)(g).

¹⁶⁰ CAR 2000b: 105.

¹⁶¹ CAR Act: section 6(1)(h).

¹⁶² Ibid.

¹⁶³ CAR 2000b: 105.

¹⁶⁴ Ibid: 26-35.

drew up two ‘documents of reconciliation’, entitled respectively *Australian Declaration Towards Reconciliation* and *Roadmap for Reconciliation*.¹⁶⁵

The Howard Government published its response to CAR’s final report in September 2002.¹⁶⁶ I examine the Government’s response to CAR’s documents of reconciliation in the following two subsections.

CAR’s *Australian Declaration Towards Reconciliation* and the Howard Government’s version of the Declaration are set out in Table 6.1 (my numbering of the statements).

Table 6.1
Australian Declaration Towards Reconciliation

CAR version of Declaration	Government’s version of Declaration ¹⁶⁷
[1] We, the peoples of Australia, of many origins as we are, make a commitment to go on together in a spirit of reconciliation.	[1] Same
[2] We value the unique status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of lands and waters.	[2] Same
[3] We recognise this land and its waters were settled as colonies without treaty or consent.	[3] Same
[4] Reaffirming the human rights of all Australians, we respect and recognise continuing customary laws, beliefs and traditions.	[4] Reaffirming the human rights of all Australians, we respect the cultures and beliefs of the nation’s first people and recognise the place of traditional laws within these cultures.
[5] Through understanding the spiritual relationship between the land and its first peoples, we share our future and live in harmony.	[5] Same
[6] Our nation must have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves.	[6] Same
[7] Reconciliation must live in the hearts and minds of all Australians. Many steps have been taken; many steps remain as we learn our shared histories.	[7] Same
[8] As we walk the journey of healing, one part of the nation apologises and expresses its sorrow and sincere regret for the injustices of the past, so the other part accepts the apologies and forgives.	[8] As we walk the journey of healing, Australians express their sorrow and profoundly regret the injustices of the past and recognise the continuing trauma and hurt still suffered by many Aboriginals and Torres Strait Islanders.
[9] We desire a future where all Australians enjoy their rights, accept their responsibilities, and have the opportunity to achieve their full potential.	[9] We desire a future where all Australians enjoy equal rights, live under the same laws and share

¹⁶⁵ Ibid: Appendix 1.

¹⁶⁶ Commonwealth Government 2002.

¹⁶⁷ Ibid: 60.

CAR version of Declaration	Government's version of Declaration ¹⁶⁷
	opportunities and responsibilities according to their aspirations.
[10] And so, we pledge ourselves to stop injustice, overcome disadvantage, and respect that Aboriginal and Torres Strait Islander peoples have the right to self-determination within the life of the nation.	[10] And so, we pledge ourselves to stop injustice, overcome disadvantage and respect the right of Aboriginal and Torres Strait Islander peoples, along with all Australians to determine their own destiny.
[11] Our hope is for a united Australia that respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all.	[11] None

As can be seen from Table 6.1, the Howard Government accepted CAR's assertion – in statement [2] – of “the unique status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of [Australian] lands and waters.”¹⁶⁸ The Government also accepted CAR's narrative – in statement [3] – concerning the imposition of settler-colonialism on Indigenous Australia.¹⁶⁹ But it rejected CAR's proposal – in statement [4] – for recognition of “continuing [Indigenous] customary laws”. This rejection is reflected in its version of statement [4]. The Government believed that all Australians should be “equally subject to a common set of laws.”¹⁷⁰ This assimilationist view is reiterated in the Government's version of statement [9].¹⁷¹ The Government also refused to accept CAR's proposal for a formal apology to First Nations peoples for past injustices perpetrated against them. This refusal is reflected in the Government's version of statement [8]. According to the Government, such “an apology could imply that present generations are in some way responsible and accountable for the actions of earlier generations”.¹⁷² The Government rejected CAR's assertion of the right of First Peoples to self-determination “within the life of the nation”. This rejection is reflected in the Government's version of statement [10]. According to the Government, it understood the term ‘self-determination’ to imply the unacceptable “possibility of a separate Indigenous state or states”.¹⁷³

However, the Howard Government did at the time (2002) indicate that “it unequivocally supports the principle of Indigenous people having opportunities to exercise control over

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid: 61.

¹⁷¹ Ibid: 60.

¹⁷² Commonwealth Government 2002: 61.

¹⁷³ Ibid.

aspects of their affairs (as reflected in the establishment and operation of ATSIC for example)".¹⁷⁴ Yet, the Howard Government abolished ATSIC in 2005.¹⁷⁵ As pointed out by Jane Robbins,¹⁷⁶ this outcome was the actualisation of John Howard's original position in relation to ATSIC when he was leader of the Opposition. He was opposed to the establishment of ATSIC. In a parliamentary statement, in 1989, Howard urged the Labor Government not to implement the ATSIC legislation in the following terms:¹⁷⁷

If there is one thing, above everything else, that we in this Parliament should regard as our sacred and absolute duty, it is the preservation of the unity of the Australian people. The ATSIC legislation strikes at the heart of the unity of the Australian people. In the name of righting the wrongs done against Aboriginal people, the legislation adopts the misguided notion of believing that if one creates a parliament within the Australian community for Aboriginal people, one will solve and meet all of those problems.

The only way to bring about a proper accord between Aboriginal and non-Aboriginal Australians is to embrace Aborigines fully within the Australian community; to treat their deprivation and their disadvantage – which I do not dispute – as a manifest responsibility of the entire Australian community. The Government will not lift up Aborigines, embrace them, and right their wrongs by signing treaties or creating black parliaments. It will bring upon them more distrust, more hostility and more misunderstanding. I ask the Government not to go ahead with the legislation.

The above 1989 statements indicated very clearly John Howard's assimilationist settler-nationalist opposition to the decolonisation of the Australian nation-state. That this opposition had not abated by 2002¹⁷⁸ was evidenced by the Howard Government's response to the reconciliation proposals contained in CAR's final report.¹⁷⁹ Solutions for the 'deprivation' and 'disadvantage' of First Nations peoples were to be found within the settler-colonial embrace. Self-determination would not deliver First Nations advancement.

CAR's second document of reconciliation, the *Roadmap for Reconciliation*, is reproduced in Appendix 10. CAR's recommendations on the manner of giving effect to the

¹⁷⁴ Ibid.

¹⁷⁵ ATSIC was abolished effective 30 June 2005: *Aboriginal and Torres Strait Islander Commission Amendment Act 2005*.

¹⁷⁶ Robbins 2007: 322.

¹⁷⁷ Hansard (House of Representatives) – Administration of Aboriginal Affairs: Ministerial Statement – 11 April 1989: 1332-1333.

¹⁷⁸ Commonwealth of Australia 2002.

¹⁷⁹ CAR 2000b.

Australian Declaration Towards Reconciliation and the *Roadmap for Reconciliation*, and the response of the Howard Government to them, are set out in Table 6.2.

Table 6.2

CAR's recommendations on the manner of giving effect to the documents of reconciliation and the Commonwealth Government Response to them¹⁸⁰

No	Recommendation	Response
[1]	The Council of Australian Governments (COAG) agrees to implement and monitor a national framework whereby all Governments and the Aboriginal and Torres Strait Islander Commission (ATSIC) work to overcome Aboriginal and Torres Strait Islander peoples' disadvantage through setting program performance benchmarks that are measurable (including timelines), are agreed in partnership with Aboriginal and Torres Strait Islander peoples and communities and are publicly reported.	Accepted ¹⁸¹
[2]	All parliaments and local Governments pass formal motions of support for the <i>Australian Declaration Towards Reconciliation</i> and the <i>Roadmap for Reconciliation</i> , enshrine their basic principles in appropriate legislation, and determine how their key recommendations can best be implemented in their jurisdictions.	Rejected ¹⁸²
[3]	The Commonwealth Parliament prepare legislation for a referendum which seeks to: (a) recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution; and (b) remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.	Rejected ¹⁸³
[4]	Recognising that the formal reconciliation process over the last decade has achieved much and has helped bring Australians together, all levels of Government, non-Government, business, peak bodies, communities and individuals commit themselves to continuing the process and sustaining it by: (a) affirming the Australian Declaration Towards Reconciliation and actioning the Roadmap for Reconciliation; (b) providing resources for reconciliation activities and involving Aboriginal and Torres Strait Islander peoples in their work; (c) undertaking education and public-awareness activities to help improve understanding and relations between Aboriginal and Torres Strait Islander peoples and the wider community; and (d) supporting Reconciliation Australia, the foundation which has been established to maintain a national leadership focus for reconciliation, report on progress, provide information and raise funds to promote and support reconciliation.	Accepted [qualified support for (a)] ¹⁸⁴

¹⁸⁰ The recommendations were set out in Chapter 10 of CAR's Final Report. For ease of reference in discussion, I have converted the dot-points used in the original in recommendations [3], [4] and [5] to alphabetical numbering.

¹⁸¹ Commonwealth Government 2002: 56.

¹⁸² Ibid: 61.

¹⁸³ Ibid: 69-70.

¹⁸⁴ Ibid: 71.

No	Recommendation	Response
[5]	Each Government and parliament: (a) recognise that this land and its waters were settled as colonies without treaty or consent and that to advance reconciliation it would be most desirable if there were agreements or treaties; and (b) negotiate a process through which this might be achieved that protects the political, legal, cultural and economic position of Aboriginal and Torres Strait Islander peoples.	Rejected ¹⁸⁵
[6]	That the Commonwealth Parliament enact legislation (for which the Council has provided a draft in this report) to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved.	Rejected ¹⁸⁶

As can be seen from Table 6.2, the Howard Government rejected four of the six recommendations: [2], [3], [5] and [6]. In relation to recommendation [2], the *Roadmap for Reconciliation* contained four strategies:¹⁸⁷ (1) *National Strategy to Sustain the Reconciliation Process*, (2) *National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights*, (3) *National Strategy to Overcome Disadvantage*, and (4) *National Strategy for Economic Independence*. The Government supported “the overall direction and intention” of strategies (3), (4) and (1), and discussed them in that order.¹⁸⁸ Strategy (3) focused on the need to address the comparative disadvantage of First Nations peoples in the areas of education, employment, health, housing, and law and justice. Strategy (4) sought to promote the attainment of economic independence among First Nations peoples to the same levels as those among non-Indigenous Australians. In other words, strategies (3) and (4) were concerned with enabling First Nations peoples to enjoy their citizenship entitlements on par with non-Indigenous Australians. Strategy (1) was concerned with “measures to address practical, cultural and spiritual dimensions of reconciliation”¹⁸⁹, that is, socialisation measures designed to promote the internalisation of ‘reconciliation’ among individuals and institutions.

However, the Howard Government refused to endorse strategy (2). The issue, in relation to strategy (2), that was of particular concern to the Government was the following proposal:¹⁹⁰

¹⁸⁵ Ibid.

¹⁸⁶ Ibid: 68.

¹⁸⁷ Appendix 10.

¹⁸⁸ Commonwealth Government 2002: 61-66.

¹⁸⁹ Appendix 10; Commonwealth Government 2002: 65.

¹⁹⁰ Appendix 10: Item [d] under ‘Legislation’.

Governments establish legislative processes to deal with the ‘unfinished business’ of reconciliation, allowing for negotiated outcomes on matters such as Indigenous rights, self-determination within the life of the nation, and constitutional reform.

The Howard Government regarded the above proposal as seeking to “entrench additional, special or different rights for one part of the community”¹⁹¹ The Government could not support such an objective, and, according to it, neither would that objective be acceptable to “the general community”¹⁹². Thus, recommendation [2] was unacceptable to the Government. The Government indicated that it was not unsupportive of “a continuing dialogue on the unfinished business of reconciliation”, as such, but such dialogue should take place “outside the confines of a legislative process”.¹⁹³

Recommendation [3] dealt with matters that were also included in strategy (2).¹⁹⁴ Regarding recommendation [3](a), the Government pointed to the failed 6 November 1999 referendum on this very issue as its reason for refusing to revisit the matter.¹⁹⁵ As for recommendation [3](b), the Government indicated that it was “generally supportive of the proposal to remove [section 25]” and “would be disposed to put the matter to a referendum at an appropriate time”.¹⁹⁶ The Howard Government was in power for another five years,¹⁹⁷ but no such referendum was held during that time. The Government viewed the second part of recommendation [3](b) – the introduction of a new constitutional provision “making it unlawful to adversely discriminate against any people on the grounds of race” – as involving the deletion of section 51(xxvi)¹⁹⁸ of the Constitution and the inclusion of specific rights in the Constitution akin to a Bill of Rights.¹⁹⁹ Regarding section 51 (xxvi) – although “this power has the capacity to be used to discriminate against Indigenous Australians”²⁰⁰ – the Government was of “the

¹⁹¹ Commonwealth Government 2002: 67.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*: 68.

¹⁹⁴ Appendix 10: Items [b] [i] and [ii] under ‘Australian Constitution’.

¹⁹⁵ Commonwealth Government 2002: 69. See also Gunstone 2000: 262.

¹⁹⁶ Commonwealth Government 2002: 70.

¹⁹⁷ Until 24 November 2007 [<http://primeministers.naa.gov.au/timeline/results.aspx>]

¹⁹⁸ The provision reads: “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good Government of the Commonwealth with respect to: (xxvi) the people of any race for whom it is deemed necessary to make special laws”.

¹⁹⁹ Commonwealth Government 2002: 70.

²⁰⁰ As demonstrated, for example, in the enactment of the Bridge Act, which was introduced by the newly elected Howard Government to overcome Ngarrindjeri people’s opposition to the construction of the Hindmarsh Island Bridge. The Act prohibited the application of the Heritage Protection Act to the construction of the Bridge. Ngarrindjeri opponents of the construction were thereby precluded from seeking a Ministerial declaration under

view that this legislative power is necessary to advance the interests of Indigenous Australians”, and should therefore be retained.²⁰¹ As to the constitutional incorporation of a Bill-of-Rights type of provisions, the Government argued that it was unnecessary to do so. “Australia already has an effective system in place [that is, the RDA] to prevent discrimination on the basis of race.”²⁰² It is to be noted that the Howard Government suspended the application of the RDA in 1998 for its amendment to the *Native Title Act 1993* and again in 2007 for its Northern Territory Emergency Response program.²⁰³

The Howard Government addressed recommendations [5] and [6] conjunctively.²⁰⁴ As can be seen from Table 6.2, the outcome envisaged by recommendation [5] was the negotiation of “agreements or treaties” that would facilitate “reconciliation”. The outcome sought by recommendation [6] was the enactment of Commonwealth legislation to “put in place a process” designed to deliver “an agreement [or a] treaty” by which “unresolved issues of reconciliation can be resolved”. In rejecting the notion of a treaty embodied in those recommendations, the Howard Government argued “rather than offering closure, pursuit of a treaty would be a recipe for ongoing disputation and litigation as has happened ... elsewhere”.²⁰⁵ The idea of a treaty between the Commonwealth or a State or a Territory and First Nations “would undermine the concept of a single Australian nation ... and would not best harness the positive environment that now exists in relation to reconciliation”.²⁰⁶ The draft legislation²⁰⁷ prepared by CAR for the purpose of recommendation [6] was unacceptable to the Howard Government not only because it embodied the notion of a treaty but also for the reason that.²⁰⁸

It envisages an agenda encompassing self-government, recognition of customary law, compensation and reparation, comprehensive settlement of native title and other land claims, deaths in custody and separated children issues, a bill of rights, and constitutional recognition.

the latter Act to stop the construction. The High Court found the Bridge Act to be constitutionally valid (*Kartinyeri v The Commonwealth of Australia* (1998) 195 CLR 337). See Chapter 4.

²⁰¹ Commonwealth Government 2002: 70.

²⁰² *Ibid.*

²⁰³ Williams 2015.

²⁰⁴ Commonwealth Government 2002: 68-69, 71-72.

²⁰⁵ *Ibid.*: 68.

²⁰⁶ *Ibid.*: 72.

²⁰⁷ CAR 2000: Appendix 3.

²⁰⁸ Commonwealth Government 2002: 68.

The above observation reflects the “including-but-not-limited to” definition of “unresolved issues for reconciliation” in the definition section²⁰⁹ of the draft legislation that CAR had prepared and the accompanying “Explanatory Notes”.²¹⁰

What is clear from the Howard Government’s response to the *Australian Declaration Towards Reconciliation* and the four strategies of the *Roadmap for Reconciliation* is that it did not support the inclusion of Indigenous rights as matters that should also be addressed in furthering the cause of the reconciliation process. The Howard Government saw the pursuit of Indigenous rights by First Nations peoples as destructive of national cohesion. The wider community would not tolerate enjoyment of special rights, in addition to normal citizenship rights, by one section of the community.²¹¹ His Government, said Howard, “has always stressed that practical measures to address the profound economic and social disadvantage of many indigenous Australians are at the heart of a successful reconciliation process.”²¹² The Government endorsed CAR’s *National Strategy to Overcome Disadvantage* and *National Strategy for Economic Independence* precisely because both dealt with “practical measures”. The Government would:²¹³

... continue to listen to and act on views that serve to further the cause of reconciliation based on the fundamental principle of equality for all Australians whilst recognising the unique position of Aboriginal and Torres Strait Islander peoples in Australian society.

However, it would not be prepared to entertain views about their right to self-determination. It viewed the concept of self-determination as a “right to unilaterally challenge national sovereignty” and the “responsibility of government to ensure that all Australians have equality of opportunity and access to services”.²¹⁴ The Government could not “relinquish responsibility for and control over those aspects of Indigenous wellbeing over which it rightly has jurisdiction in common with its responsibilities to all Australian citizens.”²¹⁵ In short, the Howard Government did not want First Nations peoples to be free from settler-colonialism.

²⁰⁹ CAR 2000: Appendix 3 (at page 167)

²¹⁰ Ibid (at page 177).

²¹¹ Commonwealth Government 2002: 67.

²¹² Howard 2000: 91.

²¹³ Commonwealth Government 2002: 72.

²¹⁴ Ibid: 69.

²¹⁵ Ibid.

First Nations leaders have strongly criticised the “practical reconciliation” approach of the Howard Government. Geoff Clark, who was the last chairperson of ATSIC (2000-2004), saw the Howard Government strategy for what it was, a settler-colonial assimilationist program.²¹⁶ He pointed out in 2000: “Improvements in citizenship entitlements – health, housing, education, employment – serve to mark progress towards a level playing field but the ultimate goal must be commitment to respect the specific rights of indigenous peoples.”²¹⁷ For Clark, the product of the reconciliation process should be a treaty that must “address the structural relationship between the Aboriginal and Torres Strait Islander peoples and the Australian state.”²¹⁸ In other words, Clark was asserting that the reconciliation process must be fundamentally about decolonising the Australian nation-state.

The reconciliation process, as Patrick Dodson (the founding chairperson of CAR, 1991–1997) had pointed out, should have been “a doorway to a political settlement” between the Australian nation-state and First Nations.²¹⁹ Like Clark, Dodson was expecting that the reconciliation process would ultimately lead to a restructuring of the political, social and economic relationships between First Nations and the Australian nation-state, that is, to the decolonisation of the Australian nation-state. However, the Howard Government’s coming to power in March 1996 resulted in the shutting of the decolonisation doorway. During its 11 years of power, the Howard Government laid down the groundwork for furthering the absorption of First Nations peoples into the settler society.²²⁰ “Practical reconciliation,” Dodson pointed out, “became the Government’s weasel worded mantra to discredit the inherent rights of Indigenous people.”²²¹ Therefore, because of the Howard Government’s assimilationist policies on First Nations affairs, Australia’s First Nations peoples were still awaiting the “resolution of our Unfinished Business”.²²² Like Clark, Dodson too was of the view that a resolution of such “unfinished business” should be by way of a treaty.²²³

The *Australian Declaration Towards Reconciliation* (Table 6.1) and the *Roadmap for Reconciliation* (Appendix 10), together with CAR’s recommendations (Table 6.2) on how they

²¹⁶ Clark 2000: 229.

²¹⁷ Ibid: 232-233.

²¹⁸ Ibid: 233.

²¹⁹ Dodson 2007: 21.

²²⁰ Ibid: 25.

²²¹ Ibid: 26.

²²² Ibid: 28.

²²³ Ibid.

are to be given effect, are fundamentally about the restructuring of the social, economic and political relationships of First Nations and the Australian nation-state. As ATSIC had done, CAR was recommending a program for decolonising the Australia nation-state, to be achieved by means of a treaty or treaties. Such a treaty or treaties would grant First Nations peoples the right to self-determination and the flow-on right to self-government within the constitutional framework of the Australian nation-state. Such a program of decolonisation is clearly within the articles and intent of UNDRIP. In particular, as noted above, in relation to the respective call for a treaty by the Barunga Statement and ATSIC, treaties between First Nations peoples and the Australian nation-state are within the contemplation of Article 38 (measures to achieve the ends of UNDRIP).²²⁴

The next section deals with the fourth of the decolonising proposals that I examine in this chapter – that contained in the Uluru Statement from the Heart. In the Uluru Statement, the First Nations National Constitutional Convention made three demands. One, the establishment of a First Nations parliamentary advisory body to be enshrined in the Commonwealth Constitution. Two, the granting of the right to self-determination to First Nations and the adoption of a treaty approach to decolonisation. Three, the emplacement of a national truth-telling process concerning the effects on First Nations peoples of the imposition on them settler colonialism.

5 The Uluru Statement from the Heart

In December 2015, the Prime Minister at the time (Malcolm Turnbull) and the Opposition Leader at the time (Bill Shorten), jointly appointed a Referendum Council to advise them on constitutional amendment options to be put to a referendum.²²⁵ The Council was required to conduct a national consultation and community engagement process. This was done through a series of ‘First Nations Regional Dialogues’ – 12 in all – in various parts of Australia, between December 2016 and May 2017, and a First Nations National Constitutional Convention at Uluru on 23–26 May 2017.²²⁶

²²⁴ See Van Genugten and Lenzerini 2018: 545-546, 555-556.

²²⁵ Referendum Council 2017: 3.

²²⁶ Ibid: 9.

The Referendum Council developed five options, which the Prime Minister and the Leader of the Opposition approved on 7 April 2016, as the basis of its consultation process.²²⁷ The options were (my numbering):²²⁸

- [1] a statement acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians (which could be placed in the Constitution or outside it);
- [2] amending the existing ‘race power’, section 51(xxvi) of the Constitution, or deleting it and inserting a new power for the Commonwealth to make laws for Aboriginal and Torres Strait Islander peoples;
- [3] inserting a guarantee against racial discrimination, Section 116A, into the Constitution;
- [4] deleting section 25 [of the Constitution], which contemplates the possibility of a state Government excluding some Australians from voting on the basis of their race; and
- [5] providing for a First Peoples’ Voice to be heard by [the Commonwealth] Parliament, and the right to be consulted on legislation and policies that relate to Aboriginal and Torres Strait Islander peoples.

Subsequently, however, the Council added a sixth option – ‘agreement-making’ – “as a substantive reform option” for consideration by participants in the First Nations Regional Dialogues.²²⁹ The Council noted that there was “significant interest in agreement-making” – evidenced by “concrete actions toward negotiating treaties commencing in Victoria and in South Australia during its tenure, and the [commitment by] the Northern Territory Government ... to commence discussions [on the matter] during this time.”²³⁰ Although ‘agreement-making’ was not part of its formal terms of reference, the Council was of the view that it was “inextricably linked to the issue of constitutional reform.”²³¹ According to the Council, implementation of ‘agreement-making’ as a reform option did not require constitutional amendment.²³²

Out of the six reform options that were put to the 12 First Nations Regional Dialogues, option [5] (‘Voice to Parliament’: requiring constitutional amendment) and option [6]

²²⁷ Ibid: 6.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid: 14.

(‘Agreement-making through Treaty’: not requiring constitutional amendment) received “the highest level of support”.²³³ In the course of the Dialogues, a further option – the adoption of a ‘process to facilitate Truth Telling’ (option [7]: not requiring constitutional amendment)²³⁴ – emerged spontaneously, receiving unanimous support.²³⁵ The National Constitutional Convention at Uluru (23–26 May 2017) approved those three options – Voice to Parliament, Agreement-making through Treaty, and Truth-telling.²³⁶

The National Constitutional Convention issued the Uluru Statement from the Heart.²³⁷ A copy of the Statement is at Appendix 11. The following signifies the Statement’s demand for decolonisation:

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia’s nationhood.

...

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.

Makarrata is the culmination of our agenda: *the coming together after a struggle*. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In other words, the National Constitutional Convention made five sets of demands. One, it demanded recognition of First Nations’ internal sovereignty. Two, it called for the establishment of a First Nations parliamentary advisory body to be enshrined in the Commonwealth Constitution. Three, it sought acceptance of First Nations’ inherent right to self-determination and right to self-government. Four, it called for the adoption of a treaty approach to decolonisation of the Australian nation-state. Five, it sought the emplacement of a

²³³ Ibid: 15.

²³⁴ Ibid: 37.

²³⁵ Ibid: 15.

²³⁶ Ibid: 29.

²³⁷ Appendix 11 (Uluru Statement from the Heart).

truth-telling process concerning the effects on First Nations peoples of the imposition on them of settler-colonialism.

The Uluru Statement's call for "a First Nations Voice enshrined in the Constitution" – as replicated by the Referendum Council's recommendation for a "constitutionally entrenched Voice to Parliament" – is within the contemplation of UNDRIP Article 18 (right to participate in decision-making in matters affecting First Nations peoples)²³⁸ and Article 38 (adoption of appropriate measures to implement UNDRIP)²³⁹.

The Uluru Statement's demand for First Nations to be accorded the right to internal self-determination and self-government is supported by UNDRIP Article 3 (right to self-determination)²⁴⁰ and Article 4 (right to autonomy or self-government in internal affairs)²⁴¹. The demand for the adoption of a treaty approach to structural reform is within the contemplation of Article 38 (adoption of appropriate measures to implement UNDRIP)²⁴².

The Uluru Statement's call for the implementation of a truth-telling process is within the spirit and intent of UNDRIP, as reflected in preambular paragraph 6, and Article 38 (adoption of appropriate measures to implement UNDRIP)²⁴³. Preambular paragraph 6 expresses the concern of the General Assembly of the UN that:

... indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.

The Referendum Council made the following observation concerning three of the seven reform options set out above, as follows:

²³⁸ See Weller 2018: 145.

²³⁹ See Van Genugten and Lenzerini 2018: 545-546, 555-556.

²⁴⁰ See Quane 2011: 269; Davis 2012a: 461; Maguire 2014: 110; Scheinin and Åhrén 2018: 64-67, 70-73; Weller 2018: 136-137.

²⁴¹ See Burger 2011: 46.

²⁴² See Van Genugten and Lenzerini 2018: 545-546, 555-556.

²⁴³ See *Ibid.*

Voice to Parliament

A constitutionally entrenched Voice to Parliament was a strongly supported option across the Dialogues. It was considered as a way by which the right to self-determination could be achieved.²⁴⁴

Treaty

The pursuit of Treaty and treaties was strongly supported across the Dialogues. Treaty was seen a pathway to recognition of sovereignty and for achieving future meaningful reform for Aboriginal and Torres Strait Islander Peoples. Treaty would be the vehicle to achieve self-determination, autonomy and self-government.²⁴⁵

Truth-telling

The need for the truth to be told as part of the process of reform emerged from many of the Dialogues. The Dialogues emphasised that the true history of colonisation must be told: the genocides, the massacres, the wars and the ongoing injustices and discrimination.²⁴⁶

In its Final Report of 30 June 2017²⁴⁷, the Referendum Council recommended the adoption of the Voice to Parliament option, as follows:²⁴⁸

That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51(xxvi) [the ‘race power’] and section 122 [‘territories power’]. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.

The Referendum Council also recommended the adoption of the ‘Declaration of Recognition’ [that is, of First Nations] option “by legislation passed by all Australian Parliaments”.²⁴⁹

The Referendum Council drew specific attention to ‘Agreement-making through Treaty’ option and the ‘process to facilitate Truth Telling’ option. The Council pointed out that these options were “two matters of great importance to Aboriginal and Torres Strait Islander peoples, as articulated in the Uluru Statement from the Heart, that can be addressed outside the

²⁴⁴ Referendum Council 2017: 30.

²⁴⁵ Ibid: 31.

²⁴⁶ Ibid: 32.

²⁴⁷ Ibid: ii (Letter of Transmittal).

²⁴⁸ Ibid: 2.

²⁴⁹ Ibid.

Constitution.”²⁵⁰ The Council said that it could not make a specific recommendation on either of the two options because they were not within their terms of reference.²⁵¹

The Turnbull Government rejected the Referendum Council’s constitutional amendment recommendation. It announced the rejection in a media release on 28 October 2017.²⁵² Its reasoning for rejecting the recommendation is as follows:²⁵³

The Government does not believe [the Voice to Parliament proposal] is either desirable or capable of winning acceptance in a referendum. Our democracy is built on the foundation of all Australian citizens having equal civic rights – all being able to vote for, stand for and serve in either of the two chambers of our national Parliament – the House of Representatives and the Senate. A constitutionally enshrined additional representative assembly for which only Indigenous Australians could vote for or serve in is inconsistent with this fundamental principle. It would inevitably [be] seen as a third chamber of Parliament. ... The Council’s proposal for an Indigenous representative assembly, or Voice, is new to the discussion about Constitutional change, and dismissed the extensive and valuable work done over the past decade – largely with bipartisan support.

But the ‘Voice to Parliament’ proposal was not new. As noted earlier, it was one of the five options – approved by the Prime Minister and the Leader of the Opposition on 7 April 2016 – that the Council was required to put to participants in its consultation process. So, given its reasoning for rejecting the proposal, why did the Government allow the option to be included for consideration in the first place? The Turnbull Government did not express any view on the Council’s recommendation for a legislated ‘Declaration of Recognition’ nor on the issues of treaty and truth telling.²⁵⁴

Nor would the Voice to Parliament be a third chamber of the Parliament. Before the publication of the Referendum Council’s Final Report, Anne Twomey (Professor of Constitutional Law at the University of Sydney²⁵⁵) set out how she perceived the Commonwealth Constitution might be amended to incorporate the Noel Pearson proposed

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Media release 26 October 2017. <<https://www.malcolmturnbull.com.au/media/response-to-referendum-councils-report-on-constitutional-recognition>>.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Freeman and Morris 2016: 180.

Voice to Parliament and how that body would function.²⁵⁶ She proposed the following wording of a new section 60A of the Constitution:²⁵⁷

60A (1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [insert appropriate name], which shall have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.

(2) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, powers and procedures of the [body].

(3) The Prime Minister [or the Speaker/President of the Senate] shall cause a copy of the [body's] advice to be tabled in each House of Parliament as soon as practicable after receiving it.

(4) The House of Representatives and the Senate shall give consideration to the tabled advice of the [body] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.

As envisaged by Twomey, the Voice to Parliament would work in the following way:²⁵⁸

- (1) The indigenous advisory body is given a broad power under the proposed section 60A (1) to provide advice on any matters relating to Aboriginal and Torres Strait Islander peoples.
- (2) All the advice provided by the indigenous advisory body must be tabled in the Parliament.
- (3) The obligation on the Parliament to consider that advice under the proposed section 60A (4) is much more limited. It only applies in relation to debates upon bills to be made under the ... power to make laws with respect to Aboriginal and Torres Strait Islander peoples.

Twomey explained that under the foregoing formulation of the proposed Voice to Parliament (see below criticism of the concept by Michael Mansell):²⁵⁹

There is no constraint upon the exercise by the Parliament of its legislative powers. The only obligation is to consider advice, in relation to a limited category of bills, if that advice has already been tabled. The key, therefore, is the tabling of the advice. It provides the Parliament with clarity and certainty, as it is only obliged to consider advice if it has been tabled. If no advice has been tabled, there is nothing to consider and therefore no obligation and no prospect of delay.

²⁵⁶ Twomey 2016: 157-159.

²⁵⁷ Ibid: 158.

²⁵⁸ Ibid: 158-159.

²⁵⁹ Ibid: 160.

[T]here is no obligation upon Parliament to act in accordance with that advice. All it needs to do is consider it.

There would be no third house of parliament, no power of veto and no power of delay – simply a capacity on behalf of the indigenous advisory body to have its advice tabled in the Parliament and internally considered by Parliament in relation to a limited category of bills. The effectiveness of this mechanism in giving rise to changes to bills and policies will then depend upon the value and persuasiveness of that advice.

In contrast to the Turnbull Government’s position, Bill Shorten – speaking on the Prime Minister’s annual statement on Closing the Gap – indicated in February 2018 that Labor would pursue the Voice to Parliament proposal without the Coalition.²⁶⁰ He said:²⁶¹

After years of parliament delivering well-intentioned, incremental disappointment, who are we to suddenly say this idea is simply too big or too bold? Who are we to say that we’re only capable of minimalism, or symbolism ... to tell 1,200 delegates from 12 regional dialogues: go back to the drawing board and try again, we here don’t like it?

In June 2018, he reiterated Labor’s intention – upon gaining government – to follow through with a constitutional referendum on the Voice to Parliament.²⁶² On the issue of a treaty, he had already indicated in June 2016 his support for it.²⁶³ He reiterated this endorsement at a dinner function of Recognise²⁶⁴ in Sydney on 6 December 2016. He declared:²⁶⁵

It is time for some Australians to move beyond knee-jerk panic and unthinking outrage every time the word ‘treaty’ is mentioned. It is time ... to talk about what unfinished business really looks like, what treaty really means.

For Shorten, a political settlement process in the form of a treaty or treaties “is about building new frameworks for government to engage with, and empower, the First Australians.”²⁶⁶ Labor

²⁶⁰ Wahlquist 2018a.

²⁶¹ Ibid.

²⁶² At the signing of a memorandum of understanding between the Chief Minister of the Northern Territory and the four Northern Territory Land Councils that committed the Northern Territory Government to the development of a treaty or treaties between First Nations of the Northern Territory and the Government (Wellington 2018).

²⁶³ Begg and Breheny 2016: 16; Butler 2016.

²⁶⁴ Recognition was a constitutional recognition campaign arm of Reconciliation Australia that was wound up in 2017 (<<http://www.recognise.org.au/index.html>>); Reconciliation Australia [29 June 2018].

²⁶⁵ Gordon 2016.

²⁶⁶ Ibid.

lost the 18 May 2019 federal election, and Shorten was replaced as leader of the Australian Labor Party (ALP). So, the ALP has yet to have an opportunity to make good its promises.

In his speech at the 2019 Garma Festival (3 August 2019),²⁶⁷ the ALP leader, Anthony Albanese, announced his party's intention to pursue the Referendum Council's constitutional amendment recommendation – to incorporate the Voice to Parliament. He also proclaimed ALP support for the implementation of the Uluru Statement from the Heart proposals for (in addition to the Voice to Parliament) the establishment of “a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.”²⁶⁸ He said: “I want a Voice and Truth then Treaty to be part of our nation's journey, part of our national life.”²⁶⁹

Not all First Nations leaders agree with the Voice to Parliament proposal. Michael Mansell²⁷⁰ is critical of the idea of a constitutionally entrenched First Nations parliamentary advisory body as advocated by Noel Pearson since 2013.²⁷¹ The Pearson proposal would appear to have become the Referendum Council's Voice to Parliament. Mansell describes the Pearson proposal as a “constitutional entrenchment of subordination” that “endorses the right of politicians to decide while Aboriginals can only comment.”²⁷² Mansell makes a valid point here. Such an advisory body will not lead to a substantive restructuring of the political relationship between the Australian settler state and Aboriginal people. Mansell's criticism of the Pearson idea applies equally to the Referendum Council's Voice to Parliament concept. That concept provides an indirect form of constitutional recognition, and is, as noted earlier on in this section, within the contemplation of UNDRIP Article 18 and Article 38. But the proposal on its own does not give First Nations the kind of social, economic and political empowerment that they seek: self-determination and self-government.

²⁶⁷ Speech to 2019 Garma Festival <<https://anthonyalbanese.com.au/speech-to-2019-garma-festival-pathways-to-our-future-saturday-3-august-2019>>.

²⁶⁸ Appendix 11 (Uluru Statement from the Heart).

²⁶⁹ Speech to 2019 Garma Festival <<https://anthonyalbanese.com.au/speech-to-2019-garma-festival-pathways-to-our-future-saturday-3-august-2019>>.

²⁷⁰ Mansell 2016a: 51-53.

²⁷¹ Pearson 2016a: xiii-xv.

²⁷² Mansell 2016a: 53.

As Anne Twomey had pointed out, the Voice to Parliament merely “seeks to influence Parliament by making it aware of indigenous concerns.”²⁷³ It “sets up a procedural mechanism through which the Parliament can become informed of the needs and interests of Aboriginal and Torres Strait Islander peoples and how best to adapt and target its laws.”²⁷⁴ However, it does not deliver self-determination and self-government. Bill Shorten appeared to have recognised the fundamental shortcoming of the Voice to Parliament proposal because, in addition to his endorsement of the proposal, he also advocated the treaty approach for First Nations empowerment.²⁷⁵

Like the Turnbull Government, the Scott Morrison Government has in effect rejected the Referendum Council’s recommendation for a constitutionally enshrined Voice to Parliament. Instead, it has put forward a proposal, which would be implemented by legislation (if at all), for “an Indigenous voice to government”.²⁷⁶ It is an approach that tries, it would appear, to keep faith with the Malcolm Turnbull Government’s reasoning for rejecting the constitutionally enshrined Voice to Parliament proposal and at the same time seeks to provide an offering that would help to ameliorate the disappointment of Voice to Parliament proponents.²⁷⁷ Ken Wyatt, Minister for Indigenous Australians, announced on 8 November 2019 the appointment of a “Voice Co-Design Senior Advisory Group” (headed by Professor Tom Calma and Professor Marcia Langton) to develop options for the proposed “voice to government”.²⁷⁸ The Group has completed its task of producing design options for “Local and Regional Voices” and “National Voice”.²⁷⁹ Members of the public have been invited “to provide their feedback and comments on the proposals.”²⁸⁰ The deadline for public submissions was 30 April 2021.²⁸¹ A legislatively enacted National Voice would be easier to get off the

²⁷³ Twomey 2016: 156.

²⁷⁴ Twomey 2016: 157.

²⁷⁵ Gordon 2016.

²⁷⁶ Media release by Ken Wyatt, Minister for Indigenous Australians, dated 30 October 2019. <<https://ministers.pmc.gov.au/wyatt/2019/voice-indigenous-australians>>.

²⁷⁷ Nimmo 2020; Twomey 2019.

²⁷⁸ Media release by Ken Wyatt, Minister for Indigenous Australians, dated 8 November 2019. <<https://ministers.pmc.gov.au/wyatt/2019/voice-co-design-senior-advisory-group>>.

²⁷⁹ (1) Design options for Local and Regional Voices (<<https://voice.niaa.gov.au/sites/default/files/2021-01/detailed-local-regional-voice-proposal.pdf>>).

(2) Design options for a National Voice (<<https://voice.niaa.gov.au/sites/default/files/2021-01/detailed-national-voice-proposal.pdf>>).

²⁸⁰ Australian Government [11 January 2021].

²⁸¹ Australian Government [25 March 2021]. The deadline for submissions to the Indigenous Voice co-design process has been extended to 30 April, 2021. <<https://www.indigenous.gov.au/topics/indigenous-voice>>.

ground. However, its continued existence would be subject to the vagaries of changing political circumstances.

According to the Morrison Government:²⁸²

The National Voice will have a right and responsibility on behalf of Aboriginal and Torres Strait Islander Australians to advise Parliament and the Government with regard to any matters of national significance to Aboriginal and Torres Strait Islander Australians.

It would be a “National Voice to Commonwealth Parliament and Government on matters of critical importance to the social, spiritual and economic wellbeing, or which has a significant or particular impact on Aboriginal and Torres Strait Islander Australians of national significance.”²⁸³ It “would have a proactive, unencumbered scope to advise on priorities and issues as determined by [it].”²⁸⁴

Implicit in the above statements is that, even though the National Voice’s direct role is to act as a “voice to government”, it would function indirectly as a “Voice to Parliament”. This is because the Government would/could be expected to table in Parliament advices it receives from the National Voice. However, unless the legislation establishing the National Voice includes a provision compelling the Government to table in Parliament advices it receives, it would be entirely at the discretion of the Government whether or not to table an advice.

6 Conclusion: The usefulness of UNDRIP as a content guide for tripartite treaty negotiations

The suitability of the political arena is not contingent upon whether or not particular political initiatives are accepted by the Australian nation-state’s governmental authorities. What determines the political arena’s suitability is whether a proposal that has been put before it would bring about, if implemented, the desired result. The political arena permits negotiation of outcomes. In contrast, in the judicial arena, a litigant argues their case and makes submissions to convince the court to deliver a judgment in their favour. But they could not negotiate with the court the outcome.

²⁸² Design options for a National Voice (<<https://voice.niaa.gov.au/sites/default/files/2021-01/detailed-national-voice-proposal.pdf>>).

²⁸³ Ibid.

²⁸⁴ Ibid.

The Hawke Government's failure – in the context of the Barunga Statement – to fulfil its promise to negotiate a treaty with First Nations peoples demonstrated the difficulties of overcoming the assimilative forces of settler colonialism at particular moments in time. What the Northern Land Council and the Central Land Council were demanding for First Nations peoples was recognition of their inherent rights to self-determination and self-government within the constitutional and governmental framework of the Australian nation-state. These rights are foundational requirements for decolonising the Australian nation-state. They are manifestations of internal sovereignty. They are affirmed by UNDRIP Article 3 (right to self-determination) and Article 4 (right to self-government). Had the envisaged treaty/treaties come into being, First Nations peoples would have acquired a fundamental framework for bringing about their decolonising objective. They would have gained, in the political arena, what the High Court had refused to accord positive consideration in the *Coe Cases*.

ATSIC's package of social justice measures dealt with both the rights of First Nations peoples as citizens of Australia and their unique rights as Australia's Indigenous peoples. Fundamentally, the recommended measures represented a program for decolonising Indigenous Australia. The implementation of the decolonising agenda was to be guided and sustained by a set of decolonising principles, which included the negotiation of a treaty or treaties – an issue that is within the provision of UNDRIP Article 38 (measures to achieve the ends of UNDRIP). Apart from the issue noted immediately below, all of ATSIC's proposals are well within the contemplation of UNDRIP.

One of ATSIC recommended measures would probably be viewed by many as controversial. That is, the ownership of subsurface resources on land collectively owned by First Nations. ATSIC proposed that such resources should belong to First Nations landholders. This is a radical departure from the general settler rule that the Crown owns such resources. The drafting history of UNDRIP would appear to indicate that the proposal may not be within the land ownership rights declared by UNDRIP Article 26.²⁸⁵ However, ATSIC's proposal has strong moral justification. Before the settler-colonisation of Australia by the British, First Nations owned all the land/natural resources of Australian continent. They were colonised and deprived of ownership of their land/natural resources without their consent. For this reason, First Nations landholders should not be treated in the same way as non-Indigenous landholders

²⁸⁵ Errico 2011: 331, 338-340.

who do not own subsurface resources. And compared to non-Indigenous landholders, whose ownership of subsurface resources on their land has not been legislatively rendered null and void,²⁸⁶ why should First Nations landholders be treated differently? The ancestors of contemporary First Nations landholders had not consented to the settler-colonial expropriation of their lands, nor were they compensated for such expropriation. Furthermore, in relation to gold and silver, although non-Indigenous landholders have never owned these minerals,²⁸⁷ why should First Nations landholders be deprived of ownership of these minerals? In other words, in this regard, why should First Nations landholders be treated in the same way as non-Indigenous landholders? For First Nations, their deprivation of ownership of subsurface resources on their land constitutes a significant form of settler-colonial impositions.

However, the apparent shortcomings of UNDRIP for First Nations peoples, in terms of ownership of subsurface resources, are ameliorated to some degree by UNDRIP Article 32(1) (First Nations peoples' right to determine and develop priorities and strategies for the development or use of their lands or territories). This right constitutes a significant constraint on the freedom of a nation-state (if the owner of those resources) to extract such resources.²⁸⁸ Article 32(2) imposes an obligation on the nation-state to consult and obtain the free and informed consent of First Nations landowners concerned before extraction can proceed. In carrying out the consultation process, the nation-state must have full regard to the close cultural and spiritual relationship that First Nations peoples have with their lands, and the need to preserve their social, cultural and economic integrity.²⁸⁹ In the circumstances, First Nations landowners would need to be involved in associated environmental impact assessment studies and to participate in benefit-sharing arrangements.²⁹⁰

Ownership of subsurface resources on their lands would include, as a matter of course, right for First Nations landowners to extract and develop them. However, assuming that the Commonwealth/State/Territory Governments would be unlikely to agree to vesting subsurface rights to First Nations landowners, UNDRIP Article 32(1) would assist First Nations peoples, in treaty negotiations, in claiming authority/control over extraction/development of those

²⁸⁶ See Hepburn 2015.

²⁸⁷ Ibid: 18.

²⁸⁸ Errico 2018.

²⁸⁹ Ibid: 446-447.

²⁹⁰ Ibid: 456.

resources. Such authority/control would give First Nations landowners the right to determine whether or not those resources should be extracted/developed. If they are in favour of extraction/development, then they could decide to undertake the extraction process themselves, if they have the capacity, or in joint-venture with experienced/established operators.

In any event, the foregoing complexities about the issue of subsurface rights do not undermine the usefulness of UNDRIP as a content guide for treaty negotiations. The most important matters for First Nations peoples to secure in a treaty is the foundational rights to self-determination (UNDRIP Article 3) and self-government (UNDRIP Article 4). What these rights contain are clear enough. They are fundamental requirements for restructuring First Nations peoples' political, social and economic relationships with the Australian nation-state.

As ATSIC had done, CAR had also prescribed measures that dealt with First Nations peoples' citizenship rights and their Indigenous rights. CAR's documents of reconciliation – the *Australian Declaration Towards Reconciliation* and the *Roadmap for Reconciliation* – are a program for decolonising the Australian nation-state. The implementation of this decolonising program is to be by means of a treaty or treaties. Such a program of decolonisation, as noted above, is within the provision of UNDRIP Article 38 (measures to achieve the ends of UNDRIP).

While ATSIC's social justice measures had apparently fallen through the interregnum space between the Keating Labor Government and the succeeding Howard Coalition Government, and simply forgotten or ignored, CAR's decolonising proposals met with express rejection by the Howard Government. The Howard Government's perception – informed as it was by assimilationist settler nationalism – was that the assertion by First Nations peoples of their Indigenous rights was destructive of national cohesion. According to Prime Minister Howard, the wider community (read that as the settler community) would not tolerate enjoyment of special rights, in addition to normal citizenship rights, by one section of the community. As for a treaty between Indigenous Australia and the Australian nation-state, from Howard's assimilationist settler-nationalist point of view, First Nations peoples are members of the Australian nation, and a nation does not make a treaty with itself.²⁹¹

²⁹¹ PM Transcripts [29-05-2000].

The 2017 National Constitutional Convention issued the Uluru Statement from the Heart. The Statement's proposals for:

- (a) the establishment of a First Peoples parliamentary advisory body to be enshrined in the Commonwealth Constitution (replicated in the recommendation of the Referendum Council to Prime Minister Turnbull and Opposition Leader Shorten);
- (b) the granting of the right to self-determination to First Peoples – and therefore the right to self-government – and the adoption of a treaty approach to decolonisation; and
- (c) the emplacement of a truth-telling process concerning the effects on First Peoples of the imposition on them of settler-colonialism

are all within the spirit and intent, and express provisions, of UNDRIP. Rejection by the Turnbull Government of the Uluru Statement's proposal for a Voice to Parliament is an indication of the continuing salience of assimilationist settler-nationalism.

The Australian settler regime is now well established. First Nations peoples understand very well what Richard Mulgan has described as “the practical political imperative of coming to terms with de facto situations.”²⁹² In seeking to restructure their political, social and economic relationships with the Australian nation-state, First Nations peoples demonstrate their preparedness to treat as legitimate a regime that was unjustly founded.

The decolonisation proposals – in particular the calls for treaties – discussed in this chapter are each capable, if implemented, of providing a sound framework for the restructuring of Indigenous Australia's political, social and economic relationships with the settler nation-state. In the event, the proposals failed to gain much foothold. However, this failure does not diminish the argument that, compared to the judicial arena, the political arena is the most appropriate forum for achieving a comprehensive restructuring of the political, social and economic relationships between Indigenous Australia and the Australian nation-state. The political arena is inherently capable of facilitating negotiations of these issues. In the judicial arena, given its nature, litigants, assuming that they have causes of action that a court could consider, can only argue and submit the righteousness of their case. They could not negotiate with the judges the outcome.

²⁹² Mulgan 1998: 186.

All that the failure of the four proposals has shown is that it is not an easy task for First Nations to achieve their decolonisation objective. To gain that objective, First Nations peoples must continue the journey of endurance that their ancestors began in 1788 with greater vigour. I will discuss the way forward in the concluding chapter of this thesis (Chapter 8).

As a content guide for tripartite treaty negotiations, UNDRIP would be attractive to First Nations parties for a number of reasons. For one, Indigenous peoples played a key role in the drafting of UNDRIP.²⁹³ UNDRIP – a manifestation of the collective wisdom of the international community that took more than two decades (1982 to 2007) to evolve²⁹⁴ – is an eminently useful guide for treaty negotiation and content.²⁹⁵ As an “external standard of legitimacy”,²⁹⁶ UNDRIP would help ensure that both the negotiation process and the content of the treaty satisfy the minimum standards contained in UNDRIP.²⁹⁷ UNDRIP would help enhance the otherwise unequal bargaining position of First Nations.²⁹⁸ UNDRIP would assist in ensuring that the negotiation process remain focused on Indigenous rights.²⁹⁹ UNDRIP would “help to articulate justifications for both [the] distinct status of [First Nations] and the necessity of a treaty relationship [between First Nations and the Australian nation-state].”³⁰⁰ UNDRIP constitutes a direct challenge to settler colonialism and settler-colonial impositions. As Mick Gooda³⁰¹ has pointed out, “the implementation of [UNDRIP] within Australia is the principal means of resetting the relationship between the Australian Government and Aboriginal and Torres Strait Islander peoples.”³⁰² In 2013, in a paper that he co-authored, Gooda asserted “that [UNDRIP] is the most comprehensive tool available to advance the rights of Indigenous peoples and to address the contemporary effects of oppression and colonisation.”³⁰³

²⁹³ Allen and Xanthaki 2011: 1; Fontaine 2010: 8-9; Deer 2010: 18-22; Malezer 2010: 29-30.

²⁹⁴ Allen and Xanthaki 2011: 1, and see in particular Daes 2011 and Burger 2011 on the emergence of that collective wisdom in the course of the work to finalise UNDRIP.

²⁹⁵ See generally Hobbs 2019.

²⁹⁶ *Ibid*: 185.

²⁹⁷ *Ibid*: 184.

²⁹⁸ *Ibid*: 184-185.

²⁹⁹ *Ibid*: 186.

³⁰⁰ *Ibid*: 186.

³⁰¹ Mick Gooda was the Aboriginal and Torres Strait Islander Social Justice Commissioner from February 2010 to July 2016 (Australian Human Rights Commission.

(<<https://www.humanrights.gov.au/about/commissioners/mick-gooda-aboriginal-and-torres-strait-islander-social-justice-commissioner>>).

³⁰² ATSI Social Justice Commissioner 2011: 12.

³⁰³ Australian Human Rights Commission 2013: 4.

Assuming that they would be keen to negotiate ‘win-win’ outcomes, the governmental parties would also find UNDRIP attractive as a content guide for tripartite treaty negotiations. UNDRIP, as noted above, constitutes an internationally derived set of standards, adoption of which should facilitate interest-based negotiations. That parties to treaty negotiations would, without more, be keen to adopt a win-win approach to negotiation may be a big assumption. It would be necessary to stipulate an interest-based negotiation approach in the treaty process advancement legislation. By interest-based negotiation, I mean “one in which parties share the interests that underlie their [fundamental purpose for coming to the negotiation table] and try to jointly negotiate a solution that satisfies all parties.”³⁰⁴ A legislated interest-based negotiation approach would, for example, be of great help in producing an amicable solution to the thorny issue of ownership of subsurface resources on First Nations lands and authority/control over their extraction/development. The opposite of interest-based negotiation is positional-based negotiation. This approach “frames negotiation as an adversarial, zero-sum exercise focused on claiming rather than creating value.”³⁰⁵ A positional-based negotiation approach – designed as it is on achieving “win-lose” outcomes – would be extremely unhelpful in progressing treaty negotiations.

Victoria, Northern Territory, and Queensland (all currently in the process of advancing their respective treaty-making process – examined in Chapter 7) have indicated acceptance of UNDRIP as the basis for negotiating the content of a treaty:

- (a) A preambular paragraph of the Victorian *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) states: “the State recognises the importance of the treaty process proceeding in a manner that is consistent with the principles articulated in [UNDRIP]”. This statement suggests that UNDRIP should be adopted as a content guide of a treaty between the State Government and a Victorian First Nation.
- (b) In its discussion paper issued in June 2020, the Northern Territory Treaty Commission has proposed that the negotiation of a treaty or treaties in Northern Territory should be premised upon the provisions of UNDRIP.³⁰⁶

³⁰⁴ Harvard Law School [n.d.(a)]. See also Coyle 2014.

³⁰⁵ Harvard Law School [n.d.(b)]. See also Coyle 2014.

³⁰⁶ Ibid.

- (c) The Queensland Path to Treaty Eminent Panel recommended, in its report to the Queensland Government, that legislation should be enacted to adopt UNDRIP as the basis for treaty negotiation.³⁰⁷ The Queensland Government has accepted this recommendation.³⁰⁸

The Barunga Agreement (8 June 2018) – between the Northern Territory Government and the Northern Land Council, Central Land Council, Anindilyakwa Land Council and Tiwi Land Council – stipulates that the content of a prospective treaty between the Northern Territory Government and Northern Territory First Nations “must ... honour the Articles of [UNDRIP]”.³⁰⁹ The Northern Territory Treaty Commission has acknowledged “[UNDRIP] provides a recognised reference point and minimum standard of Indigenous rights in both treaty negotiations and the final terms of agreement.”³¹⁰

The Commonwealth Government under Scott Morrison would appear to prefer that State/Territory Governments take the initiative in treaty negotiation. In his speech at the National Press Club on 10 July 2019, in conjunction with NAIDOC week 2019 (7–14 July), during which he adumbrated on the NAIDOC theme of “Voice Treaty Truth”³¹¹, Ken Wyatt, the Minister for Indigenous Australians, said: “With respect to treaty, it is important that state and territory jurisdictions take the lead.”³¹² However, exclusively State/Territory treaties would be faced with some constitutional limitations on matters that could be included in them,³¹³ as would also exclusively Commonwealth treaties.³¹⁴

This chapter has demonstrated that, had any of the examined decolonising proposals been implemented, it would have provided a fundamental framework for restructuring Indigenous Australia’s political, social and economic relationships with the Australian nation-state. The chapter has also shown that the UNDRIP provisions reflect almost all the calls that have been made by Australian First Nations for change, which indicates that UNDRIP could be a useful guide in developing both the process for tripartite treaty negotiations and the content. Acceptance of UNDRIP as a treaty-content guide by the parties would facilitate interest-based

³⁰⁷ Expert Panel 2020a, 2020b.

³⁰⁸ Queensland Government 2020.

³⁰⁹ Northern Territory Government 2018: 6.

³¹⁰ Northern Territory Treaty Commission 2020b: 41.

³¹¹ NAIDOC 2019.

³¹² Wyatt 2019.

³¹³ See discussion in Hobbs and Williams 2019: 217–227. See also Williams and Hobbs 2020: 280–287.

³¹⁴ Hobbs and Williams 2019: 217–227; Williams and Hobbs 2020: 280–287.

negotiations. I propose in the next chapter (Chapter 7) a conceptual structure for a tripartite treaty-making process and a minimum content for such a treaty based on the provisions of UNDRIP.

Chapter 7

UNDRIP-informed Comprehensive Tripartite Political Settlements with First Nations

1 Introduction

This chapter proposes the use of tripartite treaties, premised upon the provisions of UNDRIP, as a framework for the decolonisation of the Australian nation-state. As explored in Chapter 6, tripartite treaties constitute a suitable avenue for First Nations to achieve their decolonisation objective. Each tripartite treaty would be made by reference to the respective constitutional powers of the State/Territory and Commonwealth. A tripartite treaty-making approach would avoid limitations – arising from the distribution of constitutional powers – that a treaty negotiated exclusively with a State/Territory or with the Commonwealth would have.¹ A tripartite treaty-making approach has the potential capacity to deliver for First Nations a comprehensive political settlement. As noted in Chapter 6, the issues raised in demands by First Nations organisations and individuals for a fundamental and comprehensive restructuring of the political, social, and economic relationships between Indigenous Australia and the Australian nation-state are largely within the contemplation of UNDRIP.

The structure of the rest of this chapter is as follows. Section 2 examines a number of ambiguities in UNDRIP and critiques of UNDRIP's decolonising potential. Section 3 examines the treaty-making processes in Victoria, South Australia, Northern Territory, and Queensland as sources of useful lessons for a tripartite treaty-making process for Australia. Section 4 looks at the Canada/British Columbia (BC) treaty-making process as part of a possible model for Australia. Section 5 sets out a conceptual framework for a tripartite treaty-making process for Australia. Section 6 outlines the minimum content of a tripartite Australian treaty premised upon UNDRIP. Section 7 concludes the chapter by discussing the question why treaties would be beneficial to all parties.

2 Ambiguities in UNDRIP and critiques of UNDRIP's decolonising potential

There are a number of ambiguities in some UNDRIP provisions and there are differences in opinion regarding the decolonising power of UNDRIP. As noted in Chapter 6, there is

¹ Hobbs and Williams 2019: 217-227; Williams and Hobbs 2020: 280-287.

ambiguity concerning the issue of ownership of subsurface resources.² There is also ambiguity in UNDRIP concerning the precise extent of First Nations' rights to lands that their ancestors had traditionally owned but are now in the possession of third parties.³ There is a further ambiguity in UNDRIP regarding First Nations' rights to be involved in governmental authorities' decision-making processes on issues concerning First Nations peoples (participatory rights).⁴ The UNDRIP participatory rights provisions stipulate that governmental authorities have an obligation to consult First Nations peoples in order to obtain their free, prior and informed consent (FPIC) to governmental actions/measures that affect them. The language of the provisions is ambiguous. Are governmental authorities required only to consult or must they actually obtain First Nations peoples' consent? Mauro Barelli has pointed out: "Both the drafting history of the Declaration and the relevant practice of judicial and quasi-judicial bodies suggest that FPIC does not confer on Indigenous peoples an overarching right to veto with regard to all decisions affecting them."⁵

The above ambiguities do not detract from the suitability of UNDRIP as a content guide for treaty negotiations. What an ambiguous provision might mean, or how it might operate in a particular jurisdiction, should be capable of being amicably resolved by the parties, who would be legislatively required (as my thesis proposes) to follow an interest-based approach to negotiation. As defined in Chapter 6, interest-based negotiation is one in which parties share the interests that underlie their fundamental purpose for coming to the negotiation table and try to jointly negotiate a solution that satisfies all parties. The treaty provision concerning a particular issue would reflect the precise agreement of the parties. It would not replicate any ambiguity in a relevant UNDRIP provision. Thus, for example, concerning the extraction/development of subsurface resources on a First Nation's land – assuming nation-state-ownership of those resources – the parties would need to agree on the effect of the provisions of Article 32. Article 32(2) requires the relevant nation-state governmental authorities to obtain a First Nation's FPIC prior to approving the extraction/development of those resources. At the same time, Article 32(1) accords First Nations the right to determine and develop priorities and strategies for the development or use of their lands. The provision is inextricably linked with First Nations peoples' right to self-determination (Article 3) and the

² UNDRIP Article 26(2).

³ UNDRIP Article 26(1). See Barelli 2016: 30-31; Charter 2018: 413-418.

⁴ UNDRIP Articles 10, 19, 29(2) and 32(2). See Barelli 2016: 36-39; Barelli 2018: 251-254, 268-269.

⁵ Barelli 2018: 268.

associated right to self-government (Article 4).⁶ As noted above (and as seen in Chapter 6), FPIC does not constitute a veto against a proposed subsurface extractive/developmental project. But, nonetheless, the objective of either provision would need to be given the effect mutually agreed to by the parties. Therefore, in an interest-based approach to negotiation, those objectives would need to be reconciled to the mutual benefit of all parties.

As noted in Chapter 6, Stefania Errico⁷ has argued that a proper understanding of the scope of Article 32 requires the following to be borne in mind.⁸ First Nations peoples have profound cultural and spiritual relationship with their lands.⁹ Protection of First Nations peoples' rights of ownership and use of their traditional lands, territories, resources is closely related to the need to preserve their social, cultural, and economic integrity.¹⁰ These considerations constitute a fundamental supportive structure for Article 32(1). In the circumstances, as Errico has argued, the provision acts as a substantial constraint on the right of a nation-state to extract subsurface resources on First Nations lands.¹¹ Barelli is of the same view. He says:¹²

... it would be difficult to reconcile the fact that governmental plans could be implemented without the consent of Indigenous peoples, and regardless of the consequences that those could have on their lands, cultures, and lives, with, generally, the normative framework of the Declaration and, specifically, Article 3 of that instrument, which establishes that, by virtue of their right to self-determination, Indigenous peoples have the right to freely pursue their economic, social, and cultural development.

It is conceivable, in terms of UNDRIP Article 32(1), and in an interest-based negotiation approach, that, as noted in Chapter 6, James Anaya had suggested,¹³ First Nations could be accorded the right to control the extraction/development of subsurface resources on their lands “through their own initiatives and enterprises.”¹⁴ If that is the negotiation outcome, then that would be what the treaty provision on this issue would unambiguously stipulate. On the ambiguity in UNDRIP Article 26(1) concerning the precise extent of First Nations' rights to

⁶ Errico 2018: 432, 446.

⁷ Errico 2018

⁸ Ibid: 433.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid: 446-447.

¹² Barelli 2018: 268.

¹³ United Nations 2013: paragraphs 80.

¹⁴ Ibid.

lands that their ancestors had traditionally owned but are now in the possession of third parties, the answer is to be found in the Commonwealth *Native Title Act 1993* and in relevant Federal Court and High Court decisions concerning, in particular, pastoral leases.

Some commentators have contested the idea that UNDRIP constitutes a decolonising tool or that it is necessarily the high-water mark for fulfilling First Nations' aspirations.¹⁵ Ward Churchill asserted that UNDRIP is against the right of First Nations to opt "for complete independence from alien powers".¹⁶ He said UNDRIP has turned "the rhetoric of self-determination to the opposite purpose, that of consecrating in law the very structure of internal colonial domination and exploitation at the hands of state entities from which Indigenous nations have been struggling to free themselves."¹⁷ Karen Engle expressed the view that UNDRIP "represents the continued power and persistence of an international human rights paradigm that eschews strong forms of indigenous self-determination..."¹⁸ By 'strong forms' of self-determination, Engle meant "both external self-determination models and forms of self-determination that provide for significant autonomy for indigenous groups *vis-à-vis* the state."¹⁹ Michael Mansell argued that UNDRIP "offers little to Aboriginal people."²⁰ He said UNDRIP has not been able "to properly deal with self-determination and dispossession".²¹ So: "If Australia was to enact the Declaration into domestic law, the principles relating to land rights and self-determination would need to be strengthened beforehand."²² Aileen Moreton-Robinson asserted that UNDRIP supports the "continuing denial of Indigenous sovereignty" by settler nation-states.²³

Irene Watson saw UNDRIP as having failed "to enable or open up space for a dialogue on coexisting sovereignties – that is, state and Aboriginal sovereignties."²⁴ According to Watson, First Nations "sovereignties have more depth than those of the 'norm', concerned with

¹⁵ Churchill 2011; Engle 2011; Mansell 2011; Moreton-Robinson 2011; Watson 2011a; Watson 2011b; Watson and Venne 2012.

¹⁶ Churchill 2011: 527.

¹⁷ Ibid.

¹⁸ Engle 2011: 142.

¹⁹ Ibid: footnote 3.

²⁰ Mansell 2011: 659.

²¹ Ibid.

²² Ibid: 671.

²³ Moreton-Robinson 2011: 656.

²⁴ Watson 2011a: 508.

power and ownership; they are more about being in relationship with, belonging and being responsible to the lands of our ancestors.”²⁵ Watson went on to say:²⁶

As soft law, the Declaration is of aspirational value only. The Declaration will do little to provide a reprieve for the millions of Indigenous peoples across the globe who struggle to protect and reoccupy their traditional lands. The UNDRIP will do little more than provide an illusionary human rights protection while Aboriginal peoples remain trapped and contained within a matrix of colonising powers.

Watson was of the view that for “Aboriginal life” to be liberated from “the ongoing assimilationist effects of the colonial project”, it is necessary for “colonialist states” to uphold and recognise “the land rights and rights to self-determination of our peoples”.²⁷

Irene Watson and Sharon Venne argued that UNDRIP, in the course of its development, had become an “interpretation of decolonisation as an act of populating white political space with Aboriginal people as managers of that white political space...”²⁸ Such a state of affairs “is not an act of decolonisation”.²⁹ It is “a turn in the colonial project which enables at best Aboriginal self-management of the colonial project.”³⁰ According to Watson and Venne:³¹

For a real act of decolonisation to occur we need to regain an Aboriginal centre – that is, an Aboriginal centre that engages in its own decolonisation and repair from the effects of colonialism – and to enable that centre to occupy the spaces of political power, rather than let it become assimilated into colonial processes of power-sharing. To decolonise, the process needs to assimilate the coloniser into Aboriginal processes of power-sharing. And it is plain that the Declaration is light years away from undertaking that turn in power-sharing arrangements.

The above statement would appear to indicate that Watson and Venne were looking for what Engle has described “forms of self-determination that provide for significant autonomy for indigenous groups *vis-à-vis* the state.”³² On this basis, ‘decolonisation’ for Watson and Venne would mean at least a state of affairs in which First Nations peoples are empowered to self-govern themselves on their own terms. It would not be ‘decolonisation’ if First Nations peoples

²⁵ Ibid: 509.

²⁶ Watson 2011b: 629.

²⁷ Ibid: 637-638.

²⁸ Watson and Venne 2012: 88.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid: 88-89.

³² Engle 2011: footnote 3.

were merely empowered to ‘self-manage’ their affairs on terms dictated by the Australian nation-state. They cited ATSIC as a manifestation of such a non-decolonising state of affairs.³³

However, further on in their commentary, Watson and Venne also asserted: “The Declaration enables recognition of a range of human rights but fails to progress in any meaningful manner the right of Indigenous Peoples to self-determination as recognised under the UN Charter.”³⁴ Their reference to self-determination in the context of the UN Charter would appear to imply that they were also looking for another form of self-determination, one that would enable First Nations to opt for, if they wish, independent nationhood. In other words, they were also hoping for what Engle has called “external self-determination models”.³⁵ Martin Scheinin and Mattias Åhrén explained that under the UN Charter: “The use of the word ‘peoples’ as the rights-holder in Article 1(2) entails that the right of self-determination is not a right of States (or their rulers), but of the people or peoples within a State.”³⁶ It seems to me that the following statement by the Unrepresented Nations and Peoples Organization (UNPO)³⁷ best sums up the rather ambivalent position taken by Watson and Venne:³⁸

The preferred outcome of an exercise of the right to self-determination varies greatly among the members of UNPO. For some of our members, the only acceptable outcome is full political independence. This is particularly true of occupied or colonized nations. For others, the goal is a degree of political, cultural and economic autonomy, sometimes in the form of a federal relationship. For others yet, the right to live on and manage a people's traditional lands free of external interference and incursion is the essential aim of a struggle for self-determination.

Watson and Venne went on to say:³⁹

Perhaps the greatest discrepancy in the language of the UN Declaration in affirming the right of Indigenous Peoples to self-determination can be found in Article 46. The paramountcy of state sovereignty is guaranteed by Article 46(1), whereby the territorial integrity of the state is retained and guaranteed against all other claims including those of colonised and dispossessed

³³ Watson and Venne 2012: footnote 1.

³⁴ Ibid: 91.

³⁵ Engle 2011: footnote 3.

³⁶ Scheinin and Åhrén 2018: 71.

³⁷ UNPO “is an international membership-based organization established to empower the voices of unrepresented and marginalized peoples worldwide and to protect their fundamental human rights.” It is based in Brussels, Belgium. Its members “are indigenous peoples, minorities, unrecognised States and occupied territories that have joined together to promote their right to self-determination, while also defending their political, social and cultural rights and preserving their environments.” (UNPO [21-09-2017]).

³⁸ UNPO [21-09-2017].

³⁹ Watson and Venne 2012: 103.

Indigenous Peoples. The opportunity for the decolonisation of indigenous territories or even a dialogue on coexistence between Indigenous Peoples and the colonial states is limited and will be determined by the clear intention of the UN to retain the territorial integrity of colonial states. The future political identities of all peoples will be guided by Article 46(2), and is a position that is likely to ensure the ongoing unequal and minority status of Indigenous Peoples, as it is unlikely to prove an opportunity for the development of Indigenous Peoples' governance initiatives, particularly where those initiatives are likely to be considered as repugnant or different to the majority rule.

The above statement is, in essence, a summary of the concerns by the other commentators noted above regarding the UNDRIP declared right to self-determination. This right is, in effect, exercisable only within the constitutional and governmental frameworks of nation-states and is objectionable to Watson and Venne and the other commentators if all that it delivers is 'self-management' on terms dictated by nation-states' governmental authorities. In addition, as noted above, Mansell and Watson⁴⁰ have respectively raised concerns about 'weak' UNDRIP provisions on land rights. Essentially, Watson's fundamental position is that she is not content with internal self-determination. She does not accept self-government within the constitutional and government framework of the Australian nation-state. She laments the fact that UNDRIP does not offer a path to First Nations sovereignty (as she understands it).⁴¹ Watson's stance is in contrast with the position taken by a majority of First Nations peoples, who accept self-determination and self-government for First Nations within the constitutional and governmental framework of the Australian nation-state.⁴²

The concern of Watson and Venne about the operation of UNDRIP Article 46(1) is misplaced. As Martin Scheinin and Mattias Åhrén have pointed out, the:⁴³

... provision does not negate Article 3 of the UNDRIP, a cornerstone of the Declaration, and does not preclude an Indigenous people from pursuing the option of secession as one of the possible modalities of their self-determination, through means that are compatible with international law.

⁴⁰ Watson 2011b: 637-638.

⁴¹ See her 2015 book, *Aboriginal Peoples, Colonialism, and International Law: Raw Law* (Watson 2015), in particular, Chapter 1 (Introduction) and Chapter 7 (Indigenous ways – A future).

⁴² See ATSIC 1995; CAR 2000; Behrendt 2003; Mansell 2016a; Referendum Council 2017; Uluru Statement from the Heart (2017).

⁴³ Scheinin and Åhrén 2018: 85.

Marc Weller is of the same view:⁴⁴

... [the] injunction only applies within the terms of the Declaration itself. That is to say, nothing in the Declaration may be invoked in favour of secession. But this does not affect the rights and status of Indigenous peoples in general international law.

The concern expressed by Watson and Venne over Article 46(2) is a reflection of tensions that have been created by the recognition of First Nations collective rights with human rights of First Nations individuals.⁴⁵ Scheinin and Åhrén are of the opinion that the provision:⁴⁶

... must be understood as a general human rights safeguard clause that provides that Indigenous peoples' collective rights, including the right to self-determination, must be exercised in a manner that respects the human rights of the individual members of the group.

In Australia, it is in First Nations peoples' own interest to assume the same human rights obligations accepted by the Australian nation-state under international law.⁴⁷ If First Nations were independent nations, and members of the UN, they would likely be looked upon with disfavour by the international community if they were to ignore the human rights of their members.

Mauro Barelli⁴⁸ is of the view that "the more radical evaluations⁴⁹ of the UNDRIP's legal framework tend to overlook the importance of defining the scope of what indigenous peoples could realistically achieve in their international endeavours."⁵⁰ He goes on to say:⁵¹

[T]here is little doubt that indigenous peoples had to accept some compromises in the final text of the Declaration. This, however, is hardly surprising considering that, first, compromises represent a basic, and indeed almost unavoidable, aspect of any negotiation process, and, second, indigenous peoples advanced far-reaching and controversial claims that States could have hardly endorsed without some form of opposition. Under these circumstances, remaining true to principle would not necessarily require the rejection of compromises.

⁴⁴ Weller 2018: 137.

⁴⁵ See Scheinin and Åhrén 2018: 79-84.

⁴⁶ Scheinin and Åhrén 2018: 82.

⁴⁷ Cf. Ibid: 83.

⁴⁸ Barelli 2016: 14.

⁴⁹ Barelli (op.cit.) noted as examples those of Churchill (2011), Watson and Venne (2012), Engle (2011), and Rodriguez-Garavito 2011.

⁵⁰ Ibid: 14-15.

⁵¹ Ibid.

Barelli examined in some detail the meaning and scope of the three specific sets of rights that he regarded as being “at the heart” of UNDRIP, and which are of particular concern to those who espouse “more radical evaluations” of UNDRIP. These are the right to self-determination, land rights and participatory rights (as embodied in the concept of free, prior and informed consent (FPIC)).⁵² Barelli came to the following conclusions:⁵³

[T]he final language of the provisions on self-determination, land rights and participatory rights has accommodated to a significant extent the initial claims of indigenous peoples. Thus, Article 3 on self-determination remains a fundamental provision with important political and legal implications for indigenous peoples, despite the last-minute inclusion of Article 46(1). In a similar fashion, the land rights provisions offer substantive protection to the special relationship that indigenous peoples have with their territories. Equally importantly, the way in which Article 32 ultimately defines FPIC imposes significant obligations on States, which, in the absence of the consent of indigenous peoples concerned, may well be prevented from implementing certain decisions affecting the latter’s ancestral lands.

Therefore, in his view, “the Declaration represents a truly innovative and progressive instrument that has the capacity to contribute to re-empower indigenous peoples in accordance with the latter’s aspirations.”⁵⁴

Sheryl Lightfoot has expressed views similar to those of Barelli. She said: “the passage of the Declaration by the UN General Assembly was an important transformational moment in global politics.”⁵⁵ In her opinion, implementing UNDRIP “forces a reinterpretation of the twin concepts of decolonization and self-determination.”⁵⁶ “States,” she pointed out, “are now expected to protect the land, self-determination, and collective rights of Indigenous peoples, by imagining, negotiating, and recognizing various possible modes of plural sovereignty and power sharing.”⁵⁷ She examined the emergence of a global Indigenous rights movement in the 1970s and its rights campaign, and “the thirty-year odyssey to achieve an Indigenous rights declaration”.⁵⁸ She summed up her findings, as follows:⁵⁹

⁵² Barelli (2016) examined the right to self-determination at 21-29, land rights at 29-35, and participatory rights at 35-40.

⁵³ Ibid: 42.

⁵⁴ Ibid.

⁵⁵ Lightfoot 2016: 41.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid: 43-70 (the quoted passage is at 69).

⁵⁹ Ibid: 42-43.

- 1 The Declaration was always intended to be a *set of guidelines for state implementation* of Indigenous rights, providing a framework for new Indigenous-state relationships grounded in mutual respect, not state domination.
- 2 The Declaration was always intended to be a *persuasive tool*, a set of international standards that would be utilized morally and politically in Indigenous rights struggles around the world and, like all human rights declarations, was never intended to be a legally enforceable or legally binding document.
- 3 The Declaration was always seen as a document of *global consensus*, not just among UN member states as had been the case with all previous human rights declarations, but also including the active participation of Indigenous peoples in the consensus-building process.
- 4 Closely related to its consensual character, the Declaration was necessarily a *compromise* document. As is the case with all international negotiations and treaties, it is rare and generally undesirable for one party to achieve all of its objectives. International agreements, especially ones that take thirty years to negotiate, will end with a compromise text, and the Declaration has always been viewed as such by the Indigenous rights movement. As a compromise document ultimately accepted by both states and the Global Indigenous Caucus, Indigenous peoples' right to self-determination (Article 3) sits alongside the right of states to their sovereignty and territorial integrity (Article 46). The guiding framework of the Declaration therefore expects states to recognize, negotiate, and protect a variety of possible self-government or autonomous arrangements for Indigenous peoples, dealing with them as "peoples", even if not as states. At the same time, it expects Indigenous peoples to negotiate the same with states and not seek secession from or dismemberment of them.

In concluding, Lightfoot pointed out that UNDRIP "is an indicator of global consensus that the ways in which [settler colonial states like Canada, Australia, New Zealand, and the USA] were founded, the ways in which they have ruled over Indigenous peoples, and the ways in which they continue to deal with Indigenous peoples today are now recognized as illegitimate human rights violations."⁶⁰

As indicated in Chapter 1, my thesis conceives of 'decolonisation' as a state of affairs whereby First Nations' inherent right to self-determination and right to self-government are recognised/activated within the constitutional and governmental framework of Australia. This state of affairs would be within the meaning of the first form of 'decolonisation', noted above, that Watson and Venne would appear to have envisaged. That is, a state of affairs in which First Nations peoples are empowered to self-govern themselves on their own terms within the

⁶⁰ Ibid: 69.

Australian nation-state. Tripartite treaties premised upon UNDRIP would deliver such decolonisation. My reading of the literature indicates to me that by far the predominant demand by Australian First Nations is not for independent nationhood but decolonisation in the form conceived of by my thesis.⁶¹ On that basis, UNDRIP provides a sound basis/useful guideline for the negotiation of treaties between First Nations peoples, a State/Territory and the Commonwealth.

3 State/Territory treaty-making processes

Victoria, South Australia, Northern Territory, and Queensland have taken the initiative to commence treaty-making processes with their respective First Nations. Following a change of government in March 2018, South Australia abandoned its process in June 2018, and those in Victoria, Northern Territory, and Queensland are still in their initial stages of development. Nonetheless, an examination of these State/Territory treaty-making processes is worthwhile. Useful lessons can be gained from a study of them. They provide insights into, for example, the commencement of a treaty-making process, the issues that need to be dealt with prior to treaty negotiation and the institutions that need to be established to support the entire treaty-making process. I consider Victoria's treaty-making process first.

3.1 Victoria's treaty-making process

Victoria's treaty-making process is relevant to my thesis for lessons that can be gained from it. These include recognition of (1) a need to establish a First Nations representative organisation; (2) modern treaty-making as a long process, requiring a slow, steady and measured approach; and (3) a need to enact a treaty-process legislation to specify (a) guiding principles for treaty negotiation, (b) required treaty-making institutions, (c) a treaty negotiation framework, and (d) support funding for First Nations' participation in treaty negotiations.

On 19 March 2015, in a Closing-the-Gap speech, Daniel Andrews, the Premier of Victoria, indicated the State Labor Government's commitment "to an approach to Aboriginal Affairs founded on self-determination."⁶² Victorian First Nations saw the Premier's speech as

⁶¹ See ATSIC 1995; CAR 2000; Behrendt 2003; Mansell 2016; Referendum Council 2017; Uluru Statement from the Heart (2017).

⁶² Victoria Government [n.d.(d)]: 24; See also Closing-the-Gap – Premier's Speech, 19 March 2015. <<https://www.premier.vic.gov.au/closing-the-gap-premiers-speech/>>.

an invitation for them to confirm to the State Government their willingness to enter into treaty negotiations. In February 2016, they advised the Government of their wish to do so.⁶³ Victoria's treaty process consists of three phases.⁶⁴

Phase 1 has been completed. It consisted of five milestone events. The first of these was the establishment of a First Nations Treaty Working Group in July 2016. The Treaty Working Group's primary task was to consult with Victorian First Nations on the design of a First Nations representative body – that is, the body that is now the First Peoples' Assembly of Victoria.⁶⁵ The Treaty Working Group led 16 community consultations across Victoria from 2016 to early 2018. It submitted its Final Report (which contains its recommendation on the design of the representative body)⁶⁶ to the Treaty Advancement Commissioner in March 2018.⁶⁷

The second of the Phase 1 milestone events was the appointment of Jill Gallagher as the Treaty Advancement Commissioner in December 2017⁶⁸ and the establishment of the Victorian Treaty Advancement Commission in January 2018. The Treaty Advancement Commissioner had oversight over the finalisation of the design structure of the First Peoples' Assembly of Victoria. The Minister for Aboriginal Affairs accepted the Commissioner's recommendation for the establishment of the Assembly. The Commissioner oversaw the formation of the Assembly.⁶⁹

The third of the Phase 1 milestone events was the enactment of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) ("Treaty Process Act") on 21 June 2018.⁷⁰ The Act was assented to on 3 July 2018 and commenced operation on 1 August 2018.⁷¹ George Williams and Harry Hobbs have noted: "The Liberal Opposition voted against the Bill [for the

⁶³ Ibid.

⁶⁴ Aboriginal Victoria [Victoria Government] [n.d.].

⁶⁵ The body to be was given this name in February 2019 (Victorian Treaty Advancement Commission [n.d.]).

⁶⁶ Victoria Government [n.d.(d)].

⁶⁷ Aboriginal Victoria [Victoria Government] [n.d.].

⁶⁸ Victorian Treaty Advancement Commission [n.d.].

⁶⁹ Treaty Process Act: sections 11 and 12; Aboriginal Victoria [Victoria Government] [n.d.].

⁷⁰ Premier of Victoria, Media Release 21 June 2018. <<https://www.premier.vic.gov.au/historic-treaty-legislation-passes-in-victoria/>>.

⁷¹ Aboriginal Victoria [Victoria Government] [n.d.].

Act] and had signalled their intention to scrap the treaty process.”⁷² The Act embodies the Victorian treaty process. It sets out “a roadmap towards treaty negotiations.”⁷³

The fourth of the Phase 1 milestone events was the launching of a so-called ongoing “Deadly Questions” campaign in June 2018. The aim of the campaign is to engage all Victorians in the treaty process. It invites them to ask questions about the treaty process and First Nations issues in general. It “provides an opportunity for Victorians to learn directly from Aboriginal Victorians about their cultures, history and issues facing their communities, as well as their aspirations for treaty.”⁷⁴ The Deadly Questions campaign is a distinctive feature of the Victorian process. Williams and Hobbs have emphasised the importance of such an educational campaign in fostering understanding and appreciation, among non-Indigenous communities, of First Nations peoples’ aspirations for a restructuring of their social, economic and political relationships with the Australian nation-state.⁷⁵ The cost of, and time taken in, staging the Deadly Questions campaign are in my view offset by the potential for broader community acceptance of a treaty or treaties that, it is hoped, would ultimately be negotiated.

The fifth of the Phase 1 milestone events was the coming into being in November 2019 of the First Peoples’ Assembly of Victoria (“First Peoples’ Assembly”).⁷⁶ Election of its members (by and from Victorian traditional owners) took place from 16 September – 20 October 2019.⁷⁷ It has 32 members.⁷⁸ Its primary function is to represent Victoria’s First Nations peoples – as their sole representative – in discussions with the State Government⁷⁹ to establish the Treaty Authority,⁸⁰ a treaty negotiation framework,⁸¹ a self-determination fund,⁸² and a dispute resolution process.⁸³ The ‘dispute resolution process’ referred to here is the mechanism for settling disputes that arise between the First Peoples’ Assembly and the State Government in the course of their joint task of establishing the Treaty Authority, the treaty

⁷² Williams and Hobbs 2020: 259.

⁷³ Aboriginal Victoria [Victoria Government] [n.d.].

⁷⁴ Ibid.

⁷⁵ Williams and Hobbs 2020: 334-339.

⁷⁶ Dunstan 2019.

⁷⁷ Aboriginal Victoria [Victoria Government] [n.d.].

⁷⁸ Ibid.

⁷⁹ Treaty Process Act: sections 9 and 10.

⁸⁰ Ibid: Part 4.

⁸¹ Ibid: Part 5.

⁸² Ibid: Part 6.

⁸³ Ibid: Part 7.

negotiation framework, and the self-determination fund.⁸⁴ The dispute resolution process must be culturally appropriate,⁸⁵ must specify the periods of time for carrying out stages of the process,⁸⁶ and must provide for the extension of time by written consent of the First Peoples' Assembly and the State Government.⁸⁷

The establishment of the First Peoples' Assembly completed Phase 1 of Victoria's treaty process. With this milestone, the First Nations Treaty Working Group and the Victorian Treaty Advancement Commission had accomplished their task and they no longer exist.

Phase 2 of Victoria's treaty-making process is concerned with the establishment, by agreement between the State Government and the First Peoples' Assembly of the Treaty Authority, the treaty negotiation framework, and the self-determination fund. As of 30 June 2021, this phase has yet to commence.

The functions of the Treaty Authority are to:⁸⁸

- (a) facilitate and oversee treaty negotiations;
- (b) administer the treaty negotiation framework;
- (c) resolve disputes in treaty negotiations; and
- (d) carry out research to support treaty negotiations and the administration of the treaty negotiation framework.

Additional functions may be conferred on the Treaty Authority by agreement between the First Peoples' Assembly and the State Government.⁸⁹ The Treaty Authority is an independent body.⁹⁰ Funding for the Treaty Authority is not stipulated in the Treaty Process Act. This issue will need to be determined by agreement between the First Peoples' Assembly and the State Government. If they cannot reach agreement, then settlement of the dispute would be according to the dispute resolution process that they would have laid down pursuant to the requirements of section 40 of the Treaty Process Act.

⁸⁴ Ibid: sections 39 and 40(b).

⁸⁵ Ibid: section 40(a).

⁸⁶ Ibid: section 40(c).

⁸⁷ Ibid: section 40(d).

⁸⁸ Ibid: section 28(1).

⁸⁹ Ibid: section 28(2).

⁹⁰ Ibid: section 28(3).

The Treaty Process Act stipulates that the treaty negotiation framework must include at least the following matters:⁹¹

- (a) the process for negotiating a treaty or treaties;
- (b) the process for formalising agreement to a treaty or treaties;
- (c) minimum standards that a party must meet in order to enter into treaty negotiations;
- (d) a schedule setting out the matters that cannot or must not be agreed to in the course of treaty negotiations [for example, because of jurisdictional limits⁹²];
- (e) the process for the resolution of disputes arising in the course of treaty negotiations;
- (f) the mechanisms for enforcing a treaty or treaties; and
- (g) reporting requirements in relation to a treaty or treaties.

Additional matters may be included in the treaty negotiation framework by agreement between the First Peoples' Assembly and the State Government.⁹³ The treaty negotiation framework may be varied by agreement between the First Peoples' Assembly and the State Government.⁹⁴

The specified purposes of the self-determination fund are: to provide support funding for Victorian First Nations to negotiate a treaty or treaties on an equal footing with the State Government, and to empower them to build capacity, wealth and prosperity.⁹⁵ The First Peoples' Assembly and the State Government may agree to include additional purposes for the fund.⁹⁶ They may agree to vary such additional purposes.⁹⁷ The First Peoples' Assembly will administer the fund.⁹⁸ The Treaty Process Act does not stipulate the source of the fund. The First Peoples' Assembly and the State Government will determine this issue by agreement. If they cannot reach agreement, then settlement of the dispute would be according to the dispute resolution process that they would have laid down pursuant to the requirements of section 40 of the Treaty Process Act.

Phase 3 (final phase) of Victoria's treaty-making process (which has yet to commence) is concerned with treaty negotiations. The First Peoples' Assembly will not be a participant in

⁹¹ Ibid: section 31.

⁹² Explanatory Memorandum (on the Bill for the Act) 2018.

⁹³ Ibid: section 31(3).

⁹⁴ Ibid: section 32.

⁹⁵ Ibid: section 36(1). See also Explanatory Memorandum (on the Bill for the Act) 2018.

⁹⁶ Ibid: section 36(2).

⁹⁷ Ibid: section 36(3).

⁹⁸ Ibid: section 37.

such negotiations.⁹⁹ The parties to treaty negotiations will be the State Government and each First Nation that wishes to negotiate a treaty with the State Government. The treaty negotiation framework (to be established in Phase 2) will set out the procedure for how First Nations could indicate their intent to negotiate a treaty with the State Government. Treaty negotiations will not commence until after the Treaty Authority, the treaty negotiation framework, and the self-determination fund have been established. According to Williams and Hobbs, “negotiations are not expected to begin for several years.”¹⁰⁰

There is no operative provision in the Treaty Process Act stipulating that UNDRIP is to be a content guide for treaty negotiations. The preamble to the Act says “the State recognises the importance of the treaty process proceeding in a manner that is consistent with the principles in [UNDRIP]”. The State Government had rejected an amendment to the Bill for the Act, proposed by the Greens, to insert an operative provision requiring UNDRIP to be a content guide for treaty negotiations.¹⁰¹ Therefore, as pointed out by Harry Hobbs, UNDRIP’s “norms and values remain aspirational rather than obligatory and there is no mechanism to enforce compliance with its standards.”¹⁰² One is left to wonder “how far Victoria’s rhetorical or political commitment to the UNDRIP and Indigenous self-determination extends once negotiation commence.”¹⁰³ In the absence of an operative provision in the Treaty Process Act, expressly specifying UNDRIP as a content guide for treaty negotiations, there is a risk that UNDRIP might be sidelined, and, therefore, “both the negotiations and content of any treaty may not satisfy the minimum standards recognised in the Declaration.”¹⁰⁴ If UNDRIP is sidelined, there would be a risk that the foundational rights to self-determination and self-government might not be incorporated in a treaty. These rights are the mainspring to bringing about a decolonised relationship between Indigenous Australia and the Australian nation-state.

It should be noted that that the Victorian Government has agreed with the First Peoples’ Assembly to establish a truth-telling process.¹⁰⁵ The process will be carried out by the Yoo-

⁹⁹ First Peoples’ Assembly of Victoria [n.d.].

¹⁰⁰ Williams and Hobbs 2020: 261.

¹⁰¹ Hobbs 2019: 181.

¹⁰² Ibid.

¹⁰³ Ibid: 183.

¹⁰⁴ Ibid: 184.

¹⁰⁵ Aboriginal Victoria (State Government of Victoria) 2021.

rook Justice Commission¹⁰⁶ (established under the State's *Inquiries Act 2014*) over a period of three years. The Commission is expected to commence its task in July 2021.

The next subsection looks at the treaty-making process in South Australia, which took a different approach to Victoria in a number of respects.

3.2 South Australia's treaty-making process

South Australia's treaty-making process provides negative lessons for my thesis. Unlike Victoria, South Australia did not see the need for embedding its treaty-making process in legislation. And it did not adopt UNDRIP as a treaty-content guide. The State Government appeared to have been in a great hurry to negotiate treaties with South Australian First Nations.¹⁰⁷ On 14 December 2016, the then South Australian Labor Government – through the Minister for Aboriginal Affairs and Reconciliation (Kyam Maher) – announced its intention to enter into treaty negotiations with South Australia's First Nations.¹⁰⁸ South Australia's treaty-making process commenced in February 2017 with the appointment of Roger Thomas as the Treaty Commissioner. His functions were to:¹⁰⁹

- (1) Undertake broad consultation on a suitable framework to further Treaty negotiations between the South Australian Government and Aboriginal people of South Australia.
- (2) Provide advice to the Minister for Aboriginal Affairs and Reconciliation on a framework to Treaty negotiations, which could recognise the unique cultural identity of all Aboriginal people of South Australia.
- (3) Facilitate conversations for a possible Treaty framework process between the Government and Aboriginal people of South Australia.

The Treaty Commissioner undertook the required community consultation from April to July 2017.¹¹⁰

¹⁰⁶ Yoo-rook means 'truth' in the Wemba-Wemba/Wamba-Wamba language, which is spoken in the north-west region of Victoria (First Peoples' Assembly of Victoria [n.d.(a)]).

¹⁰⁷ Thomas 2017: 8; Williams and Hobbs 2020: 271.

¹⁰⁸ Maher 2016.

¹⁰⁹ Thomas 2017: 3.

¹¹⁰ Ibid: 5-6.

In his report to Minister Maher (17 July 2017), the Treaty Commissioner recommended a treaty-making framework with the following elements:

- (a) The State Government would invite South Australian First Nations to express their interest in negotiating a treaty with the Government.¹¹¹
- (b) Expressions of interest must meet a set of eligibility criteria. The Commissioner recommended a set of such criteria.¹¹²
- (c) The State Government would appoint an independent First Nations Treaty Advisory Committee to assess expressions of interests received and recommend selected First Nations to the Minister for consideration. The Treaty Commissioner would be the chairperson of the Committee.¹¹³

The Government accepted and implemented the above recommended treaty-making framework. The Treaty Advisory Committee recommended the Ngarrindjeri, Narungga and Adnyamathanha as the first three nations that the Government should engage with in treaty negotiation.¹¹⁴

The 17 March 2018 state election – won by the Liberal Party – interrupted South Australia’s treaty-making process. However, the Labor Government was able to arrange a pre-treaty agreement between the Narungga Nation Aboriginal Corporation and the State of South Australia (the Buthera Agreement) before the election.¹¹⁵ The agreement was signed on 16 February 2018, a day before the Government went into caretaker mode.¹¹⁶ The agreement committed South Australia to providing broad community-development support to the Narungga nation (Yorke Peninsula) for a period of 10 years. It also committed the parties “to work together with the aim of promoting a legislative structure that enables the parties to negotiate entry into a treaty in the future.”¹¹⁷

In June 2018, the Liberal Party Government abandoned the treaty approach to dealing with First Nations affairs.¹¹⁸ According to Premier Steven Marshall: “State-based treaties [were] ‘expensive gestures’ [and] treaties ‘should be negotiated at the federal level, not the state

¹¹¹ Ibid: 15.

¹¹² Ibid: 16.

¹¹³ Ibid: 17.

¹¹⁴ Petrie and Graham 2018: 7.

¹¹⁵ The Buthera Agreement.

¹¹⁶ South Australian Native Title Services (Lucy Kingston) [n.d.].

¹¹⁷ The Buthera Agreement.

¹¹⁸ ABC News [8 June 2018].

level’.”¹¹⁹ Roger Thomas, the erstwhile Treaty Commissioner, was appointed Commissioner for Aboriginal Engagement (18 July 2018) within the Department of the Premier and Cabinet. The basic role of the Commissioner for Aboriginal Engagement is to provide “Aboriginal leadership in South Australia, advocating on behalf of all Aboriginal people and communities across the state.”¹²⁰

The South Australian Labor Government was criticised for not legislatively embedding its treaty-making process.¹²¹ The Government appeared to have been in a rush to progress its treaty-making process. Williams and Hobbs have commented that the haste in commencing treaty negotiations in South Australia might “have had more to do with political calculations rather than good process.”¹²² Erstwhile Treaty Commissioner Thomas had reported that the State’s First Nations were generally of the view that: “The process is moving too fast and should be slowed down so that Aboriginal people can properly digest what is being proposed and the principles behind the proposition.”¹²³ And, importantly, as pointed out by Harry Hobbs, there was a failure in South Australia to specify UNDRIP as a content guide in treaty negotiations.¹²⁴

Some useful lessons could be gained from the South Australian experience. A treaty process should not be rushed. Treaty-advancement process legislation should be enacted prior to the commencement of negotiations. And, in order to ensure that a treaty would achieve First Nations’ decolonising objective, UNDRIP should be specified as a treaty-content guide in the treaty process legislation. UNDRIP constitutes a direct challenge to settler colonialism, settler-control impositions and assimilative settler nationalists, and is therefore a useful basis for treaty negotiations. The abovementioned steps would not, however, prevent a future Government from abandoning the treaty process. Constitutional entrenchment of treaty-making would raise the level of political difficulty for a future Government to undo the process. But constitutional amendment in South Australia does not require a referendum (as in the case of the Commonwealth Constitution).¹²⁵ So, in the final analysis, even a treaty-making constitutional provision could conceivably be repealed by a determined anti-treaty Government.

¹¹⁹ Williams and Hobbs 2020: 267.

¹²⁰ Department of the Premier and Cabinet [n.d.].

¹²¹ Wahlquist 2018.

¹²² Williams and Hobbs 2020: 271.

¹²³ Thomas 2017: 8.

¹²⁴ Hobbs 2019: 184.

¹²⁵ Constitutional Act 1934 (SA): section 8.

The next subsection examines the Northern Territory's treaty-making process. The Northern Territory Treaty Commissioner has recommended the embedding of the Territory's treaty-making process in legislation (like in Victoria).

3.3 Northern Territory's treaty-making process

The Northern Territory treaty-making process has essentially adopted a similar approach to that of Victoria, and affirms the important lessons that the latter provides for my thesis (see above, section 3.1). The Northern Territory process began with the signing of a Memorandum of Understanding (MOU) – the Barunga Agreement¹²⁶ – between the Territory (Labor) Government and the four Land Councils of the Territory (Northern, Central, Anindilyakwa, and Tiwi) on 8 June 2018. The MOU was the result of a proposal, for the initiation of a treaty-making process, which the four Land Councils put to the Government on 2 March 2018.¹²⁷ On 23 March 2018, representatives of the Land Councils and the Government met at Alice Springs and agreed to establish a Treaty Working Group to develop the MOU.¹²⁸ Membership of the Treaty Working Group comprises senior representatives of the Government and the Land Councils.¹²⁹ As required by the MOU, the Government appointed a Treaty Commissioner – Mick Dodson – on 18 February 2019.¹³⁰ Dodson took up his position on 4 March 2019.¹³¹

The Treaty Commissioner is required to advise the Government on:¹³²

- (a) Interest in a treaty or treaties in the Northern Territory.
- (b) What a Northern Territory treaty or treaties will seek to achieve.
- (c) Whether there should be one or multiple treaties.
- (d) The best model for a treaty or treaties in the Northern Territory.
- (e) What outcomes are possible under a treaty or treaties for First Nations.
- (f) What the best process is for negotiating a treaty or treaties.
- (g) The potential contents of any treaty or treaties in the Northern Territory.

¹²⁶ Northern Territory Government 2018.

¹²⁷ *Ibid*: 5.

¹²⁸ *Ibid*: 6.

¹²⁹ *Ibid*: 10.

¹³⁰ Northern Territory Chief Minister, Media Statement, 18 February 2019, The Territory's First-Ever Treaty Commissioner Appointed (<<http://newsroom.nt.gov.au/mediaRelease/28697>>).

¹³¹ *Ibid*.

¹³² Northern Territory Treaty Commissioner Terms of Reference.

The Treaty Commissioner has to complete his work within 2-3 years of his taking up his appointment.

As part of his responsibilities, the Treaty Commissioner has to undertake a consultation program in two stages. Stage 1 was concerned with ascertaining support for a treaty by the Territory's First Nations. This stage has been completed. In his report, delivered to the Chief Minister in March 2020, the Commissioner indicated strong support for a treaty or treaties, but some scepticism on the value of exclusively Territory treaties, and acceptance that treaty negotiation could take over several years.¹³³ Stage 2 of the program has begun, with the release of a Discussion Paper on 30 June 2020, setting out a proposed Territory treaty-making framework and model.¹³⁴ Consultation will be over the content of the Discussion Paper, and the Treaty Commissioner is required to provide a final report to the Chief Minister on the outcome of the consultation, as well as his recommendations, by September 2021 (at the earliest) or September 2022 (at the latest).

The Discussion Paper proposes the creation of the following treaty-making structure and institutions:¹³⁵

- (a) Interim Northern Territory First Nations Treaty Commission – limited tenure.
- (b) Northern Territory First Nations Commission – permanent tenure.
- (c) Northern Territory First Nations Treaty Tribunal.
- (d) Office of First Nations Treaties.

The Interim Northern Territory First Nations Treaty Commission – multi-membered, but “with a clear majority of Aboriginal Commissioners”¹³⁶ – would have a two-year tenure. It would be responsible for overseeing and providing advice on the:

- (a) development of a treaty process legislation;
- (b) development and implementation of a truth-telling process;
- (c) establishment of a treaty-making fund;
- (d) establishment of a self-determination fund;
- (e) establishment of a permanent treaty commission; and

¹³³ Northern Territory Commission 2020a: 4-6.

¹³⁴ Northern Territory Commission 2020b.

¹³⁵ Ibid: 67-70.

¹³⁶ Ibid: 67.

- (f) creation of a treaty dispute adjudication tribunal.

The Interim Commission would also be responsible for:

- (a) the initial development and implementation of a treaty education and awareness program;
- (b) carrying out community consultations as elements of the treaty-making framework are being developed; and
- (c) holding a treaty convention, no later than June 2024, to ratify the draft treaty process legislation prior to its introduction in the Northern Territory Parliament.

The operation of the Interim Commission would be funded by the Northern Territory Government. The Interim Commission's tenure expires once the treaty process legislation has been enacted and the permanent Treaty Commission commences operation.

The BC Treaty Commission (see below, section 4) would be the model for the proposed permanent Northern Territory First Nations Treaty Commission. Its members would all be First Nations individuals.¹³⁷ It would be responsible for overseeing and facilitating treaty negotiations. It would develop all necessary support processes, systems, and procedures for putting into operation the treaty negotiation framework prescribed in the treaty process legislation. It would also be responsible for further development and implementation of the treaty education and awareness program initiated by the Interim Treaty Commission. And it would manage grants to First Nations to build their capacity to be treaty ready, to finance their costs in treaty negotiations, and to finance a mediation process concerning any dispute that might arise between First Nations. This proposal differs from that of Victoria. In Victoria, it would be the First Peoples' Assembly which would manage First Nations' treaty-process funding requirements. The Northern Territory Government would fund the operation of the permanent Treaty Commission.

The permanent Treaty Tribunal would have five members, who could be First Nations and non-Indigenous persons, but First Nations persons must comprise the majority. The Tribunal Chair would be a First Nations person. At least one of the members of the Tribunal must have legal qualifications. The Tribunal would be an independent treaty

¹³⁷ Ibid: 68.

dispute adjudication panel. It would convene as and when needed. The Northern Territory Government would fund its operation.

The Treaty Office would be a Northern Territory Government agency, modelled on New Zealand's Office of Māori Crown Relations. It would be responsible for managing the treaty-making affairs of the Government including treaty negotiations.

The Discussion Paper proposes a treaty negotiation process modelled on that of BC (see below, section 4)¹³⁸ It states: "The British Columbian six-stage process is endorsed as a comprehensive, simple to understand and proven process that can be adapted to the NT."¹³⁹

The Discussion Paper identifies the following specific treaty-making funding requirements:

- (a) grants to First Nations to finance their treaty negotiation process and mediation of disputes (if any) between First Nations (the paper does specify the types of disputes referred to here);
- (b) a self-determination fund to finance capacity-building for First Nations to be treaty ready and cash components of treaty-settlements;
- (c) financing the operations of the interim Treaty Commission, the permanent Treaty Commission, the Treaty Tribunal, and the Office of First Nations Treaties; and
- (d) financing the transfer of service delivery budgets post treaty.

The Discussion Paper has also proposed the establishment of a truth-telling process. The Interim Treaty Commission would oversee this process. A (yet to be established) Northern Territory Truth-Telling Institute would carry out the process. The process should begin well before the commencement of treaty negotiations.

The Discussion Paper has identified UNDRIP as "a recognised reference point and minimum standard of Indigenous rights in both treaty negotiations and the final terms of agreement."¹⁴⁰ It has also identified reparation as one of the important treaty-negotiation

¹³⁸ Ibid: 71-74.

¹³⁹ Ibid: 72.

¹⁴⁰ Ibid: 41.

issues. It recognises the van Boven Principles¹⁴¹ as the appropriate base-line guide in dealing with the question of reparation.¹⁴²

Similar to the approach taken in Victoria, the Discussion Paper has proposed slow, steady and measured steps in developing the Territory's treaty-making framework. In addition, as in Victoria, there is a clear recognition in the Discussion Paper of the wisdom of legislatively embedding the Territory's treaty-making process, and putting in place all required treaty-making institutions and funding, before commencing any treaty negotiation. However, the Discussion Paper – although it acknowledges UNDRIP as “a recognised reference point and minimum standard of Indigenous rights in both treaty negotiations and the final terms of agreement” – has not indicated whether the proposed Territory's treaty process legislation would include an operative provision stipulating the adoption of UNDRIP as a content guide for treaty negotiations. I would anticipate that the Treaty Commissioner would deal with this issue in his final report (due in March 2022) to the Northern Territory Government. Stipulating UNDRIP as a treaty-content guide would be a useful way for bringing the foundational rights to self-determination and self-government to the negotiation table. The Discussion Paper's recommendation that the Canada/BC six-stage approach to treaty negotiations should be adopted by the Northern Territory manifests an underlying judgment that such an approach is a wise one. The Canada/BC approach is a systematic process to ensure that all issues needing resolution in each stage are properly settled to the mutual satisfaction of all parties before they could move on to the next stage.

The next subsection looks at the treaty-making process in Queensland.

3.4 Queensland's treaty-making process

The Queensland Government announced its commitment to enter into treaty negotiations with Queensland's First Nations in a media statement issued on 14 July 2019.¹⁴³ The treaty process

¹⁴¹ Descriptive title: “Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law” (Discussion Paper, Appendix 8.3).

¹⁴² Ibid: 41-43.

¹⁴³ Queensland Government [n.d.1)].

commenced with the appointment by the Government, shortly afterwards, of a Path to Treaty Eminent Panel and a Treaty Working Group.¹⁴⁴

Jackie Huggins and Michael Lavarch co-chaired the Eminent Panel (with Indigenous and non-Indigenous membership). The Panel was responsible for providing “leadership, support engagement with key parliamentary, government and non-government stakeholders”, and advice to the Government on the next steps in the treaty process following completion of required state-wide community consultations.¹⁴⁵ The Treaty Working Group carried out the consultations program under the general supervision of the Eminent Panel.¹⁴⁶ The program commenced on 17 October 2019,¹⁴⁷ and was completed in February 2020.¹⁴⁸ The Panel provided its advice and recommendations to the Government on 3 February 2020.¹⁴⁹ However, having regard to the impact of COVID-19 on timelines, the Panel proposed to the Government a revised schedule for implementing its recommendations on 29 May 2020.¹⁵⁰ The Government responded to the recommendations in August 2020.¹⁵¹

The Eminent Panel recommended: “the Queensland Government proceed on a Path to Treaty with the ultimate aim of reaching a treaty or treaties with the First Nations of Queensland.”¹⁵² In addition, “the Path to Treaty [should] be conducted using a rights-based approach consistent with both the *Human Rights Act 2019* (Qld) and [UNDRIP].”¹⁵³

Queensland’s Path to Treaty Eminent Panel has recommended the embedding of the State’s treaty-making process in legislation, as has occurred in Victoria and as Treaty Commissioner Dodson has recommended for the Northern Territory. It has also recommended that Queensland’s treaty-process legislation specifies UNDRIP as a treaty-content guide. As in the case of the Northern Territory, the Queensland treaty-process has also adopted an approach that is essentially similar to that of Victoria, thus furnishing a further affirmation of the important lessons provided by Victoria (see above, section 3.1). The Queensland Government

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Layt 2019.

¹⁴⁸ Queensland Government [n.d.2a]

¹⁴⁹ Queensland Government [n.d.2b]; Eminent Panel 2020a.

¹⁵⁰ Queensland Government [n.d.2c]; Eminent Panel 2020b.

¹⁵¹ Queensland Government [n.d.2d].

¹⁵² Ibid: 5.

¹⁵³ Ibid.

has indicated that it is “committed to embarking on a Path to Treaty with First Nations peoples consistent with the rights as embodied in the *Human Rights Act 2019* (Qld) and the principles articulated in [UNDRIP].”¹⁵⁴ In February 2021, the Government appointed a Treaty Advancement Committee to advise it on options for implementing the Eminent Panel’s recommendations.¹⁵⁵ The members of the Committee are Jackie Huggins (co-chair), Mick Gooda (co-chair), Michael Lavarch, Josephine Bourne and Sallyanne Atkinson. The Government expects to receive the Committee’s report “later” in 2021.¹⁵⁶

The Eminent Panel recommended the:¹⁵⁷

- (a) establishment of a First Nations Treaty Institute;
- (b) establishment of capacity-build programs for First Nations;
- (c) establishment of a community engagement program;
- (d) enactment of a treaty-process legislation;
- (e) establishment of a treaty future fund; and
- (f) launching of a truth-telling and healing process.

The First Nations Treaty Institute would be an independent statutory authority, reporting directly to the Queensland Parliament.¹⁵⁸ Its functions would include:¹⁵⁹

- (a) advising and facilitating the development of a treaty-making framework;
- (b) advising on possible representative organisations for First Nations Peoples;
- (c) leading a process of truth telling and healing;
- (d) providing support to build the capacity of First Nations to engage in the treaty-making process;
- (e) supporting the development of governance models suitable for First Nations; and
- (f) engagement with the Queensland community on the Path to Treaty.

The governing Council of the Treaty Institute would comprise members initially appointed by the Governor in Council and then subsequently by First Nations representative organisations.¹⁶⁰

¹⁵⁴ Ibid.

¹⁵⁵ Queensland Government [13 April 2021]

¹⁵⁶ Ibid.

¹⁵⁷ Queensland Government [n.d.2d]: 5-9.

¹⁵⁸ Ibid: 6.

¹⁵⁹ Ibid: 5

¹⁶⁰ Ibid: 6.

As recommended by the Eminent Panel, it would be the responsibility of the First Nations Treaty Institute to “develop and administer programs to assist First Nations and their communities to become treaty-ready and support First Nations to develop governance models appropriate for different communities.”¹⁶¹

The Eminent Panel proposed:¹⁶²

... the Queensland Government undertake in conjunction with the establishment of the First Nations Treaty Institute and in advance of the Truth [Telling] and Healing process, a community engagement program to promote understanding of the history of First Nations Peoples and the Path to Treaty process.

In summary, the treaty process legislation recommended by the Eminent Panel would:¹⁶³

- (a) establish the First Nations Treaty Institute;
- (b) establish the First Nations Treaty Future Fund;
- (c) enable future First Nations representative organisations to be recognised as participants in the settlement of a treaty framework and as parties to treaties;
- (d) support the development of appropriate governance structures for First Nations representative organisations;
- (e) provide for treaty-content negotiations to be based on UNDRIP;
- (f) enable the future creation of a Treaty Tribunal to oversee the treaty-making process, monitor compliance, arbitrate and resolve disputes and review treaties over time;
- (g) provide mechanisms for dispute resolution; and
- (h) provide for reporting and other necessary legislative requirements.

The Eminent Panel has also strongly recommended that the treaty process legislation should include acknowledgment of the status of First Nations of Queensland and past injustices perpetrated against them, as follows:¹⁶⁴

- (a) First Nations successfully governed their lands, seas, waters and air and associated resources for at least 65,000 years prior to British colonisation of Queensland;
- (b) Colonisation occurred without the consent of First Nations and often against the active resistance of First Nations peoples;

¹⁶¹ Ibid: 7.

¹⁶² Ibid.

¹⁶³ Ibid: 8.

¹⁶⁴ Ibid: 7-8

- (c) First Nations have never ceded their sovereignty and continue to assert sovereignty;
- (d) Colonisation occasioned devastating disruption to First Nations societies and the wholesale dispossession of First Nations peoples of their lands, seas, waters and air;
- (e) First Nations' responsibilities for their lands, seas, waters and air continue in accordance with traditional laws and customs; and
- (f) First Nations cultures and knowledge is an enormous resource for Queensland.

The First Nations Treaty Future Fund recommended by Eminent Panel would finance:¹⁶⁵

- (a) the operational costs of the First Nations Treaty Institute;
- (b) capacity building for First Nations;
- (c) support for the Truth Telling and Healing process and programs;
- (d) support for First Nations representative organisations;
- (e) the costs of First Nations peoples' involvement in treaty negotiations; and
- (f) annual allocations for capital investment to enable the Fund to be self-sustaining over time.

The Queensland Government would be required to credit the Fund with annual appropriations for a minimum period of 10 years. The First Nations Treaty Institute would administer the Fund, but the Queensland Investment Corporation would undertake the investment of the Fund.

The Eminent Panel recommended that the Queensland Government launch:¹⁶⁶

a comprehensive process of Truth Telling to chronicle the history of First Nations peoples prior to British colonisation of Queensland, the history and impact of colonisation on First Nations peoples and the more recent history of Queensland in relation to First Nations peoples.

The First Nations Treaty Institute would manage the process.

Similar to Victoria and Northern Territory, the Queensland Path to Treaty Eminent Panel has acknowledged and recommended the strategic and prudent necessity for legislatively embedding a treaty-making process before substantive commencement of the process itself. The Panel has proposed that the legislation should have an operational provision expressly specifying UNDRIP as a content guide for treaty negotiations. Furthermore, as noted above, the Panel has strongly recommended that the legislation should also include acknowledgment

¹⁶⁵ Ibid: 9.

¹⁶⁶ Ibid: 6.

of the Indigenous difference of Queensland First Nations and the historical injustices perpetrated on them by settler colonialism.

3.5 An overview of Australian treaty-making processes

The treaty-making experience in South Australia demonstrates that “treaty processes in Australia are vulnerable to political fluctuations.”¹⁶⁷ In Victoria, had the Liberal Party won government following the state election of 24 November 2018,¹⁶⁸ it too would have abandoned the process.¹⁶⁹ In Northern Territory, the Country Liberal Party Opposition was “largely ... silent” on treaty making during its campaign for the 22 August 2020 election.¹⁷⁰ However, according to Paul Wright and Eddie Cubillo, “based on past comments”, the Country Liberal Party “has the standard conservative position of disregarding treaty as largely symbolic and a distraction from more ‘practical’ policies.”¹⁷¹ The position of the Liberal National Party Opposition in Queensland on treaty making is ambivalent.¹⁷² What all of this suggests is, ideally, there should be bipartisan commitment to the treaty-making process in order to avoid the risk that a change in government might undo any progress already made in the process.¹⁷³

The following are some other important lessons from State/Territory treaty-making processes to date:¹⁷⁴

- (a) Modern treaty making between the Australian nation-state and its First Nations would be, by its nature, a long process. Commencing the treaty journey requires adequate preparation (including the launching of community consultation/educational programs and capacity-building programs for First Nations).
- (b) There is a need to enact treaty-process legislation to specify a firm treaty roadmap. It should provide for all required treaty-making institutions and funding (including funding for First Nations capacity building, treaty readying and treaty negotiating).
- (c) The legislation should stipulate an interest-based approach to treaty negotiations.

¹⁶⁷ Williams and Hobbs 2020: 273.

¹⁶⁸ Muller 2019.

¹⁶⁹ Williams and Hobbs 2020: 259.

¹⁷⁰ Wright and Cubillo 2020.

¹⁷¹ Ibid.

¹⁷² Wright and Hall 2020.

¹⁷³ Williams and Hobbs 2020: 273.

¹⁷⁴ See Ibid: 270-277

- (d) The legislation should also include an operative provision stipulating UNDRIP as a content guide for treaty negotiations. Without UNDRIP being stipulated as such a guide in a treaty-process legislation, there would be a risk that UNDRIP might be sidelined. If that turns out to be the case, there would be a risk that the foundational rights to self-determination and self-government might fail to be incorporated in a treaty. A treaty that does not include these rights would not deliver a decolonised relationship between Indigenous Australia and the Australian nation-state.
- (e) There should be acknowledgment in the legislation of the Indigenous difference of First Nations and the historical injustices perpetrated on them by settler colonialism.
- (f) Treaty process development requires a slow, steady and measured approach. The proverbial saying ‘slow and steady wins the race’ is apposite to treaty process development.
- (g) Treaty negotiations must not commence until all parties are treaty-ready.

Finally, it is worthwhile to keep in mind the following observation by Williams and Hobbs:¹⁷⁵

The allocation of constitutional authority in Australia provides both opportunities and challenges for [First Nations peoples]. Most significantly, it permits multiple treaty processes to commence even in circumstances where the Australian Government refuses to countenance a national process. Conversely, it means that although State and Territory treaties may lead to positive settlements that secure meaningful outcomes for Indigenous communities, those agreements may not be capable of realising all Indigenous aspirations.

The above statement is an argument for a tripartite Australian treaty-making process. Essentially, it says that an exclusively State/Territory treaty (as is the current approach in Victoria, Northern Territory and Queensland) could only deliver benefits to First Nations that are within the constitutional power of a State/Territory to provide. An exclusively Commonwealth treaty would only be able to include benefits that are within the Commonwealth’s constitutional power. A tripartite treaty would deliver both sets of benefits.

The next section examines the Canada/BC treaty-making process as part of a possible model for a tripartite treaty-making process in Australia.

¹⁷⁵ Ibid: 276.

4 The Canada/BC treaty-making process

Treaty making had been common practice in Canada since the beginning of British colonisation, and was formalised by the Royal Proclamation of 1763 by King George III.¹⁷⁶ However, following the conclusion of a series of 11 treaties, referred to as the Numbered Treaties, between 1871 and 1921,¹⁷⁷ the Canadian Government discontinued its treaty-making process.¹⁷⁸ However, as a consequence of the 1973 Supreme Court of Canada's decision in *Calder v Attorney-General of British Columbia*,¹⁷⁹ the Canadian Government adopted a so-called Comprehensive Land Claim Policy. This Policy inaugurated Canada's modern treaty-making approach. Signed in 1975, the first of these modern treaties was the James Bay and Northern Québec Agreement.¹⁸⁰

As pointed out by Williams and Hobbs, the Canadian Government:¹⁸¹

... might have opted for a legislative response to *Calder* [in the way that the Australian Government had responded to the *Mabo* decision, with the enactment of the *Native Title Act 1993*], or to fight it out case-by-case in the courts.

However, the Canadian Government elected instead to enter into treaty negotiations with Canadian First Nations, with a view to achieving comprehensive settlements of their claims relating not just to land rights but also to other Indigenous rights including self-determination and self-government.¹⁸² If the Australian Government had implemented either of the decolonising proposals by ATSIC or CAR (discussed in Chapter 6), Australia's subsequent dealings with Australian First Nations peoples might have become more aligned with the Canadian approach.

In BC, "where few treaties were concluded during the early years of colonisation",¹⁸³ tripartite modern treaty making began in 1990, with the formal participation of the BC

¹⁷⁶ Government of Canada [n.d.].

¹⁷⁷ Elizabeth Prine Pauls [n.d.].

¹⁷⁸ Williams and Hobbs 2020: 183.

¹⁷⁹ [1973] SCR 313. This judgment (which found that 'Aboriginal title' existed in British Columbia) is in essence the much earlier Canadian equivalent of the 1992 *Mabo* decision in Australia.

¹⁸⁰ Government of Canada [n.d.]; Williams and Hobbs 2020: 183.

¹⁸¹ Williams and Hobbs 2020: 183.

¹⁸² Government of Canada [n.d.]; see also Williams and Hobbs 2020: 183-184.

¹⁸³ Williams and Hobbs 2020: 178. See also Government of Canada [n.d.].

Provincial Government in negotiating the Nisga'a Nation treaty.¹⁸⁴ The Nisga'a treaty negotiation commenced in 1976 between the Canadian Government and the Nisga'a Nation under the Comprehensive Land Claim Policy (with the BC Government being involved in the process merely as an observer).¹⁸⁵ The Nisga'a treaty came into effect on 13 April 2000, almost a quarter of a century following commencement of negotiation.¹⁸⁶ The Canada/BC tripartite framework was formalised in 1992 following the establishment of the BC Treaty Commission, by agreement among the Canadian Government, the BC Provincial Government and the BC First Nations Summit.¹⁸⁷ The First Nations Summit is the representative organisation of the First Nations of BC.¹⁸⁸ This tripartite approach is in recognition of the fact that although "treaty making is a federal responsibility,¹⁸⁹ ... the fulfilment of many treaty promises requires provincial cooperation".¹⁹⁰ The Provinces "have constitutional powers in the area of land and resources."¹⁹¹ Therefore, the BC Provincial Government must necessarily be a party to any treaty with British Columbia First Nations.

Discussions about treaty making in Australia have usually sought to engage with the ongoing Canadian modern treaty-making experience.¹⁹² As Larissa Behrendt has observed:¹⁹³

Canada has played a prominent role as a mirror for jurisprudential and policy developments in Australia because of its origins as a colony, primarily and then solely ruled by the British Empire. Like Australia, it is an invaded and colonised country, that, in its modern period, has had a constitutional history that has seen the gradual devolution of power from colonial power to colony. Both countries work with a common law system that often refers to and adopts the precedents of each other's jurisdiction. Both jurisdictions share a history of colonisation that was powered by similar ideologies of European racial supremacy, ideals of assimilation and cultural imperialism.

And as Williams and Hobbs have pointed out:

¹⁸⁴ BC Treaty Commission 2020: 13.

¹⁸⁵ *Ibid*: 12.

¹⁸⁶ *Ibid*: 13.

¹⁸⁷ Government of Canada [n.d.].

¹⁸⁸ First Nations Summit [n.d.].

¹⁸⁹ Williams and Hobbs 2020: 185.

¹⁹⁰ *Ibid*: 186.

¹⁹¹ *Ibid*: 185.

¹⁹² See Behrendt 2001; Behrendt 2003 [2004 Reprint]: 22-29; Brennan et al. 2005: 87-94; Hobbs and Williams 2019: 194-201; Williams and Hobbs 2020: 178-193.

¹⁹³ Behrendt 2001: 1.

Australians can ... look to Canada and see a modern regional comprehensive agreement-making process with Indigenous peoples that has legal and constitutional significance and manages the complexities of federalism. They can see that land, resource and self-government issues are being resolved by negotiation and then given the strongest form of legal backing.¹⁹⁴

They say “The modern treaty-making experience ... in British Columbia ... offers a model of what the architecture of a treaty process might look like.”¹⁹⁵

And it should be noted that BC has recently legislated the implementation of UNDRIP in the Province. The legislation – *Declaration on the Rights of Indigenous Peoples Act 2019* – received Royal Assent on 28 November 2019. Thus, as the BC Treaty Commission has proudly proclaimed in its 2020 Annual Report: “British Columbia became the first province or territory in Canada, and one of the first governments in the world, to enact [such] legislation”.¹⁹⁶ In December 2020, the Canadian Federal Government tabled Bill C-15, which is designed to align Canadian law with UNDRIP.¹⁹⁷

The BC Treaty Commission (based in Vancouver BC) facilitates and oversees treaty negotiations in BC. The Commission “is the only independent tripartite statutory body in the country whose mandate is to support reconciliation.”¹⁹⁸ The other main roles of the Commission are to allocate funding to First Nations to support them in treaty negotiations, and to educate/inform the public about treaty negotiations. The Commission also supports the negotiating parties in implementing UNDRIP (since 2018).¹⁹⁹

The Canadian Government (60%) and the BC Government (40%) jointly fund the operating costs of the Commission.²⁰⁰ The Canadian Government (90%) and the BC Government (10%) jointly provide the treaty-making support funding for First Nations.²⁰¹ Up

¹⁹⁴ Williams and Hobbs 2020: 191.

¹⁹⁵ Ibid: 192.

¹⁹⁶ BC Treaty Commission 2020: 4.

¹⁹⁷ Parliament of Canada: Bill C-15. <<https://parl.ca/DocumentViewer/en/43-2/bill/C-15/first-reading>>. The Bill was read for the 2nd time on 17 February 2021. A previous attempt to enact such a national legislation – by way of a private Member’s Bill C-262 introduced in 21 April 2016 – was passed in the House of Commons, by a huge majority (206 for, 79 against) on 20 May 2018, but lapsed (because of stalling tactics) in the Senate before it could be voted upon. (<<https://www.afn.ca/policy-sectors/implementing-the-united-nations-declaration-on-the-rights-of-indigenous-peoples/>>>).

¹⁹⁸ BC Treaty Commission [n.d.(a)].

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ BC Treaty Commission [n.d.(b)].

to 2018, 80% of this support funding was by way of Canadian Government loans.²⁰² The Canadian Government is solely responsible for funding the BC First Nations Summit's operational costs.²⁰³

The BC Treaty Commission comprises a Chief Commissioner and four part-time Commissioners. Appointment of the Chief Commissioner (for a three-year term, renewable) is by agreement between the Canadian Government, the BC Government and the First Nations Summit.²⁰⁴ Of the four part-time Commissioners, the First Nations Summit elects two, the Canadian Government appoints one, and one is appointed by the BC Government.²⁰⁵ The part-time Commissioners serve two-year terms (renewable).²⁰⁶

The Canada/BC tripartite treaty negotiation process consists of six stages.²⁰⁷ The first stage is concerned with the initiation of treaty negotiation. The onus of commencing the negotiation process lies with a BC First Nation. It does this by filing a "Statement of Intent to Negotiate" with the BC Treaty Commission. The statement of intent:

- (a) must identify the Nation's governing body, the people that the governing body represents, and show that the governing body has a mandate from its people to enter into treaty negotiation; and
- (b) must describe the geographic area of the Nation's traditional territory, and indicate whether it overlaps with the territory of any other First Nation.

The second stage is concerned with ensuring that the parties are properly ready to commence negotiation. The BC Treaty Commission must convene an initial meeting of the parties within 45 days of accepting a statement of intent. The purposes of the meeting are to:

- (a) allow the Treaty Commission and the parties to exchange information;
- (b) consider the criteria for determining the parties' readiness to negotiate and generally identify issues of concern;
- (c) enable the parties to demonstrate that they have a commitment to negotiate, a qualified negotiator, sufficient resources, a mandate and a process to develop that mandate and ratification procedures;

²⁰² Ibid; Lornie Report 2011: 31.

²⁰³ Government of Canada [11-03-2020].

²⁰⁴ BC Treaty Commission [n.d.(c)].

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ BC Treaty Commission [n.d.(e)].

- (d) enable the First Nation to confirm that it has begun addressing any territorial overlaps; and
- (e) enable the Canadian Government and the BC Government to confirm that they have a formal means of consulting with third parties, including local governments and interest groups.

When the parties have everything in place, the Treaty Commission will declare that they could begin negotiating a treaty framework agreement.

In the third stage, the parties negotiate a treaty framework agreement, that is, the ‘table of contents’ of their intended comprehensive treaty. The framework agreement will provide an estimated period for the negotiation of an agreement in principle on each of the proposed treaty subjects in the fourth stage of the treaty process. In the meantime, during this third stage, the Canadian Government and the BC Government will each be engaging in public consultation at the regional and local levels.

Substantive treaty negotiations begin in the fourth stage. During this stage, the parties examine in detail the elements outlined in the treaty framework agreement, with the aim of reaching an agreement in principle on each of the topics that will form the basis of their intended treaty.

The fifth stage is concerned with the finalisation of the stage four agreement in principle (including the settlement of any technical and legal issues) into a formal treaty for signature and ratification. The sixth and final stage is concerned with the implementation of the treaty according to agreed plans.

Since the commencement of tripartite treaty-making in BC under the 1992 treaty-negotiation framework, there have only been (up to 2019) three signed treaties (stage 6).²⁰⁸ There are 16 First Nations in stage 5, 34 in stage 4, three in stage 3, and five in stage 2. The time taken to progress the negotiation process under the 1992 framework – from the lodgement of an intent to negotiate (stage 1) to treaty implementation (stage 6) – is generally lengthy. For example, negotiation for the Tsawwassen Nation took about 16 years to complete and that for the Tla’amin Nation about 22 years. Negotiation for the Nisga’a treaty was initiated in 1976 –

²⁰⁸ British Columbia 2019: 1 (paragraph 2); BC Treaty Commission [n.d.(f)].

under the Canada-wide Comprehensive Land Claim framework – and the treaty only came into effect on 13 April 2000, and its practical implementation commenced on 11 May 2000.²⁰⁹

A 2011 study by James Lornie, commissioned by the Canadian Government, identified a number of problematic issues associated with the BC treaty process.²¹⁰ Lornie pointed out two broad categories of issues: treaty mandates (matters to be included in a treaty as specified by the Canadian Government) and the negotiation process. He found “high levels of frustration ... regarding both mandate issues and the slowness and complexity of the negotiation process.”²¹¹ Concerning mandates, he pointed out that “the current application of various aspects of the federal mandates relating to certainty and recognition, fisheries and own source revenue present significant constraints on progress.”²¹² On the negotiation process, he observed: “Process issues appear to be at least as significant a barrier to making progress as mandate gaps.”²¹³

Recognition and certainty are two fundamental treaty mandates concern with identifying and recognising the extent of a First Nation’s rights and title under section 35(1) of the Canadian Constitution (*Constitution Act 1982*)²¹⁴ and converting them into defined treaty rights. This identifying and recognising process is described as modifying the undefined section 35(1) rights of the First Nation into rights as set out in the treaty. Upon being transformed into defined treaty rights, the extent of a First Nation’s section 35 rights is made certain. Those defined rights are stipulated in the treaty as comprising the entire section 35 rights of the First Nation.²¹⁵ This modification concept was adopted in an attempt to overcome First Nations’ strong objection to the former requirement “that Aboriginal people, as a condition of signing treaties, surrender or extinguish all their rights and title in exchange for a different set of rights set out in a treaty.”²¹⁶ James Lornie had pointed out that the modification concept was “considered equal to

²⁰⁹ BC Treaty Commission 2020: 12-13.

²¹⁰ Lornie Report 2011.

²¹¹ *Ibid*: 3-4.

²¹² *Ibid*: 5.

²¹³ *Ibid*.

²¹⁴ Section 35(1) of the *Constitution Act 1982* stipulates: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

²¹⁵ Blackburn 2005: 593; Lornie Report 2011: 16.

²¹⁶ Blackburn 2005: 587, 591-592; Lornie Report 2011: 16.

extinguishment by First Nations, as it does not recognize and affirm existing rights, nor does it explicitly provide that existing rights are not extinguished.”²¹⁷

The own source revenue (OSR) mandate is related to the financing of First Nations self-government. Lornie pointed out that First Nations were fully prepared to share in the financing of their self-government functions from their own revenues.²¹⁸ However, they objected to what they perceived as an “inflexible and unfair” approach to implementation of the OSR treaty provisions.²¹⁹ Lornie found that “OSR comes into play too early”.²²⁰ The “inflexibility of the current approach to the mandate does not allow for the different economic circumstances of various First Nations to be taken into account.”²²¹ First Nations’ “concerns with the way in which the current OSR policy is to be applied form a significant constraint on further progress in negotiations.”²²²

Regarding the treaty negotiation process, Lornie pointed out “that the way in which the federal treaty-making bureaucracy is organized and federal decision-making and mandate development processes have contributed to significant delays and disruptions at every treaty table and created high levels of frustration for all three parties.”²²³ Some of his other significant findings in this regard are as follows:²²⁴

- (1) There was no dedicated federal treaty-making agency.
- (2) There was little urgency accorded by federal departments – including Aboriginal Affairs and Northern Development Canada (AANDC), the department tasked with overseeing the BC treaty-making process – to reaching agreement at individual treaty-negotiation tables.
- (3) AANDC had negligible authority to make commitments at treaty tables on behalf of other departments and agencies on any matter falling within those departments/agencies program mandates.

²¹⁷ Lornie Report 2011: 16.

²¹⁸ *Ibid*: 19.

²¹⁹ *Ibid*.

²²⁰ *Ibid*: 20.

²²¹ *Ibid*: 19.

²²² *Ibid*.

²²³ *Ibid*: 25.

²²⁴ *Ibid*: 25-27.

- (4) Treaty negotiations were not a program priority of other departments/agencies, making it challenging for federal treaty negotiators to receive attention on their requests as a matter of priority.
- (5) Consultation with other departments/agencies was immensely time-consuming. Poor coordination and communication between departments contributed to delays and a lack of ability to close agreements.
- (6) Treaty negotiators had limited authority to make commitments at treaty tables. Federal mandates were developed in comprehensive detail before being brought to the table to open discussions, inhibiting negotiation of alternative options.
- (7) There was an “all or nothing” approach on certain issues.
- (8) Canadian/BC Governments would not engage in any discussion on any issue outside of their established mandates.
- (9) All decisions of any substance must be referred through a time-consuming process in Ottawa involving multiple committees of multiple agencies.

Until March 2020, another significant problematic issue for First Nations concerned treaty-negotiation support funding provided to them by way of Canadian Government loans (80% of the support funding).²²⁵ This had led to First Nations participating in the treaty process incurring a significant debt burden. Lornie commented: “It is my view that the accumulated debt burden of the First Nations in the BC treaty process, amounting to more than \$420 million to date [as at 2011], has become an insurmountable and unsustainable barrier to progress and a disincentive to completion of agreements.”²²⁶ He pointed out: “While all three parties have invested significant financial resources in the negotiations process, First Nations are the only party who will be faced with a debt burden, whether or not agreements are concluded.”²²⁷ As of 2018, treaty-negotiation support funding is now made up entirely of governmental grants, and First Nations’ accumulated debt has, as of March 2020, been forgiven by the Canadian Government and loan repayments refunded.²²⁸

First Nations territorial overlaps is also a highly problematic issue, impacting on treaty completion progress. As Lornie had pointed out: “The issue of shared territory conflicts remains a significant problem for all three parties.”²²⁹ This had led to “a few First Nations

²²⁵ Ibid; Lornie Report 2011: 31.

²²⁶ Lornie Report 2011: 29.

²²⁷ Ibid.

²²⁸ BC Treaty Commission [n.d.(g)]; Bellrichard 2019b; Palmer 2019.

²²⁹ Lornie Report 2011: 39.

[unsuccessfully resorting] to the courts to attempt to protect their interests.”²³⁰ He noted: “Some First Nations ... feel that insufficient rigour has been applied to assessing claims by First Nations to their territory, and that the initial acceptance by the BC Treaty Commission of all assertions of territorial rights in Statements of Intent [to negotiate a treaty] filed with Commission, without questioning the issue of shared or other First Nations rights, has complicated the issue of overlaps.”²³¹ He identified the need here for:²³²

- (1) the issue to be resolved “much earlier in the process than is current practice”;
- (2) “increasing funding to the BC Treaty Commission to support the facilitation of discussions of shared territory between First Nations”;
- (3) “increased levels of rigour by the BC Treaty Commission in establishing the bases for claimed overlapping interests in shared territories, including in the acceptance of amended or new Statements of Intent, and in the facilitation of resolution of overlap issues”; and
- (4) “funding for all First Nations to ensure they have adequate resources to engage meaningfully in shared territory discussions.”

The Canadian Parliament Standing Senate Committee on Aboriginal Peoples had also conducted a study on the BC treaty process in 2012.²³³ Representatives of the Canadian Government, the BC Government and the First Nations Summit appeared before the Committee. The Committee found (as the Lornie Report had²³⁴): “Bureaucratic federal decision-making structures and narrowly defined negotiation mandates are causing unnecessary delays in the treaty process.”²³⁵ The Committee noted “with concern that negotiation mandates which require that federal negotiators obtain clearance from Ottawa at multiple stages of negotiations contribute to delays and a lack of transparency in the treaty process.”²³⁶ The Committee pointed out: “Federal negotiation mandates that emphasize a positional, take-it-or-leave-it approach to negotiations further compromise the fairness and efficiency of the treaty process.”²³⁷

²³⁰ Ibid: 40.

²³¹ Ibid.

²³² Ibid: 39.

²³³ Standing Senate Committee 2012.

²³⁴ Lornie Report 2011.

²³⁵ Standing Senate Committee 2012: 9.

²³⁶ Ibid.

²³⁷ Ibid.

On the financial implications for First Nations participation in the treaty process, the Committee expressed its concern (as the Lornie Report had²³⁸) “that delays in the treaty process are imposing an additional financial burden on [them], much of it in the form of loans ...”²³⁹ The Committee pointed out: “Treaties should provide a strong net financial benefit for the parties, not saddle First Nations with high level of debt.”²⁴⁰ For many First Nations, said the Committee, “the costs of entering and remaining in treaty negotiations are too high”.²⁴¹

The Committee also expressed its concern “with the lack of resources and institutional supports for First Nations in the negotiation of overlapping claims.”²⁴² It noted (as the Lornie Report had²⁴³): “Disputes related to overlapping claims have caused, and may continue to cause, delays impeding the conclusion of treaties.”²⁴⁴

The Committee recommended “immediate consideration” by the Canadian Government to the following issues (my numbering):²⁴⁵

- [1] That federal decision-making processes and negotiation mandates be revised to accord federal negotiators sufficient flexibility and authority to engage in open genuine and interest-based negotiations with First Nations.
- [2] That the federal government work closely with the Government of BC and the First Nations Summit to determine what First Nations need to resolve overlapping claims within the BC treaty process and to determine each party’s responsibility in this regard.
- [3] That adequate resources be available to the [BC Treaty Commission] to provide or appoint dispute resolution services to assist First Nations in the resolution of overlapping claims with the BC treaty process.

A nation-wide study, commissioned by the Canadian Government, was conducted by Douglas Eyford in 2015, to review the Government’s comprehensive land claims policy. Eyford identified essentially the same kind of problematic issues (as noted in the abovementioned studies on the BC treaty process) occurring nation-wide.²⁴⁶

²³⁸ Lornie Report 2011.

²³⁹ Standing Senate Committee 2012: 9.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² *Ibid.*: 10.

²⁴³ Lornie Report 2011.

²⁴⁴ Standing Senate Committee 2012: 10.

²⁴⁵ *Ibid.*

²⁴⁶ Eyford Report 2015: 48-78.

Also in 2015, the Canadian Government, BC Government and First Nations Summit established a so-called “multilateral engagement process ... to develop options to improve and expedite treaty negotiations in British Columbia.”²⁴⁷ The exercise (from June 2015 to March 2016) was carried out by a Technical Working Group under the guidance of a Senior Officials Group, with each Group consisting of representatives from each of the Principals.²⁴⁸ The focus of the exercise was on five areas that previous studies had identified as requiring improvements – process efficiencies, negotiation support funding, shared territory and overlap issues, certainty and the role of the BC Treaty Commission.²⁴⁹ The Technical Working Group came up with a number of options for the Canadian Government, BC Government and First Nations Summit to consider.

Finally, in September 2019, the Canadian Government, BC Government and First Nations Summit issued a revamped policy governing the operation of the BC treaty process.²⁵⁰ Paragraph 9 of the policy sets out the fundamental aim of the policy. The paragraph reads (my numbering):

This policy will support, improve, and enable, and not limit, approaches to the negotiation of treaties, agreements and other constructive arrangements between and among Canada, British Columbia and Participating Indigenous Nations that²⁵¹

- [1] are grounded in the recognition of the rights of Participating Indigenous Nations;
- [2] reconcile pre-existing Indigenous sovereignty with assumed Crown sovereignty;
- [3] do not extinguish the rights, including title of Participating Indigenous Nations, in form or result; and
- [4] are able to evolve over time based on the co-existence of Crown and Indigenous governments and the ongoing process of reconciliation of pre-existing Indigenous sovereignty with assumed Crown sovereignty.

The policy took effect on 4 September 2019.²⁵² It is subject to review annually for the first four years and thereafter every four years.²⁵³ On the face of it, the policy would appear to have

²⁴⁷ Canada et al. 2016: 6.

²⁴⁸ Ibid: 8.

²⁴⁹ Ibid.

²⁵⁰ British Columbia et al. 2019.

²⁵¹ The expression “means Indigenous peoples engaged in the negotiation of treaties, agreements and other constructive arrangements within the British Columbia treaty negotiations framework, whose Statement of Intent [to negotiate a treaty] has been accepted by the British Columbia Treaty Commission.”

²⁵² British Columbia et al. 2019: paragraph 60.

²⁵³ Ibid: paragraph 63.

addressed most of the fundamental concerns of First Nations on how the BC treaty process had been conducted in the past.

Paragraph 16 of the policy stipulates that treaty negotiations will be guided by the following (my numbering):

- [1] *Constitution Act 1867 and Constitution Act 1982*, including sections 25²⁵⁴ and 35;
- [2] *United Nations Declaration on the Rights of Indigenous Peoples* (2007);
- [3] *Report of the British Columbia Claims Task Force* (1991) and its recommendations.
- [4] Truth and Reconciliation Commission's 94 Calls to Action, which call for the repudiation of concepts such as the doctrine of discovery);
- [5] applicable customary international law; and
- [6] Indigenous laws and legal systems.

The above-noted paragraph 9 and paragraph 18 of the policy should allay First Nations' fear about the diminution of their rights and titles under section 35(1) of the Canadian Constitution (*Constitution Act 1982*) by the modification approach hitherto employed to identifying/determining those rights and titles and transforming them into treaty rights. Paragraph 18 stipulates that treaties (including agreements and other constructive arrangements) will (my numbering):

- [1] provide for the recognition and continuation of Indigenous rights;
- [2] not extinguish, surrender or require the modification of the rights of Participating Indigenous Nations, in form or result;
- [3] not set out the specific nature, scope or extent of inherent Indigenous rights, except as otherwise agreed by the parties to the negotiations;
- [4] provide a framework for reconciling Crown title and the inherent titles of Participating Indigenous Nations, and pre-existing Indigenous sovereignty with assumed Crown sovereignty;
- [5] provide for the co-existence of Crown and Participating Indigenous Nation governments;
- [6] be capable of evolving over time and not require full and final settlement;

²⁵⁴ The provision reads: *The guarantee in this Charter [of Rights and Freedoms] of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that exist by way of land claims agreements or may be so acquired.*

- [7] employ approaches that reflect the unique circumstances of each Participating Indigenous Nation rather than unilaterally developed, formulaic approaches and formulas; and
- [8] provide for the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007), including the rights to redress and “free, prior and informed consent”.

On treaty-negotiation funding support for First Nations, paragraph 19 of the policy provides: “Canada and British Columbia will fund the participation of Participating Indigenous Nations in the British Columbia treaty negotiations framework through non-repayable contributions rather than through loans.” The paragraph goes on to affirm: “Funding will be allocated by the British Columbia Treaty Commission in accordance with the *British Columbia Treaty Commission Agreement* (1992).”

Paragraph 23 of the policy stipulates that Canadian Government and BC Government treaty negotiators must follow “honourable processes of negotiations”, so as to maintain the “honour of the Crown”. The honour of the Crown requires the negotiators “to act with honour, integrity, good faith, fairness and genuine intention to reach agreement in all dealings with Participating Indigenous Nations.” The honour of the Crown also demands “that Participating Indigenous Nations are treated with respect and as full partners in Confederation, with their rights, treaties and agreements recognized and implemented.” Paragraph 24 of the policy sums up the fundamental negotiation approach that must henceforth be followed: “Negotiations, including the co-development of mandates, should be conducted in an interest-based, non-adversarial manner, conducive to reaching agreements.”

Flexibility in the negotiation process is introduced by paragraph 25 of the policy. It permits First Nation parties to participate in the co-development of mandates, and enables the employment of “incremental, staged or stepping stone approaches to the co-development of mandates.” Flexibility in the negotiation process is further enhanced by paragraph 29 of the policy, by allowing a party to “raise any issue that it views as significant ... including longstanding issues previously raised ... that are not covered by existing federal or provincial mandates.” Additionally, paragraph 31 of the policy recognises that, in the process of co-developing mandates, “there will be no ‘one size fits all’ approach” and “co-developed mandates will take into account the diversity of Participating Indigenous Nations in British Columbia.”

Concerning possible components of First Nations' inherent titles, paragraph 49 of the policy recognises that they may include the following (my numbering):

- [1] legal interests in lands and resources, including the rights to benefit from the land;
- [2] an inescapable economic component, including the right to benefit from the land'
- [3] a jurisdictional component; and
- [4] decision-making authority.

Flexibility in the negotiation process over the above issue is provided by paragraph 51 and paragraph 52 of the policy. Paragraph 51 provides: "In negotiating treaties, agreements and other constructive arrangements to reconcile Crown title and the inherent titles of Participating Indigenous Nations, negotiation tables may employ an incremental or stepping stone approach." Paragraph 52 reads (my numbering):

Federal and provincial negotiators may negotiate comprehensive, core or incremental treaties, agreements and other constructive arrangements to reconcile Crown title and the inherent titles of Participating Indigenous Nations that may include:

- [1] land transfers, including land transfers earlier in the negotiation process;
- [2] resource revenue sharing agreements and economic benefit sharing agreements;
- [3] shared decision-making in respect of lands and resources; and
- [4] jurisdictional arrangements that support the effective implementation of title.

On the highly contentious nature of shared territories and overlaps, particularly between First Nations who are negotiating treaties and those who are not, paragraph 56 says: "Resolution of these issues will require ongoing efforts and may require the development of new policies, policy annexes, tools, approaches and techniques." The required tasks (but not necessarily limited to just them) are set out in section 5 of Schedule A to the policy. It states, "subject to seeking the participation and collaboration of Indigenous Nations outside the British Columbia treaty negotiations framework", further work includes (my numbering):

- [1] identifying the roles and responsibilities of federal and provincial negotiators, if any, in connection with the resolution of shared territory and overlap issues among Participating Indigenous Nations and Indigenous Nations;
- [2] development of principles to guide the resolution of shared territory and overlap issues;
- [3] timing considerations relating to the resolution of shared territory and overlap issues among Participating Indigenous Nations and Indigenous Nations; and

- [4] exploring the potential for an institution to support the resolution of shared territory and overlap issues.

However, the policy goes on to provide, in paragraph 58: “Where two or more Indigenous Nations or groups have a shared territory and wish to enter into joint negotiations with Canada and British Columbia, federal and provincial negotiators may negotiate and enter into shared territory agreements and other constructive arrangements with these Indigenous Nations or groups in respect of the shared territory.”

On the issue of fiscal arrangements (which includes the financing of First Nations self-government), paragraph 45 of the policy states: “Canada, British Columbia and Participating Indigenous Nations will seek to develop new fiscal arrangements to support treaties, agreements and other constructive arrangements.” Section 1 of the Schedule A to the policy recognises the need for further work to consider “A framework for guiding the development and negotiation of fiscal relationships.”

The policy’s statements on self-determination and jurisdiction constitute express recognition of treaties as frameworks for the restructuring of the political, social and economic relationships of First Nations and the Canadian nation-state within the latter’s constitutional and governmental arrangement. I set out below a number of the policy’s relevant statements:

Paragraph 36

Recognition of the inherent right of self-determination of Participating Indigenous Nations in British Columbia is the starting point of negotiations to reconcile and achieve the co-existence of federal, provincial and Indigenous jurisdictions, laws and legal systems.

Paragraph 38 (which reflects UNDRIP language)

Canada and British Columbia recognize that Participating Indigenous Nations in British Columbia have the inherent right of self-determination, which includes (my numbering):

- [1] an inextricable link to the lands, territories and resources traditionally owned, occupied or otherwise used or acquired by Participating Indigenous Nations;
- [2] rights to determine their own identity and membership in accordance with their customs, traditions and laws;
- [3] inherent rights of jurisdiction and self-government;
- [4] laws, law-making authority and legal systems;

- [5] rights to determine, maintain, develop and strengthen their distinct political systems, institutional structures and representative institutions, through representatives chosen by themselves in accordance with their own procedures; and
- [6] rights to freely pursue economic, political, social and cultural development.

Paragraph 41 (concept of treaty federalism)

Canada and British Columbia recognize that self-governing Participating Indigenous Nations are part of Canada's evolving system of cooperative federalism and distinct orders of government.

Paragraph 44

Treaties, agreements, and other constructive arrangements under this policy are one pathway for enabling Indigenous Nations to transition away from the *Indian Act* [and] colonial systems of administration.

As Marcia Langton has pointed out: "The current treaty processes in Canada and the Canadian entrenchment of treaties and agreements provide a model favoured by many Aboriginal people ..."²⁵⁵ She is of the view that: "Adopting [the Canadian treaty process] would open up the possibility for alternative arrangements in a post-frontier Australia that would accord a status of full equality to the traditional laws of Indigenous peoples by mutual agreement."²⁵⁶

Williams and Hobbs have pointed out: "The Canadian experience demonstrates the need to establish realistic expectations of a treaty process and how maintaining support for the process on all sides is a continuous challenge."²⁵⁷ And, as noted above (subsection 3.3), the Northern Territory Treaty Commission's Discussion Paper has endorsed the BC/Canada 1992 treaty negotiation framework as an appropriate model for the Northern Territory treaty-negotiation process. As the Discussion Paper puts it, the BC/Canada treaty-negotiation framework is "a comprehensive, simple to understand and proven process that can be adapted to the NT."²⁵⁸

The fact that the Canadian Parliament has exclusive jurisdiction over First Nations and lands reserved for First Nations²⁵⁹ does not in practice place Canada in a better position than

²⁵⁵ Langton 2001: 24-25.

²⁵⁶ Ibid: 25.

²⁵⁷ Williams and Hobbs 2020: 193.

²⁵⁸ Northern Territory Commission 2020b: 72.

²⁵⁹ Section 91(24), *Constitution Act 1867* (Canada.).

Australia (where the Commonwealth/State Parliaments have concurrent jurisdiction) in dealing with First Nations affairs. The Canadian Government found it necessary to involve Provincial Governments in tripartite treaty-making. Treaties just between First Nations and the Canadian Government would not be able to deliver to First Nations all the outcomes envisaged by the Comprehensive Land Claim Policy. In relation to First Nations land rights, and in the context of the BC treaty process, the BC Government has jurisdiction over BC Crown land, which comprises 94% of all BC lands.²⁶⁰ Thus, the BC Government has to be a party to any treaty in BC if, for example, the land rights claim of a First Nation extends beyond its reserved land that the Canadian Government had established under the *Indian Act 1876* (Canada).²⁶¹ As the Act was designed (as in the case of the various ‘Aboriginal Acts’ in Australia) to free up lands for settler colonisation (and to assimilate First Nations peoples into settler society), it could be reasonably inferred that lands reserved for First Nations peoples would invariably be smaller than their traditional territories.²⁶² An equally fundamental objective of the Comprehensive Land Claim Policy is the need to restructure First Nations’ political, social and economic relationships with the Canadian and Provincial Governments. Therefore, the perceived advantages of tripartite treaties in British Columbia and in Australia are essentially similar. In Australia, any treaties, concluded by a State/Territory with First Nations peoples within its jurisdiction, would need to be reformulated into tripartite treaties to accommodate the participation of the Commonwealth and the inclusion of matters within the Commonwealth’s constitutional jurisdiction. Depending on the requirements of the Commonwealth, the original terms of such a treaty might require renegotiation.

Canada’s ready acceptance of the need to restructure its political, social and economic relationships with Canadian First Nations peoples, and for modern treaties to be the frameworks for achieving such restructuring, is a massive plus for Canadian First Nations when compared to the situation of First Nations peoples in Australia. Australia’s continued refusal/reluctance to align itself with Canada in this regard remains, as Marcia Langton has pointed out, “a stain on Australian history and the chief obstacle to constructing an honourable place for Indigenous Australians in the modern nation-state.”²⁶³ The acceptance in Canada of fundamental relationship-restructuring between First Nations and the nation-state is positively aided by the

²⁶⁰ Ibid: Section 92(5); Government of British Columbia [n.d.].

²⁶¹ See The Canadian Encyclopedia [n.d.].

²⁶² Ibid.

²⁶³ Langton 2001: 13.

Canadian Government's 'inherent right of self-government' policy.²⁶⁴ The policy recognises First Nations' right to self-government as a constitutional right.²⁶⁵ Thus, self-determination and self-government by First Nations are matters readily accepted in Canada as subjects for a treaty.²⁶⁶ However, despite the positive thinking, treaty negotiations in British Columbia have not, as noted above, resulted in expeditious conclusions.

The absence, in Australia, of the sort of fundamental facilitative political, legislative, and constitutional circumstances enjoyed by Canadian First Nations, should not be seen as insurmountable obstacles to the pursuit by Australian First Nations of treaties as frameworks for achieving their decolonisation objective. However, the present lack of such facilitative factors in Australia would require First Nations in Australia to take up the difficult task of encouraging the powers-that-be to adopt the political will to free them from the embrace of settler colonialism. This demanding mission is unavoidable. It requires First Nations peoples to continue, with greater vigour, the journey of endurance that their ancestors had embarked upon since 1788.

Marcia Langton and Lisa Palmer have noted the increasingly large numbers of agreements between First Nations and non-Indigenous parties under the provisions of the Commonwealth *Native Title Act 1993*²⁶⁷ They said:²⁶⁸

The recognition of native title at common law and the subsequent native title legislation confer on Indigenous people in Australia a significant, if varied, opportunity to negotiate with resource companies over the access and use of their lands. Resource companies operating in Australia, have, since the mid-1990s, and under the influence of native title law, begun to adopt an active policy of seeking agreements with Indigenous Peoples. ... Such agreements are evidence of a willingness among some present day private corporations to do what the colonial governments were, by and large, unable to countenance – that is, to acknowledge that another group of people were the owners and custodians of the lands and waters of Australia; and that their descendants have a right to possess, use and enjoy those lands and waters, and within the limits of Australian law, to govern their use and access by others, and to reap from that use or access any benefits that would accrue to any other group of people in rightful possession.

²⁶⁴ Government of Canada [n.d.(a)].

²⁶⁵ Ibid. See Section 35(1) of the *Constitution Act 1982* (Canada).

²⁶⁶ Government of Canada [n.d.(a)].

²⁶⁷ Langton and Palmer 2003a: 13-15.

²⁶⁸ Ibid: 17.

Langton and Palmer noted in particular the usefulness of the Indigenous Land Use Agreement framework in this regard.²⁶⁹ They see *Native Title Act* agreements as contributing to the development of a “culture of agreement making” in Australia, “which could lead to the legal and practical recognition of Aboriginal civil polities.”²⁷⁰

The BC tripartite treaty process had certainly not produced the speedy outcomes, and the number of First Nations participating in the process, that the Canadian Government, the BC Government and the First Nations Summit had hoped for when they established the process in 1992. They had “anticipated that treaty making would be completed by 2000.”²⁷¹ They found, instead, that “Treaty negotiations have proven to be complex and challenging undertakings.”²⁷² However, this state of affairs does not detract from the usefulness of the BC six-stage negotiation framework as a model for Australia. As noted above, the various studies on the BC treaty process had identified a number of problematic issues concerning its operation. These problems could be avoided/ameliorated in Australia. The revamped policy issued in September 2019 by the Canadian Government, BC Government and First Nations Summit (noted above) suggests some significant improvements that should be incorporated in the Australian six-stage tripartite negotiation framework proposed by this thesis.

Having regard to problematic issues identified by the various above-noted studies on the BC treaty process, and to the 2019 revamped policy issued by the Canadian Government, the BC Government and the First Nations Summit, the lessons for Australia from the operation of the BC treaty process to date may be summarised as follows:

- (1) There is a need to establish a flexible negotiation framework that would avoid undue delays in progressing the negotiation process. The framework has to include requirements that would avoid unhelpful approaches to negotiations. It needs to ensure that the negotiation process would be progressed steadily and conducted with integrity and good faith by all parties. It needs to specify an interest-based approach to negotiations. Such an approach would ensure that parties would be negotiating to reach agreements.

²⁶⁹ Ibid: 13-14.

²⁷⁰ Ibid: 24.

²⁷¹ Canada et al. 2016: 7.

²⁷² Ibid.

- (2) The negotiation framework must specify UNDRIP as a treaty-content guide, thereby ensuring a rights-based approach to the formulation of treaty terms. An interest-based approach to negotiations would facilitate mutually satisfactory solutions to the interpretation of ambiguous UNDRIP provisions.
- (3) Commonwealth, State and Territory negotiators must be accorded sufficient flexibility and authority.
- (4) Non-repayable negotiation-support funding must be provided to First Nations parties, so as to raise their negotiating capacity to a level comparable to that of the Commonwealth, State, and Territory.
- (5) Issues relating to shared territory and any disputed overlapping territorial claims must be resolved before treaty negotiations could begin.

In current circumstances, persuading the Commonwealth, in particular, to embark on a tripartite treaty-making process with First Nations would be a challenging undertaking. The difficulty in this regard is compounded by having to convince the Commonwealth to, in effect, implement the UNDRIP declared rights via a treaty. First Nations are faced here with a double-whammy situation. Again, however, this should not be regarded as an insurmountable obstacle. It needs to be tackled with the utmost persistence and resilience.

I proceed next to setting out a proposed structure for a tripartite treaty-making process for Australia.

5 A proposed structure for a tripartite treaty-making process in Australia

I base the proposed structure for a tripartite Australian treaty-making process set out in this section on my examination of literature and similar processes nationally and internationally. I make this proposal conscious of the difficulties and challenges it will face. I put it forward as a conceptual proposal to promote debate on the role of modern treaties as frameworks for decolonising the Australian nation-state. I will assign names to particular recommended treaty institutions. I will assume, for discussion purposes, that the Commonwealth Government would

be the initiator of the process (about which more will be said in the concluding chapter of this thesis, Chapter 8).

Harry Hobbs and George Williams have suggested “that interlocking state and federal treaties offer the best prospect for reaching an enduring settlement that meets Aboriginal and Torres Strait Islander peoples’ aspirations within Australia’s public law framework.”²⁷³ This approach takes into account the constitutional distribution of powers under the Australian federal system of governance and seeks to avoid constitutional limitations that would otherwise apply to treaties that are exclusively State/Territory or Commonwealth.²⁷⁴ Hobbs and Williams modelled their proposed tripartite treaty-making approach on the Canada/BC tripartite treaty-making framework examined above (section 4). While my proposed structure for a tripartite Australian treaty-making process is inspired by Hobbs and Williams, I take the matter further. In discussing their proposal, Hobbs and Williams did not engage with UNDRIP, nor did they offer a proforma tripartite treaty premised upon the UNDRIP provisions. I do both of these.

Based on lessons from the State/Territory processes examined in section 3 and the Canada/BC process explored in section 4, a conceptual tripartite Australian treaty-making structure is set out below. There are a number of matters that the Commonwealth Government, participating State/Territory Governments and First Nations would need to attend to before actual treaty negotiations can begin. These would include the matters set out/discussed below.

The Commonwealth and each participating State/Territory would have to enact complementary treaty process legislation, setting out a firm roadmap for treaty making and implementation. The legislation should include a preambular acknowledgment along the following lines:²⁷⁵

- (1) First Nations were the prior owners and occupiers of the Australian continent, its seas and waters, and all its resources.
- (2) First Nations were self-determining and self-governing under their traditional laws and customs.

²⁷³ Hobbs and Williams 2019: 217. See also discussion in Williams and Hobbs 2020: 287-290.

²⁷⁴ Hobbs and Williams 2019: see generally their discussion at 217-230. See also Williams and Hobbs 2020: 280-287.

²⁷⁵ Inspired by the history of First Nations peoples explored in Chapter 2; *Coe v Commonwealth* [1979] HCA 68 and *Coe v Commonwealth* [1993] HCA 42 explored in Chapter 3; the preamble to the *Native Title Act 1993* (Cth); ATSIIC 1995: ix-xiii, 1-13; the preamble to the *Aboriginal and Torres Strait Islander Act 2005* (Cth); Eminent Panel 2020b: 5 (Implementation – The Path to Treaty Act, subsection 6.2).

- (3) First Nations were dispossessed of their lands and their communities dispersed without their consent and without compensation.
- (4) First Nations peoples were deprived of their traditional means of subsistence.
- (5) Many First Nations peoples were unable to pursue their traditional law and cultural practices.
- (6) Many First Nations peoples suffered forcible removal of their children from their families.
- (7) First Nations peoples were subjected to oppressive policies and practices of past governments.
- (8) First Nations have never ceded their sovereignty over the Australian continent, its seas and waters, and all its resources.
- (9) First Nations have called for treaties between the Australian nation-state and Indigenous Australia to provide for the recognition of the right of First Nations to self-determination and to self-government within the constitutional framework of the Commonwealth of Australia.

The legislation should stipulate:

- (1) the establishment of a national representative body for First Nations;
- (2) the establishment of procedures for dealing with cases involving First Nations whose traditional lands and waters extend beyond the boundaries of particular State/Territory boundaries.
- (3) guiding principles for treaty negotiations;
- (4) the use of UNDRIP as a content guide for treaty negotiations;
- (5) the establishment of a treaty negotiation framework;
- (6) the establishment of a Makarrata Commission (as proposed by the Uluru Statement from the Heart) whose functions would be to manage the treaty-making process, but also vested with additional functions and powers mentioned below);
- (7) the development and implementation of a national capacity-building program for First Nations;
- (8) the development and implementation of a national community education program;
- (9) the establishment of national treaty-making and self-determination funds;
- (10) the establishment of a national truth-telling process;
- (11) dispute resolution procedures; and
- (12) reporting and other legislative requirements.

If the Morrison Government proposed National Voice to Government (noted in Chapter 6, section 5) is implemented, this organisation should become the required national representative body for First Nations for the purposes of establishing the national tripartite treaty negotiation framework. This would avoid the costs of carrying out further design

consultations with First Nations on the creation of a national representative body.²⁷⁶ As the national representative organisation for First Nations, the National Voice would have similar role/functions as the BC First Nations Summit. The BC First Nations Summit was established in 1991 to represent BC First Nations in formulating the Canada/BC tripartite treaty framework and in providing ongoing support to BC First Nations in their dealings with the Canadian/BC Governments. Its mandate is succinctly summarised in the Summit's following statement:²⁷⁷

- (1) The Summit's mandate is to represent the interests of First Nations which have agreed to participate in treaty negotiations. The Summit's role is not to negotiate treaties on behalf of First Nations, but to support local First Nations' negotiations. In doing so, the Summit also recognizes that not all First Nations in the Province have chosen to participate in the treaty process. The Summit respects each First Nation's right to determine its own course. The 1991 Report of the British Columbia Claims Task Force Report lays the foundation for the treaty process in BC.
- (2) The First Nations Summit adopted fundamental principles, which are the basis of our discussions with Canada and British Columbia. We at the Summit table are mindful that in our respective territories we are autonomous, and make decisions about our Nations that are important to our people in our respective territories. We come to the Summit table to share ideas and strategies on how to collectively reach negotiated treaty agreements and advance aboriginal rights.

As with the BC First Nations Summit, the National Voice would not be a participant in treaty negotiations. As noted above (section 4), the Canadian Federal Government is solely responsible for funding the BC First Nations Summit's operational costs. The same arrangement should be followed in Australia for the funding of the National Voice in its role as the national treaty process representative body for First Nations.

The procedures for dealing with First Nations whose traditional lands and waters extend beyond particular State/Territory boundaries would need to specify how treaty negotiations should be carried out. Could negotiations in these multi-jurisdictional circumstances only proceed when all the negotiation parties are ready? Or could a call be made for piecemeal negotiations in defined circumstances?

The guiding principles for a tripartite treaty negotiation process must be supportive of (1) an interest-based approach to negotiations, and (2) consistency in approach to dealing with

²⁷⁶ The proposed number of members of the National Voice is two from each State/Territory/Torres Strait Islands. The two members from each State/Territory/Torres Strait Islands would either be directly elected by the State's or Territory's First Nations voters or determined by a relevant State/Territory First Nations representative body.

²⁷⁷ First Nations Summit [n.d.(a)].

matters that have nationwide application (for example, ownership of subsurface resources). UNDRIP would be a content guide for treaty negotiations. As noted earlier on (concluding part of section 4), an interest-based approach means the parties share the interests that underlie their fundamental purpose for coming to the negotiation table. They would be negotiating mutually agreed interpretations of the UNDRIP provisions (including ambiguous ones) and to crystalise/translate these into treaty provisions. They would be jointly negotiating mutually satisfactory solutions. They would be negotiating to reach agreements.

Part 3 of the Victorian Treaty Process Act embodies an interest-based approach. It stipulates that treaty negotiations must be based on fairness and equality; partnership and good faith; mutuality of benefits; and transparency, honesty and integrity. A fair negotiator is one who is reasonable and just in their approach. A negotiator who values equality is one who deals with their co-negotiator as their equal. A partnership approach to negotiation is one in which the co-negotiators work together as partners in achieving their common goal of reaching agreements. Good faith negotiation is one in which each negotiator carries out their task without any intent to defraud, or take unfair advantage of, each other. A negotiator who adopts a mutuality approach is one who seeks to understand and is willing to meet their co-negotiator's needs in ways that work for both. A transparent negotiation process means one that is conducted in an open way without secrets, one that is not motivated by obscurantism. In other words, it is a process that is carried out with honesty (not deceptive) and with integrity (recognising/accepting what is right for both parties).

The Canada/BC six-stage tripartite treaty negotiation framework would be an appropriate model for Australia to adopt. As the Northern Territory Discussion Paper has pointed out (above, section 3), the Canada/BC treaty negotiation framework is a “comprehensive, simple to understand and proven process” that can be adapted to Australia. To overcome the problems associated with the Canada/BC process noted in section 4, there would be a need to stipulate appropriate treaty-negotiation guiding principles in the treaty process legislation. These principles are set out in the penultimate paragraph of section 4 and reiterated in the immediately above two paragraphs.

The six-stage process is designed to ensure that parties are fully ready to commence negotiation. The onus of commencing treaty negotiation would be on a First Nation. In other words, whether or not a First Nation would want to negotiate a treaty would be

entirely up to it. If it does, then it would signify this intent, in Stage One, by lodging with the Makarrata Commission a statement of intent (SOI) to negotiate a treaty. The SOI must identify the First Nation's governing body for treaty purposes and the people that body represents and show that the governing body has a mandate from those people to enter the process. The SOI must be accompanied by a map detailing the geographic area of the First Nation's distinct traditional territory and any overlaps with other First Nations. Thus, a First Nation would not be able to indicate to the Commission its desire to commence negotiation until it could meet the SOI requirements. If there are disputed territorial overlaps, it would be the responsibility of the First Nation to resolve the problem with the other First Nations. The relevant First Nations would be able to access treaty-making funding to support them in resolving their disputes. Shared territory and territorial overlaps must be resolved before treaty negotiation commences.

In Stage Two of the process, the First Nation would have to demonstrate to the full satisfaction of the Makarrata Commission that it is ready to commence negotiation, by filing with the Commission a readiness submission. It must demonstrate to the Commission that it has a firm commitment to negotiate, a qualified negotiator, sufficient resources to support it in the negotiation process, and has in place clear treaty-ratification procedures. If the First Nation requires treaty-negotiation support funding, it must make sure that it has received approval for it before lodging its SOI. The First Nation must also convince the Commission that it has taken, or is in the process of taking, positive steps to address any territorial overlaps problem. Resolution of territorial overlaps might involve mediation by a third party or it might require striking an agreement with the relevant other First Nations, for example, under the *Native Title Act 1993* (Cth). As to the latter, the parties might agree to jointly negotiate a single treaty as a “federated” entity.²⁷⁸ In which case, the Commission would no doubt have to be satisfied that the joint party has an appropriate constitutional/governmental structure in place. Only if the Commission is satisfied with the readiness submission – in particular that any territorial overlaps have been sorted out – would it declare the First Nation ready to negotiate. The determination of the readiness of a particular First Nation by a Commission composed of members from different nations should not give rise to concerns about its appropriateness. The

²⁷⁸ An example in the Canada/BC situation of such a concept is the joint negotiation by five (small) BC First Nations that resulted in the Maa-nulth First Nations Treaty, which came into effect on April 1, 2011 (BC Treaty Commission [n.d.(h)]).

Commissioners carry out their duties according to rules prescribed in the legislation providing for their appointment. The rules would among others require the Commissioners to perform their function impartially and without regard to their national origin or by whom they were nominated. Involvement of a State/Territory Government and the Commonwealth Government in the appointment of Commissioners does not detract from the legislatively prescribed rules.

In addition to carrying out similar roles/functions as the BC Treaty Commission (described above, section 4), the Makarrata Commission should also be vested with the power to oversee treaty implementation and treaty amendments, and to mediate on treaty disputes. Its organisational structure should be modelled on the BC Treaty Commission. However, as the Makarrata Commission would be a national body, its membership should be much larger than the BC Treaty Commission. As noted above (section 4), the BC Treaty Commission has a chief commissioner and four part-time commissioners. Some idea on membership size could be gained from that of the Morrison Government's proposed "National Voice". The proposed number of members for that body is two from each State/Territory/Torres Strait Islands – a total of 18 members. In the circumstances, it would probably be appropriate for the Makarrata Commission to consist of a full-time chief commissioner and 18 part-time commissioners (two from each State/Territory/Torres Strait Islands, assuming all would participate). All commissioners should be First Nations individuals. If the BC Treaty Commission's method for appointing its members is adopted, the National First Nations Assembly would nominate one of the two part-time commissioners from each State/Territory/Torres Strait Islands – a total of 9. Each State/Territory/ Government and the Torres Strait Islands Authority would nominate the other of its two members. The chief commissioner would be appointed by agreement among the National First Nations Assembly, the Commonwealth Government and participating State/Territory Governments and the Torres Strait Islands Authority.

The proposed national capacity-building program for First Nations would support them in developing their governance structures and representative organisations (which would undertake treaty negotiations on their behalf), and to assist them to become treaty-ready. As in the case of the BC First Nations Summit, the National Voice would also have a role to play in supporting First Nations to be treaty-ready. If the Canada/BC method of identification is followed, an Australian First Nation would be exclusively self-identifying by reference to its

traditional country. For BC First Nations, this method of identification is noted in the following BC Treaty Commission statement:²⁷⁹

A ‘First Nation’ in the BC treaty negotiations process is a self-defined governing body, established and mandated by its people within its traditional territory in BC to enter into treaty negotiations with Canada and British Columbia. The BCTC Agreement²⁸⁰ and legislation²⁸¹ set out this principle of self-definition, and is consistent with the principle of self-determination.

As indicated in the above statement, such group self-identification is consistent with the principle of self-determination – reflected in UNDRIP Article 3 (right to self-determination), Article 4 (right to autonomy/self-government) and Article 5 (right to maintain, among others, own political institution). For that reason, self-identification by each Australian First Nation would be an appropriate method to adopt in an Australian tripartite treaty negotiation framework. Thus, the targets of the proposed national capacity-building program would be each such self-identified First Nation that intends to be a party to a tripartite treaty.

Concerning membership of First Nations individuals to particular First Nations – while UNDRIP Article 6 accords them the right to a nationality and Article 9 the right to belong to a First Nation – their membership must comply with the rules prescribed by the First Nation to which they wish to belong. A First Nation has, pursuant to UNDRIP Article 33, the right to determine its membership according to its own rules. Conceivably, an individual might be eligible for multiple First Nations membership. However, the Commonwealth or a participating State/Territory might object to such multiple membership for treaty-making purposes. Multiple membership might be objectionable in this context because it leads to multiple counting of the same individuals. Such multiple counting might have implications for determination of treaty benefits including, for example, treaty-making/self-determination support funding. In the circumstances, the issue would need to be resolved by agreement between the National Voice, the Commonwealth Government and participating State/Territory Governments.

In Victoria, for example, “Aboriginal Victorians” are defined as “Victorian traditional owners, clans, family groups and all other people of Aboriginal and Torres Strait Islander descent who are living in Victoria.”²⁸² The Victorian Treaty Process Act adopts the same

²⁷⁹ BC Treaty Commission [n.d.(i)].

²⁸⁰ BC Treaty Commission Agreement [21 September 1992].

²⁸¹ *British Columbia Treaty Commission Act 1995* (Canada), section 2.

²⁸² *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), Preamble, paragraph 2.

definition of “traditional owners” as provided in the *Aboriginal Heritage Act 2006* (Vic). And “all other peoples of Aboriginal and Torres Strait Islander descent” would be determined according to the now widely-accepted formula – descent, self-identification and acceptance by the First Nations community in which the person resides. As far as identification of First Nations treaty parties is concerned, the yet to be established Victorian treaty-negotiation framework would no doubt provide relevant rules.

The fundamental aim of the national community education programs is to promote understanding among the wider Australian community as to why First Nations people are seeking to negotiate treaties with the Australian nation-state. The syllabus would include a number of important topics. Broadly speaking, there should be an historical overview of the injustices perpetrated on First Nations peoples by settler colonialism and their resistance to settler colonialism. The enduring/ongoing struggle by First Nations peoples to be free from settler colonialism, settler-colonial impositions and assimilative forces of settler-nationalism should be fully drawn out. The appropriateness of treaties as frameworks for a comprehensive re-structuring of the political, social and economic relationships of Indigenous Australia and the Australian nation-state must be fully explained. The benefits of a treaty or treaties for First Nations and the broader community should also be explained.

The treaty-making fund would finance the costs of: (a) developing and implementing First Nations capacity-building programs, (b) developing and implementing community education programs, (c) First Nations’ participation in treaty negotiations, and (d) mediation on disputes between First Nations (if any) relating to treaty making (for example, territorial overlaps²⁸³). The self-determination fund would finance First Nations self-government authorities, and the cash components of treaty settlements. As in the case of the BC Treaty Commission, the Makarrata Commission would be responsible for administering the treaty-making and self-determination funds.

The Commonwealth Government and participating State/Territory Governments would contribute to the establishment of the two funds, according to a formula agreed among them. I have not been able to access any information on how the Canada/BC cost-sharing formula is derived. In Australia, on the expectation that more than one State/Territory jurisdiction would

²⁸³ A problematic issue in BC.

be involved, cost-sharing arrangements between the Commonwealth and each participating State/Territory should take into account the relative revenue-raising capacity of each State/Territory. This notion of relative revenue-raising, or fiscal, capacity is a fundamental premise employed by the Commonwealth Grants Commission in calculating a State's or Territory's share in Goods and Services Tax revenue.²⁸⁴ Its application/adaptation to determining each jurisdiction's contribution to the treaty-making and self-determination funds should not therefore be a contentious issue. Assume, for discussion purposes, an agreed 50-50 baseline contribution. That is, the Commonwealth would provide 50% and the participating States/Territories would together meet equally the other 50%. Since a State's or Territory's contribution is subject to its relative fiscal capacity, a fiscally weaker State/Territory would not have to contribute as much as a fiscally stronger State/Territory. Assume further that the Commonwealth has agreed to meet any shortfall in contribution by a particular State/Territory. In that case, the Commonwealth's total contribution could conceivably end up being more than 50%.

The treaty-making and self-determination funds would need to be self-sustaining in the long run. For example, the Queensland Expert Panel has suggested how this could be achieved. As noted above (subsection 3.3), it recommended that the Queensland Government should credit the proposed First Nations Treaty Future Fund with annual appropriations for a minimum of 10 years. The investment of the Fund would require professional management (by the Queensland Investment Corporation). Another example of how long-term sustainability might be achieved is provided by the method prescribed for the management/investment of incomes of funds established to support local First Nations land councils in NSW. Under the *Aboriginal Land Rights Act 1983* (NSW), the NSW Aboriginal Land Council provides the support funding. The Act requires the Council to set up an investment account for its incomes (which includes annual parliamentary appropriations) with an authorised deposit taking institution. The capital value of that account must be maintained at its level as at 31 December 1998 (about 15 years

²⁸⁴ Commonwealth Grants Commission [n.d.]. For details of the CGC's method of calculating a State's/Territory's relative fiscal capacity, see Commonwealth Grants Commission 2020, *Report on GST Revenue Sharing Relativities 2020 Review — Volume 2 (Part A)*: 36-62. For details about fiscal equalisation, see Commonwealth Grants Commission 2021.

following the Act's commencement of operation).²⁸⁵ The Commonwealth, State, and Territory Governments should give due consideration to either of the two approaches.

The Commonwealth Government would be responsible for establishing the proposed national truth-telling process alongside the treaty process. Such a truth-telling program would be a positive response to the demand by the Uluru Statement from the Heart for such a program. A Commonwealth commission of inquiry should be appointed to carry out the process for a period of three years.²⁸⁶ Its funding should be borne entirely by the Commonwealth Government.

It is in Stage Three of the six-stage negotiation framework that the parties determine by agreement among them the scope of a treaty. It is during this stage that a First Nation party would put forward its list of proposed treaty subjects. The proposed subjects should be based on the UNDRIP provisions. However, it would be entirely up to a First Nation to determine what that list should include. For example, a First Nation interested only in striking a service delivery agreement would obviously limit its proposed treaty scope to this issue. On recovery of land, this would not be an issue for a First Nation that has regained its traditional country under the relevant land rights or native title legislation. However, ownership of the subsurface resources of its country would be a legitimate subject for that First Nation to include in its proposed treaty content. For a First Nation that has been unsuccessful in its land rights or native title claim, but has gained land purchased on its behalf by, for example, the Indigenous Land and Sea Corporation,²⁸⁷ recovery of land might also not be a treaty subject. But, again, ownership of subsurface resources could be. Clearly, therefore, the treaty-scope negotiation between the parties during Stage 3 would have to assess whether there is any land about which negotiations are appropriate. And pursuant to UNDRIP Article 37, Indigenous Land Use Agreements (ILUAs) under the *Native Title Act 1993* (Cth) would be recognised. Article 37 provides:

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their

²⁸⁵ The determined capital value of the account as at 31 December 1998 is \$485,340,000: *Aboriginal Land Rights Act 1983* (NSW), section 150 (note).

²⁸⁶ This is the same period that the Yoo-rrook Justice Commission has been given for carrying out the truth-telling process in Victoria (see above, subsection 2.1).

²⁸⁷ Australian Government (Indigenous Land and Sea Corporation).

successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Thus, the treaty-scope negotiation in Stage Three would proceed on a clearly articulated basis of recognition of and acceptance of rights gained to date by the First Nation. And the resulting treaty would expressly provide such recognition/acceptance. Insofar as ownership of subsurface resources is concerned – essentially a State/Territory issue – a uniform approach would be preferable. As indicated earlier on (in relation to the stipulation of the guiding principles for a tripartite treaty negotiation process), such an approach should be reflected in the treaty-process legislation.

I proceed next to set out a suggested framework and minimum content of a tripartite treaty for Australia premised upon the UNDRIP provisions.

6 Proposed tripartite Australian treaty – framework and minimum content

My proposed proforma tripartite treaty, premised upon the UNDRIP provisions, is just that, a proposed form. I do not offer it as a ‘one size fits all’ framework. I offer it simply as a guide for First Nations – intending to embark upon treaty negotiations – to consider. A First Nation would be entirely free to use it or not. It would be entirely free to negotiate a treaty that it considers appropriate to its circumstances. As mentioned earlier on, it could be that a First Nation might simply wish to negotiate a simple service-delivery agreement. Furthermore, a First Nation is entirely free to decide whether or not it would wish at all to negotiate a treaty. This freedom is a fundamental principle underlying the Canada/BC treaty-negotiation framework, and one on which my tripartite treaty concept is based.

As demonstrated in Chapter 6, proposals by First Nations organisations and individuals for a fundamental and comprehensive restructuring of the political, social and economic relationships between Indigenous Australia and the Australian nation-state are largely reflected within the provisions of UNDRIP. A tripartite treaty, with a minimum content premised upon the UNDRIP declared rights, would be a wide enough framework for achieving the

decolonisation objective of First Nations. It would have the capacity to deliver to First Nations peoples self-determination and self-government – the two foundational rights for decolonisation – within the constitutional and governmental framework of the Australian nation-state.

My proposed proforma tripartite treaty would include the following subjects:

- (1) Acknowledgment and recognition of the status of the First Nation party
- (2) Treaty objectives
- (3) Rights gained by the First Nation to date
- (4) The First Nation's treaty rights
- (5) Establishment of the First Nation's self-government authorities
- (6) The financing of the First Nation's self-government authorities
- (7) Land and ownership of subsurface resources
- (8) Reparation and compensation
- (9) Treaty implementation
- (10) Treaty amendment
- (11) Treaty dispute adjudication
- (12) Further agreements

I deal below with each of the above matters in order.

(A) Acknowledgment and recognition of the status of the First Nation party

As noted above (subsection 3.4), the Queensland Path to Treaty Eminent Panel has recommended an acknowledgment/recognition of the status of First Nations and past injustices perpetrated against them in a treaty process legislation.²⁸⁸ The *Native Title Act 1993* (Cth) contains a preambular acknowledgment or recognition of that kind, and so does the *Aboriginal and Torres Strait Islander Act 2005* (Cth). Such an acknowledgment or recognition is in essence a summary of significant issues that a truth-telling process could be expected to highlight. It is an issue that was of concern to the General Assembly of the UN, as reflected in UNDRIP's preambular paragraph 6:

... indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them

²⁸⁸ Eminent Panel 2020b: 5 (Implementation – The Path to Treaty Act, sub-paragraph 6.2).

from exercising, in particular, their right to development in accordance with their own needs and interest ...

The following statements by Larissa Behrendt constitute a cogent argument as to why acknowledgment of the impact of settler colonialism and recognition of the status of First Nations are appropriate in any treaty:

Indigenous peoples demand recognition of past injustices, including the failure to recognise Indigenous sovereignty and laws, dispossession and government policies, particularly the policy of removing Indigenous children. This recognition of past injustices also includes a claim for the recognition of prior sovereignty and prior ownership.²⁸⁹

This form of acknowledgment is not just about recognising past injustices; it is about recognising the colonial legacy that Indigenous people live with today, of the links between past and present. Such acknowledgment shows respect for Indigenous people and their experiences and it acknowledges that the impact of colonisation is experienced every day by Indigenous people. ... It seeks to counter the exclusion of Indigenous perspectives from Australian folklore, an exclusion which has led to an Australian national identity that remains silent on those experiences and adds to feelings of alienation felt by Indigenous people.²⁹⁰

Recognition of past injustices is crucial to the creation of a new relationship between Indigenous and non-Indigenous Australians.²⁹¹

It is fitting that a tripartite Australian treaty should include an acknowledgment of the impact of settler colonialism on the people of the First Nation (the party to the treaty), and recognition of its status, along the lines set out in the preamble to the proposed treaty advancement process legislation (above, section 5).

(B) Treaty objectives

A statement on the treaty objectives indicates the substantive scope of the treaty. This would aid treaty interpretation. The objectives of the treaty should include but not be limited to the following:

- (1) to acknowledge and recognise that the First Nation has and can enjoy the rights stipulated in UNDRIP;

²⁸⁹ Behrendt 2003a: 106.

²⁹⁰ Behrendt 2003a: 107.

²⁹¹ Ibid.

- (2) to acknowledge and recognise that the First Nation has and can enjoy all rights stipulated in international human rights treaties to which Australia is a party;
- (3) to recognise and accept all rights that the First Nation has gained to date;
- (4) to deal with certain other matters including but not limited to:
 - (a) issues concerning land and ownership of subsurface resources;
 - (b) reparation and compensation;
 - (c) establishment of the First Nation's self-government authorities;
 - (d) financing of the First Nation's self-government authorities;
 - (e) treaty ratification;
 - (f) treaty implementation;
 - (g) treaty amendment;
 - (h) treaty disputes; and
 - (i) further agreements.

(C) Treaty provisions dealing with the treaty objectives (B)(1)-(3)

The treaty provisions dealing with treaty objectives (B)(1), (2) and (3) should be along the following lines:

- (1) The treaty acknowledges and recognises that the First Nation has and can enjoy the rights stipulated in UNDRIP (copy to be annexed to the treaty).
- (2) The treaty acknowledges and recognises that the First Nation has and can enjoy all rights stipulated in international human rights treaties including but not limited to (copy of each to be annexed to the treaty):²⁹²
 - (a) the International Covenant on Civil and Political Rights;
 - (b) the International Covenant on Economic, Social and Cultural Rights;
 - (c) the International Convention on the Elimination of All Forms of Racial Discrimination;
 - (d) the Convention on the Elimination of All Forms of Discrimination against Women;
 - (e) the Convention on the Rights of the Child; and
 - (f) the Convention on the Rights of Persons with Disabilities.

²⁹² Australian Government [Attorney-General's Department] [n.d.(c)].

- (3) The treaty does not derogate from or affect rights that the First Nation has gained to date. Examples of such rights would be:
- (a) recovery by the First Nation of its traditional country under the relevant land rights or native title legislation; or
 - (b) the First Nation has gained land purchased on its behalf by, for example, the Indigenous Land and Sea Corporation; or
 - (c) the First Nation has gained rights through an Indigenous Land Use Agreement under the *Native Title Act 1993* (Cth).

UNDRIP Article 37 (1) supports the above treaty provision. It stipulates:

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

(D) Treaty provisions dealing with the treaty objective (B)(4)(a) – issues concerning land and ownership of subsurface resources

Whether or not there is any land about which negotiations would be appropriate would have been determined during the treaty-scope negotiation (in Stage 3 of the negotiation framework). Michael Mansell's proposal in this regard come closest to the view expressed by Tuck and Yang on repatriation of land to First Nations. However, Mansell does not require settlers to be rendered landless. Mansell has proposed:²⁹³

- (1) the return to First Nations of Crown lands located within their territories;
- (2) the vesting to First Nations of the underlying title to alienated lands located within their territories; and
- (3) converting First Nations lands to alienable freehold lands or, alternatively, funding contribution by the Commonwealth Government and State/Territory Governments for development projects undertaken by First Nations on their lands.

Regarding Mansell's proposal (3), alienable freehold lands could be mortgaged as security for financing development projects. A First Nation would have the option of negotiating either the

²⁹³ Mansell 2016a: 136-139.

conversion of its land to alienable freehold land or the Mansell development-funding proposal. Whether or not the above proposals should be part of the subjects for substantive treaty negotiation in Stage 4 would have been decided in Stage 3. If they are included as subjects for negotiation and are subsequently agreed upon in Stage 4, then the treaty would have to provide for them. If the proposals are not included as subjects for negotiation, then their rejection would constitute premises for a claim for reparation and compensation in relation to land. UNDRIP Article 28 (right to redress for being dispossessed of land, territory and resources) supports such a claim.

Recovery of land would not be an issue for a First Nation that has regained its traditional country under the relevant land rights or native title legislation. For a First Nation that has been unsuccessful in its native title claim, but has gained commensurate land purchased on its behalf by, for example, the Indigenous Land and Sea Corporation,²⁹⁴ recovery of land would also not be a treaty subject. Similarly, for a First Nation that has gained commensurate land through an Indigenous Land Use Agreement under the *Native Title Act 1993* (Cth), recovery of land would not be an issue. But for First Nations who have only partially regained their country, or received only an incommensurate fraction of land from the Indigenous Land and Sea Corporation, recovery of land would continue to be a treaty issue. However, even if recovery of land were not an issue, ownership of the subsurface resources of the land gained would be a legitimate subject for a First Nation to include in its proposed treaty-scope. If ownership of subsurface resources is not included in the treaty-scope, then the First Nation would have another issue supportive of its claim for reparation and compensation in relation to land.

Ownership of subsurface resources is a long-standing issue for First Nations. The Aboriginal Embassy included, in its demand for the enactment of land rights legislation, ownership of subsurface resources (noted Chapter 2, section 4). The erstwhile ATSIC had proposed that First Nations should own subsurface resources on their lands (noted Chapter 6, section 2). On this issue, in BC, comprehensive treaties have delivered to the BC First Nations not only freehold title to their lands but also ownership of subsurface resources.²⁹⁵

²⁹⁴ Australian Government (Indigenous Land and Sea Corporation).

²⁹⁵ Nisga'a Final Agreement; Tla'amin Final Agreement; Tsawwassen First Nation Final Agreement.

Insofar as ownership of subsurface resources is concerned – essentially a State/Territory issue – a consistent approach would be preferable. As indicated earlier on (in relation to the stipulation of the guiding principles for a tripartite treaty negotiation process), such an approach should be reflected in the treaty-process legislation.

(E) Treaty provisions dealing with the treaty objective (B)(4)(b) – reparation and compensation

Reparation/compensation is another long-standing issue for First Nations. As noted in Chapter 2 (section 4), the Aboriginal Embassy demanded, in 1972, payment of compensation to First Nations peoples for being dispossessed of their lands, territories and resources. The amount consisted of a lump sum payment of \$6 billion and an annual payment of a percentage of the Gross National Income of Australia. In its 1979 proposal for a treaty between the Commonwealth and Indigenous Australia, the NAC demanded compensation payable annually at the rate of 5% of Australia's Gross National Product for a period of 195 years following implementation of the treaty.²⁹⁶ The late Kevin Gilbert's Draft Sovereign Treaty (1987) stipulated compensation for the dispossession of First Nations peoples.²⁹⁷ The amount comprised an initial lump sum payment of \$1 billion within one month of the signing of the treaty and annual payments, in perpetuity, based on a reducing percentage of Australia's GDP at the rate of 7% for the first 10 years, 5% for the following 10 years, and 2.5% thereafter.²⁹⁸ The Barunga Statement (1988), in its call for a treaty between First Nations peoples and the Commonwealth, had demanded payment of compensation for dispossession.²⁹⁹ As noted in Chapter 3, reparation/compensation for injustices sustained by First Nations peoples – resulting from the settler colonisation of Indigenous Australia by the British – was among the remedies claimed by the plaintiff in *Coe v Commonwealth* [1979] HCA 68 and in *Coe v Commonwealth* [1993] HCA 42.³⁰⁰ In its 1995 recommended social justice measures, ATSIC had proposed reparation and compensation to First Nations peoples.³⁰¹ Such reparation/compensation was to be payable to First Nations for being dispossessed of their lands and for the flow-on impact of such dispossession – dispersal of communities, deprived of traditional means of subsistence,

²⁹⁶ Senate Standing Committee 1983: Appendix 3 (proposed treaty contents).

²⁹⁷ Gilbert 2015: 121.

²⁹⁸ Ibid.

²⁹⁹ AIATSIS [n.d.(g)].

³⁰⁰ For *Coe 1979*, see the alternative statements of claim at Appendices 2, 3 and 4. For *Coe 1993*, see the statement of claim Appendix 5.

³⁰¹ See ATSIC 1995: 51-54.

and inability to pursue customary law and cultural practices. Reparation/compensation was also payable to First Nations “for restrictions in the enjoyment of human rights and freedoms; for the trauma resulting from forced removal of children from families; and for the oppressive policies and practices of past Governments ...”³⁰² The Northern Territory Discussion Paper anticipates the inclusion in a treaty of provisions of reparation/compensation for injustices perpetrated on First Nations peoples by settler colonialism.³⁰³

The above compensation demands may be summarised into two broad strands. The first is concerned with reparation/compensation for dispossession and the flow-on impact of dispossession. The second is about reparation/compensation for human rights violations. UNDRIP has provisions supportive of those demands.³⁰⁴ In addition to Article 28 (right to redress for being dispossessed of land, territory and resources) noted above, the other relevant provisions are:³⁰⁵

- (1) Article 8(2) (redress for various acts detrimental to First Nations peoples including acts which have the effect of dispossessing them of their lands/territories/resources);
- (2) Article 11(2) (redress for the taking of First Nations’ cultural, intellectual, religious and spiritual property without their consent); and
- (3) Article 20(2) (redress for deprivation of means of subsistence and development).

The specific issues concerning reparation/compensation should have been identified and agreed to among the parties during the treaty-scope negotiation in Stage Three of the negotiation process. Depending on their applicability to the First Nation in question, the issues concerning reparation/compensation for discussion in Stage Four (negotiation of agreement in principle) could include reparation/compensation for but not limited to:

- (1) being dispossessed of its land;
- (2) dispersal of its community;
- (3) being deprived of its traditional means of subsistence;
- (4) its inability to pursue its traditional law and cultural practices;
- (5) forcible removal of children from their families;

³⁰² Ibid: 52.

³⁰³ Northern Territory Commission 2020b: 43 (paragraph 3.4 – Substantive reparations for material loss and human damage).

³⁰⁴ See Lenzerini 2018.

³⁰⁵ Ibid: 568-597.

- (6) being subjected to oppressive policies and practices of past governments;
- (7) being deprived of ownership of subsurface resources;
- (8) non-return of relevant Crown land to it; and
- (9) non-vesting of the underlying title to relevant alienated land.

The High Court – in the Timber Creek native title compensation case³⁰⁶ – has set out the assessment principles for dealing with compensation claims under the *Native Title Act 1993* (Cth) for extinguished native title. For human rights violations, the *Bringing Them Home* Report (1997),³⁰⁷ for example, recommended the use of the van Boven Principles³⁰⁸ for assessing the reparation/compensation requirements of stolen generations claimants. The Northern Territory Discussion Paper has also recommended the use of those Principles in dealing with reparation/compensation for human rights violations generally.

Richard Abraham and William Isdale have provided a succinct summary of the High Court decision in the Timber Creek native title compensation case. They pointed out:³⁰⁹

The approach now endorsed by the High Court involves three components:

1. An amount to compensate for the loss of the economic value of the native title rights. This requires a comparison between a freehold title (the maximum) and the particular native title rights that have been affected. This is an intuitive and evaluative exercise. In this case, the High Court awarded \$320,250, being 50% of the freehold value of the land, for the loss of the non-exclusive native title rights held by the claim group.
2. An amount of interest, to reflect the loss of the value of money over time. Importantly, the High Court confirmed that, ordinarily, this will only be an award of simple (not compound) interest – although compound interest may be available in some other cases. The interest awarded in this case was simple interest at the rate prescribed by a Federal Court practice note (which was 4% above the cash rate published by the Reserve Bank for the relevant period) and amounted to \$910,100.
3. An amount for the cultural and spiritual loss that was occasioned by the loss of the native title rights. Some of the compensable acts interfered with sites of spiritual significance – such as by the building of a causeway at a Dreaming site. The High Court

³⁰⁶ *Northern Territory v Mr A Griffiths* [2019] HCA 7 (13 March 2019).

³⁰⁷ Australian Human Rights Commission [n.d.(a)].

³⁰⁸ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (United Nations 2006).

³⁰⁹ Abraham and Isdale [20-03-2019].

recognised that some of the compensable acts affected not only the precise locations of the acts but, in a more general way, related areas. The effect of these acts was likened to punching holes in a single large painting which 'represented a single and coherent belief in relation to a far wider area of land'.

Assertion of British Crown sovereignty over the entire Australian continent took place progressively on four occasions: 1788, 1824, 1829 and 1879.³¹⁰ Each such proclamation resulted in settler-colonial expropriation of First Nations lands in those parts of Australia covered by the proclamation. If the High Court's Timber Creek compensation approach were applied to each of the four acts of expropriation, the total amount of compensation for each compensable act would comprise:

- (1) an amount to compensate for the loss of the economic value of the relevant lands;
- (2) an amount of interest, at simple or compound rate, to reflect the loss of the value of money over time; and
- (3) an amount for the cultural and spiritual loss occasioned by the loss of those lands.

In relation to (1), the relevant amount would be for the freehold value of the lands.

The fundamental question, therefore, is what would be the freehold value of the expropriated First Nations lands in 1788, 1824, 1829 and 1879? Determining this value would involve a highly complex exercise. Nonetheless, it would have to be undertaken if the First Nation in question is denied recovery of any relevant Crown land or the vesting to it of the underlying title to relevant alienated lands. For example, under the *Valuation of Land Act 1916* (NSW), the value of land compulsorily acquired by a governmental authority is equivalent to the "market value" of the land by reference to a hypothetical sale of the land and the purposes for which it could be used.³¹¹ The amount of interest payable – even at a simple rate of 4% per annum – on what could be comparatively modest compensation amounts for lands expropriated in 1788, 1824, 1829 and 1879 could be expected to be huge.

In relation to human rights violations, application of the van Boven Principles would include restitution, compensation, rehabilitation, satisfaction and guarantees of non-

³¹⁰ Reynolds 1996b: 86.

³¹¹ Macfarlane [11-03-2019].

repetition.³¹² It would be necessary to identify the victims, individually or as a group. For example, the Human Rights and Equal Opportunity Commission (HREOC) (now the Australian Human Rights Commission) adopted those Principles as the basis for its recommended package of reparations for stolen generation claimants. The package consisted of acknowledgment and apology, guarantees against repetition, measures of restitution, measures of rehabilitation and monetary compensation.³¹³

(F) Treaty provisions dealing with the treaty objective (B)(4)(c) – establishment of the First Nation’s self-government authorities

There should be treaty provisions dealing with the following subjects:

- (1) the creation of the First Nation’s self-government authorities;
- (2) the authorities’ constitutional and organisational structures, powers, responsibilities and functions; and
- (3) the nature of the authorities’ relationships with each other and the Commonwealth and the State or Territory in which the First Nation is located.

UNDRIP provisions supportive of the above are:

- (1) Article 3 (right to self-determination);
- (2) Article 4 (right to self-government);
- (3) Article 5 (right to maintain and strengthen distinct institutions within the framework of the constitutional and governmental framework of the relevant nation-state); and
- (4) Article 46 (maintenance of the territorial integrity or political unity of the relevant nation-state).

Fundamentally, the determination of the powers, responsibilities and functions of the First Nation’s self-government authorities would be guided by, and premised upon, the UNDRIP core rights to self-determination and self-government; land, territories, resources; and culture, and their respective clusters of flow-on rights. Under the Canada/BC comprehensive modern treaty-making process, the Nisga’a Final Agreement or the Tla’amin Final Agreement, for example, provides a useful model for:

- (1) establishing the self-government authorities of an Australian First Nation;

³¹² Reparation Law [n.d.].

³¹³ PIAC 2009: 11-12.

- (2) setting out their constitutional and organisational structures, powers, responsibilities and functions; and
- (3) the nature of their relationships with each other and with the Commonwealth and the State/Territory in which the First Nation is located.

As can be ascertained from their provisions, both the Nisga'a treaty and the Tla'amin treaty would appear to have delivered for either Nation a fundamental restructuring of their political, social and economic relationships with the Canadian nation-state within the constitutional and governmental framework of the nation-state. Both Nations now enjoy rights to internal self-determination and self-government (as affirmed in UNDRIP). In other words, in terms of this thesis' definition of decolonisation, both the Nisga'a treaty and the Tla'amin treaty have produced for each Nation a decolonised relationship with Canada and British Columbia. For details of this state of affairs, see the Nisga'a Nation's and Tla'amin Nation's respective website.³¹⁴ Some writers have characterised such a relationship as "treaty federalism".³¹⁵ This is because the treaty creates and adds a new order to "the existing provincial-federal order."³¹⁶ In Canada, according to Vuk Radmilovic, treaty federalism establishes "the necessary conditions for the development of a stronger sense of social and political unity between Aboriginal peoples and the Canadian state."³¹⁷

(G) Treaty provisions dealing with the treaty objective (B)(4)(d) – financing of the First Nation's self-government authorities

There should be treaty provisions dealing with the financing of the operational costs of the First Nation's self-government authorities – out of the self-determination fund referred to above (section 4). UNDRIP Article 4 stipulates not only that First Nations peoples have the "right to autonomy or self-government in matters relating to their internal and local affairs" but also to "ways and means for financing their autonomous functions". The Nisga'a treaty or the Tla'amin treaty provides a useful model for determining the Commonwealth/State/Territory financial support for the operational costs of a First Nation's self-government authorities. Under either of the treaties, the parties are required to enter into a so-called "fiscal financing agreement" every five years (or any other period as agreed) to determine their respective contribution over

³¹⁴ Nisga'a Nation [n.d.]; Tla'amin Nation [n.d.].

³¹⁵ Henderson 1994; Radmilovic 2004; Papillon 2019; Scholtz 2019.

³¹⁶ Radmilovic 2004: 15.

³¹⁷ Ibid: 19.

that period to meeting the Nation’s “agreed programs and services”. The agreement takes into account the fiscal capacity of the Nation (that is, its capacity to generate revenues). Based on the Canada/BC financing arrangement, an Australian First Nation that has a significant source of income, for example, from mining royalties, could be expected to receive a comparatively lower contribution from the Commonwealth/State/Territory.

(H) Treaty provisions dealing with the treaty objective (B)(4)(e) – treaty ratification

There should be treaty provisions dealing with treaty ratification. The Nisga’a treaty or the Tla’amin treaty provides useful precedents for provisions dealing with treaty ratification by the parties. Based on those precedents, ratification by the First Nation party would require a simple majority vote in favour of the treaty by its constituents. The Commonwealth or relevant State/Territory would enact legislation giving effect to the treaty.

(I) Treaty provisions dealing with the treaty objective (B)(4)(f) – treaty implementation

There should be treaty provisions dealing with treaty implementation. The Nisga’a treaty or the Tla’amin treaty provides useful precedents for provisions dealing with treaty implementation by the parties. Based on those precedents, the First Nation party and the Commonwealth or relevant State/Territory would establish an implementation plan (over a specified period) to guide the parties on the implementation of the treaty. The plan should include an overseeing role for the Makarrata Commission. The intent is that a treaty would become part of the general law of the jurisdiction(s) so that courts would have to interpret legislation or executive actions by reference to treaty principles. Accordingly, legislation such as the Acts Interpretation Act for each State, Territory and the Commonwealth would have to spell out the overarching implications of a treaty or treaties for the operation and interpretation of local laws.

(J) Treaty provisions dealing with the treaty objective (B)(4)(g) – treaty amendment

There should be treaty provisions dealing with treaty amendment procedures. The Tla’amin treaty provides useful precedents for provisions dealing with treaty amendment procedures. Based on those precedents, any party could propose an amendment to the treaty. However, before proceeding to formally deal with the proposed amendment, the parties must attempt to

find other means to address the interests of the party proposing the amendment. If the parties could not reach agreement to amend the treaty, this would become an issue for resolution under the treaty-dispute provisions (immediately below). The Makarrata Commission should be given a mediation role in this matter.

(K) Treaty provisions dealing with the treaty objective (B)(4)(h) – treaty disputes

There should be treaty provisions dealing with the resolution of treaty disputes. The Nisga’a treaty or the Tla’amin treaty provides useful precedents for provisions dealing with dispute resolution. The Nisga’a or Tla’amin dispute-resolution provisions are designed to avoid litigation as a primary means of resolving disputes. Parties are encouraged to resolve a dispute by informal discussion in the first place. If the dispute cannot be resolved informally, the parties must go through three stages of processes to resolve the dispute. In Stage One, the parties enter into an unassisted process of “collaborative negotiation”, that is, interest-based negotiation, for a specified period. If the dispute could not be resolved during this unassisted process, the parties proceed to Stage Two. Here they undergo a “facilitated process”, conducted by (among others) an independent mediator jointly appointed by the parties, for a specified period. If the dispute could still not be resolved during this mediated process, the parties then proceed to Stage Three. Here they enter into an agreement to refer the dispute to arbitration for final resolution. The arbitral award would be binding on all parties, including a party that has not participated in the arbitration, provided it has been served a copy of the notice of arbitration or agreement to arbitrate. The Makarrata Commission should be given a mediation role in this matter.

Breach of a treaty, which could not be resolved by the above primary means of dealing with it, would be justiciable and hence decided by an appropriate court and appealable to the highest court of the land, the High Court of Australia. As well as a party to a treaty, a member of a relevant First Nation would have standing to commence proceedings.

(L) Treaty provisions dealing with the treaty objective (B)(4)(i) – further agreements

There should be treaty provisions for further agreements concerning matters not already provided for in the treaty. This permits a flexible and incremental approach to deal making.³¹⁸ It recognises that a treaty should not be seen as a ‘final agreement’, that the terms of a treaty should appropriately ‘evolve’ over time as the ongoing relations of the parties develop/unfold/mature. Any party could propose a further agreement. If a party opposes the proposal, this would become an issue for resolution under the treaty-dispute provisions (K). The Makarrata Commission should be given a mediation role in this matter.

7 Conclusion: Why treaties would be beneficial to both Indigenous and non-Indigenous Australia

The political arena is the appropriate forum for First Nations peoples to achieve their decolonising objective. As discussed in the concluding section of Chapter 5, the judicial arena is, fundamentally, not a suitable forum for seeking a comprehensive restructuring of social, economic or political relationships between people. In the political arena, the most effective and preferable way of achieving the decolonisation of the Australian nation-state is through the negotiation of tripartite treaties with the Commonwealth and State/Territory Governments. Such a treaty is able to take into account the respective constitutional powers of State/Territory and Commonwealth. A tripartite treaty approach, with UNDRIP as a content and process guide, has the potential capacity to deliver a comprehensive political settlement. The issues raised in demands by Australian First Nations organisations and individuals for a fundamental and comprehensive restructuring of the political social, and economic relationships between Indigenous Australia and the Australian nation-state are substantially within the contemplation of UNDRIP.

Treaties are beneficial not just to First Nations peoples but also to non-Indigenous Australians for a number of reasons. A comprehensive modern treaty – the subject of this chapter – confers rights on both First Nations peoples and non-Indigenous Australians. Such a treaty constitutes acknowledgment and acceptance by First Nations peoples of the right of the descendants of the British settler colonisers and other non-Indigenous Australians to belong to

³¹⁸ Williams and Hobbs 2020: 193.

Australia. It recognises the legitimacy of the settler nation-state. It recognises the coexistence of the nation-state's governments, laws, and legal systems and First Nations' governments, laws and legal systems. It reconciles the pre-existing sovereignty of First Nations with the assumed sovereignty of the nation-state. It reconciles the inherent titles of First Nations to their lands, territories and resources and the assumed Crown title of the nation-state. It signifies a fundamental reconciliation between Indigenous Australia and non-Indigenous Australia over the invasion and unjust settler colonisation of the Australian continent by the British commencing in 1788. It manifests a commitment by Indigenous Australia and the Australian nation-state to a new relationship based on peaceful, friendly and respectful coexistence. It provides certainty and promotes non-conflictual fundamental existential relationship between Indigenous Australia and the Australian nation-state. Therefore, a treaty has moral, political and legal values for both First Nations peoples and non-Indigenous Australians.

Even if the benefits of treaties are accepted, modern treaty making between the Australian nation-state and First Nations would be a long process. The treaty journey would likely be a slow and difficult one. First Nations peoples, desiring a decolonised relationship with the Australian nation-state, would have to be prepared to embark upon a passage of endurance. Treaty negotiations should not commence until all parties are treaty-ready. Interest-based negotiation is the appropriate approach for a treaty-making process. To ensure that such an approach is followed, I have suggested that it should be specified in a required treaty process legislation as one of the guiding principles for treaty negotiations. First Nations would require financial assistance in developing appropriate/suitable structures for their representative organisations and in building their capacity to participate effectively in treaty negotiations. Based on the Canada/BC approach, the Commonwealth and participating States/Territories should jointly contribute to such funding according to a formula agreed upon between them.

I have proposed in this chapter a proforma tripartite treaty with a minimum content premised upon the UNDRIP provisions. Such a treaty is capable of realising for First Nations peoples their aspirations to be self-determining and self-governing within the constitutional and governmental framework of a decolonised Australian nation-state. However, faced with the dismal history of failures in calls for treaties by First Nations peoples to date – even in the case of the Barunga Statement, which was a response to a suggestion by a Commonwealth Government (the Bob Hawke Labor Government) of its preparedness to negotiate a treaty – the

question must be asked: “What makes a treaty (a tripartite one at that) informed by UNDRIP more likely to succeed today?” One cannot avoid the intuitive conclusion that the extremely disappointing chronicle of attempts at treaty-making in Australia is the outcome of the continuing salience of settler-colonial impositions. It is a testimony to the resilience of the forces of settler colonialism and its desire to attain its end point. A treaty premised upon the UNDRIP declared rights constitutes two fundamental objectionable outcomes for assimilative settler-colonialists. First, it requires the Australian settler nation-state to enter into a political arrangement that recognises the Indigenous difference of First Nations peoples. Second, it accords First Nations peoples the rights to self-determination and self-government. In short, a treaty informed by UNDRIP would free First Nations peoples from the suffocating embrace of settler colonialism. It confounds the achievement of the end point of settler colonialism. In the circumstances, the answer to the above-posed question would appear to be that the chances of such a treaty being accepted by settler Australia presently would be quite low. However, while that is certainly an extremely gloomy and depressing situation, the wall facing First Nations is not absolutely insurmountable. They will need to mount a determined, sustained and well-organised campaign to persuade the powers-that-be to come to their assistance. In the next chapter (Chapter 8), the concluding chapter of my thesis, I pose the question: “Where are you going settler Australia?”

Chapter 8

Conclusion:

Where are you going, Settler Australia?

The historical overview provided in Chapter 2 has revealed the continuing salience to the present day of settler-colonial impositions on First Nations peoples. But it has also demonstrated the abiding resistance of First Nations peoples to these impositions and their resolute determination to be free of the suffocating embrace of settler colonialism. Chapters 3, 4, 5 and 6 have also illuminated this enduring resistance to settler colonialism and settler-colonial impositions. Why does non-Indigenous Australia continue to ignore Indigenous Australia's demand for a decolonised relationship with each other? Why does non-Indigenous Australia continue to regard First Nations peoples as objects to be governed? Why is settler Australia refusing to follow the example of its Canadian cousin? What is it that is preventing settler Australia from allowing First Nations space to exercise their inherent rights to self-determination and self-government within the constitutional and governmental framework of the Australian nation-state? If the Australian Government had implemented either of the decolonising proposals by ATSIC or CAR (discussed in Chapter 6), Australia's subsequent dealings with its First Nations peoples might have become more aligned with the Canadian approach.

The court cases that I have examined in Chapters 3 and 4 show that judicial adjudication can contribute to the maintenance of settler-colonial power relations. In the *Coe* cases (Chapter 3), the High Court refused to recognise, and accommodate, a form of internal sovereignty for First Nations peoples. Each plaintiff was prepared to accept the conferment of a status on First Nations peoples analogous to the "domestic dependant nation" status recognised by the Supreme Court of the United States of America for the country's First Nations. This status would have enabled Australian First Nations to enjoy the rights to internal self-determination and self-government within the constitutional and governmental framework of the Australian nation-state. In refusing to consider the notion that Australian First Nations peoples are 'domestic dependant nations', the High Court conflated the external and internal elements of sovereignty in its application to First Nations. Thus, the sole sovereign in Australia is the Crown in right of the Commonwealth and of each of the States. The High Court pointed out that the validity of the Crown's acquisition of sovereignty over the Australian continent is an

international law issue. It is a matter that the High Court – as a domestic judicial institution established under the very sovereignty that the plaintiffs had sought to impugn – could not question. The High Court had to accept the fact the British settler-colonisers regarded Australian First Nations as not possessing attributes of a political society, that is, governmental, law-making and judicial institutions. It is not for the High Court to reform the established constitutional and governmental framework of the Australian nation-state. That task belongs to Parliament.

The court cases that I examined as part of my case study of the Hindmarsh Island Bridge political and legal epic (Chapter 4) shows that the rights and interests of First Nations peoples are treated by the judiciary in exactly the same way as the rights and interests of other citizens. First Nations peoples' Indigenous difference is not recognised and accommodated within those cases. Instead, there is a form of formal equality applied. It also demonstrated that, as in the case of other citizens, section 51(xxvi) of the Commonwealth Constitution does not protect First Nations from discriminatory Commonwealth legislation. The outcomes of the court cases have the effect of upholding the dominance of the settler legal system and maintaining it as a force for the assimilation of First Nations peoples into settler society.

The Bolt racial vilification case (Chapter 5) was a successful court action for First Nations peoples. Yet, this case has highlighted the continuing salience of the assimilative forces of settler colonialism and the enduring resistance by First Nations peoples to the settler-colonial logic of elimination. It was a manifestation, in the judicial arena, of a contestation of Indigenous difference against assimilationist settler-nationalism. However, the successful outcome of the case for First Nations peoples has not diminished the assimilative forces of settler colonialism. In its aftermath, there was “encouragement of scepticism about the authenticity of fair-skin Indigenous persons and of judgment by non-Indigenous persons about the legitimacy of Indigenous identity according to skin colour.”¹ And so, the contestation of Indigenous difference against the assimilative forces of settler colonialism is ongoing in the broader socio-political arena.

My analysis of the court cases supports my argument that the judicial arena is essentially an inappropriate forum for achieving First Nations' decolonisation objective. It paves the way

¹ Gelber and McNamara 2013: 479.

for my treaty argument. The *Coe* cases demonstrate that accommodation of First Nations' internal sovereignty claim is fundamentally a political issue that is more appropriately dealt with by way of a negotiated political settlement. Treaties would provide an avenue for negotiation and agreement on First Nations' internal sovereignty denied in those cases, and in this way undermine settler-colonial power relations. The Hindmarsh Island Bridge case study demonstrates that litigation is unpredictable in its scope and outcomes and does not provide an appropriate mechanism for the resolution of fundamental issues connected to cultural heritage for First Nations. It provides support for agreements or treaties with much broader scope and a principled policy approach to the resolution of those issues. The Bolt racial vilification case also provides an impetus for First Nations to seek a broader resolution of a range of issues by way of a treaty or treaties because, even with a successful outcome in the court case, Indigenous identity continued to be questioned in public discourse.

My analysis of calls for treaty in Chapter 6 has shown that the four decolonising proposals examined there are substantially covered by the UNDRIP declared rights. Chapter 6 examined the suitability of the political arena – as compared to the judicial arena – for decolonising the Australian nation-state in the sense defined in Chapter 1. The suitability of the political arena is not contingent upon whether or not particular political initiatives are accepted by the Australian nation-state's governmental authorities. What determines the political arena's suitability is whether a proposal that has been put before it would bring about, if implemented, the desired result. The political arena permits negotiation of outcomes. In contrast, in the judicial arena, a litigant argues their case and makes submissions to convince the court to deliver a judgment in their favour. But they could not negotiate with the court the outcome.

A tripartite treaty premised on UNDRIP would help to lessen the dominance of the settler system. A tripartite treaty based on the UNDRIP provisions would recognise Indigenous difference and Indigenous rights. Such recognition would constitute a significant protective barrier against the settler-colonial logic of elimination – the assimilative forces of settler colonialism that seek to eliminate First Nations' Indigeneity – of the kind discussed in the Bolt racial vilification case. A tripartite treaty (as noted in Chapter 1) would constitute recognition of a regime of peaceful, friendly and respectful coexistence between First Nations peoples and the Australian nation-state. Deployment of the kind of political and legal arsenal, as exemplified by the Hindmarsh Island Royal Commission, by a State/Territory Government or the

Commonwealth Government against First Nations interests would be in breach of the terms of the treaty. Enactment of pre-emptive legislation such as the *Hindmarsh Island Bridge Act 1997* (Cth) would also be in breach of the terms of the treaty. However, it should be borne in mind that without constitutional entrenchment of treaty rights, the Commonwealth could still legally pass a law that would breach the terms of any treaty.

My thesis sought to answer two fundamental questions. One, how could First Nations peoples' aspirations to enjoy/exercise their inherent right to self-determination, including their right to self-government, be met within the constitutional and governmental framework of a decolonised Australian nation-state? Two, what would be the most effective and preferable way of achieving the decolonisation of the Australian nation-state?

The answer to the first question is: by negotiating a political settlement that enables First Nations peoples to regain their inherent rights to self-determination and self-government. First Nations peoples have inherent rights to self-determination and self-government because they are the descendants of the original peoples of Australia. Their ancestors were the sovereign owners, from time immemorial, of the entire Australian continent. The British colonisers settled on First Nations peoples' ancestral lands without seeking the permission of their ancestors. The British settler colonisers wrongfully expropriated First Nations peoples' ancestral lands, converting those lands into so-called "Crown lands". The British settler colonisers usurped the indisputable sovereignty of First Nations peoples over the entire Australian continent and subjected them to settler-colonial impositions. The British settler colonisers made First Nations peoples objects to be governed by their illegitimately established settler-colonial governments.

The answer to the second question is: a tripartite treaty is the most effective and preferable way of achieving a comprehensive political settlement that brings about a fundamental restructuring of the political, social and economic relationships between Indigenous Australia and the Australian nation-state. Such a treaty would be able to take into account the constitutional distribution of powers under the Australian federal system of governance and avoid constitutional limitations that would otherwise apply to treaties that are exclusively State or Territory or Commonwealth. A tripartite treaty would signify the end of the ongoing conflict between First Nations peoples and the descendants of the British settler colonisers following their ancestors' wrongful expropriation of First Nations lands beginning in 1788. It would inaugurate a commitment to a new relationship based on peaceful, friendly

and respectful coexistence between Indigenous Australia and non-Indigenous Australia. It would reconcile First Nations' pre-existing sovereignty with the Australian nation-state's assumed sovereignty. It would reconcile First Nations' inherent titles to their lands, territories and resources and the Australian nation-state's assumed Crown title. It would recognise and continue First Nations' inherent Indigenous rights. It would recognise the coexistence of the Australian nation-state's governments, laws and legal systems and First Nations' governments, laws and legal systems. Finally, and most importantly for non-Indigenous Australians, a treaty would constitute recognition by First Nations of their right to belong to Australia. It would legitimise the settler-derived Australian nation-state. As Christa Scholtz has pointed out: "states that have not negotiated [treaties] with the descendent communities of its prior occupants exercise state sovereignty on illegitimate grounds."²

My thesis findings indicate the desirability for scholarship on treaty and decolonisation to consider the significance and usefulness of UNDRIP as a treaty-content guide. My findings demonstrate that a tripartite treaty premised upon the UNDRIP declared rights would have the capacity to bring about decolonisation of the Australian nation-state. It would deliver self-government to First Nations peoples within the constitutional and governmental framework of the Australian nation-state. This state of affairs would satisfy the decolonisation objective of the majority of First Nations peoples.

Existing post-UNDRIP scholarship on First Nations' decolonising aspirations has not foregrounded UNDRIP as a supportive platform for realising those aspirations or does it only in a limited way. In this thesis, I have tried to contribute to the filling of this gap in two ways. One, I have examined the decolonisation struggles of Australia's First Nations in both the political arena in terms of the provisions of UNDRIP. Two, I have offered a proforma tripartite treaty (Chapter 7) with a minimum content premised upon the provisions of UNDRIP. UNDRIP constitutes a direct challenge to settler colonialism, settler-colonial impositions, and assimilationist forces of settler nationalism. For that fundamental reason, UNDRIP is a useful mechanism for bringing about the decolonisation of the Australian nation-state as that process is defined in Chapter 1.

² Scholtz 2019.

I do not offer my proposed tripartite treaty as a one-size-fits-all framework. I offer it simply as a guide for Australia's First Nations – intending to embark upon treaty negotiations – to consider. A First Nation would be entirely free to use it or not. A First Nation would be entirely free to negotiate a treaty that it considers appropriate to its circumstances. It could be that a First Nation might simply wish to negotiate a simple service-delivery agreement. In such a case, that First Nation might see that it has no need at all to use my proffered template. Furthermore, a First Nation is entirely free to decide whether or not it would wish at all to negotiate a treaty. This freedom is a fundamental principle underlying the Canada/BC treaty-negotiation framework, and one on which my tripartite treaty concept is based.

For current treaty planning in Australia, my thesis findings raise a number of important issues. One, for a comprehensive restructuring of political, social and economic relationships of Indigenous Australia and the Australian nation-state to occur, the Commonwealth would need to be a party in the treaty-making process. A tripartite treaty-making approach is needed to avoid limitations – arising from the distribution of constitutional powers – that a treaty negotiated exclusively with a State/Territory or with the Commonwealth would have. Two, a national First Nations representative organisation must be established to represent the interests of First Nations peoples who wish to participate in treaty negotiations. Based on the Canada/BC precedent, the operational costs of this organisation should be met entirely by the Commonwealth. If the Morrison Government's proposed National Voice is established, this body would appear to be a suitable national representative organisation for First Nations. Three, there would be a need to conduct a national program to educate the broader Australian community of why treaties would be beneficial to the Australian nation-state as well as First Nations peoples. The program should be funded jointly by the Commonwealth and participating States/Territories. Four, First Nations wishing to participate in treaty negotiations would require funding to enable them to do so on an equal footing with Commonwealth/State/Territory parties. This funding is needed for preparing participating First Nations to be treaty-ready, meeting their treaty-negotiation costs, and (later) financing the operational costs of their self-governmental authorities. The Commonwealth and participating States/Territories would contribute to the funding according to a formula agreed between them. Five, the Commonwealth and each participating State/Territory must enact treaty process legislation, setting out a firm roadmap for treaty making and implementation. Such a firm roadmap would include the establishment of a tripartite treaty-negotiation framework, required treaty

institutions and required funds. Six, the treaty process legislation must specify UNDRIP as a minimum treaty-content guide. Seven, the treaty process legislation must establish a tripartite treaty-negotiation framework that would avoid undue delays in progressing the negotiation process. Eight, the treaty-negotiation framework must specify requirements that would avoid unhelpful approaches to negotiations. It needs to ensure that the negotiation process would be progressed steadily and conducted with integrity and good faith by all parties. For this to occur, it must specify guiding principles for the treaty negotiation process that are supportive of an interest-based approach to negotiations. It should also provide for uniformity in approach to dealing with matters that has nationwide application (for example, ownership of subsurface resources). Nine, treaty negotiations should not commence until all required treaty institutions and funding sources have been created and all treaty parties are treaty-ready, including settlement, if any, of territorial overlap issues between/among First Nations intending to commence treaty negotiation.

My thesis has highlighted the strengths of UNDRIP as a template for on the ground implementation of First Nations peoples' Indigenous difference and Indigenous rights within the constitutional and governmental framework of a decolonised Australian nation-state. UNDRIP is eminently suitable as a treaty-content guide. Decolonisation proposals by First Nations organisations and peoples are substantially covered by UNDRIP provisions. A weakness of UNDRIP is its ambiguous treatment of the extent of Indigenous peoples' right to lands which they have traditionally owned but no longer do (see Article 26(1). In Australia, the *Native Title Act 1993* (Cth) would appear to have clarified the extent of First Nations peoples' right in this regard.³ Another weakness of UNDRIP is its treatment of ownership of subsurface resources (see Article 26(2)). On the face of it, one could interpret Article 26(2) as stipulating the right of Indigenous peoples to own all resources (including subsurface resources) on their lands. But, as noted in Chapter 6, the drafting history of the provision would appear to cast doubt on the correctness of such a textual interpretation. Be that as it may, the crucial significance of First Nations' ownership of subsurface resources cannot be overemphasised. First Nations' ownership of subsurface resources on their lands could potentially significantly enlarge their fiscal capacity, and thus lessen their dependence on Commonwealth, State and Territory sources of funds to finance their self-governmental authorities' operational costs.

³ Mansell 2011: 662-664.

There is also ambiguity in UNDRIP concerning participatory rights. Nonetheless, when all is said and done, UNDRIP is in essence the mainspring for reconciling the prior presence of First Nations peoples on the Australian continent and the right of non-Indigenous Australians to belong to Australia.

My analysis – from Chapter 2 through to Chapter 6 – suggests that the journey to achieve the decolonisation of the Australian nation-state would be a long, slow odyssey. It highlights the need for First Nations peoples to continue, with greater vigour, the passage of endurance that their ancestors had started since 1788, and stay the course to the end, no matter how tortuous and difficult it is, if they are to realise their aspirations to be self-determining and self-governing within the constitutional and governmental framework of the Australian nation-state.

The fundamental requirement for a treaty process to commence nationally in Australia is that the powers-that-be must have the political will to initiate the process and see it through. If the powers-that-be lack such political will, then it would appear First Nations' aspirations to enjoy/exercise their inherent rights to self-determination and self-government would be met with an impregnable wall and, therefore, unachievable. That is the fundamental limitation of the political arena. This was amply demonstrated in the non-realisation of the 1988 Barunga Statement treaty proposals, which were made in response to an initially declared willingness of the Bob Hawke Government to enter into treaty negotiations with First Nations peoples. Ultimately, that Government lost its political will, succumbing to perceived wide-spread political opposition.

The current absence, in Australia, of the sort of facilitative political, legislative, and constitutional circumstances enjoyed by Canadian First Nations (noted in Chapter 7), is a distinct disadvantage for Australian First Nations. In current circumstances (notwithstanding that Victoria, Queensland and the Northern Territory have demonstrated their willingness to enter into treaties with First Nations peoples under their respective jurisdiction), persuading the Commonwealth, in particular, to embark upon a tripartite treaty-making process would be a challenging undertaking. The difficulty is compounded by having to convince the Commonwealth to, in effect, implement the UNDRIP declared rights via a treaty. First Nations are faced here with what might be described as a 'double-whammy' situation. They need to persuade the Commonwealth to negotiate treaties with them and to base the terms of such treaties on the UNDRIP declared rights. But the apparent lack, presently, of facilitative factors

in Australia (when compared to Canada) should not be seen by First Nations as insurmountable obstacles. The task of persuading the powers-that-be to adopt the political will to free them from the embrace of settler colonialism would be a demanding, but unavoidable, mission that First Nations must assume. It needs to be tackled with the utmost of persistence and resilience.

Adoption of UNDRIP declared rights as treaty rights would ‘automatically’ provide a solution for how the issue of Indigenous sovereignty would be dealt with in a treaty. As mentioned in Chapter 1, UNDRIP Article 3 (right to self-determination) and Article 4 (right to self-government) encapsulates a form of Indigenous internal sovereignty. Adoption of those rights by a treaty constitutes a recognition of the internal sovereignty of the First Nation party.

The proforma treaty that I have proposed is not a ‘final agreement’. It recognises that the terms of a treaty should appropriately ‘evolve’ over time as necessary to reflect developments in the ongoing relations of the parties.

As noted above, treaties are beneficial not just to First Nations peoples but also to non-Indigenous Australians. A comprehensive modern treaty is a fundamental expression of reconciliation between Indigenous Australia and settler Australia. It signifies the end of an existential conflict between First Nations peoples and settler Australians that began with the British invasion of the Australian continent in 1788. It constitutes a commitment by Indigenous Australia and settler Australia to a new relationship based on peaceful, friendly and respectful coexistence. It denotes acceptance by First Nations peoples of the right of settler Australians to belong to Australia. Is now not the right time to undo the settler-colonial relationship between Indigenous Australia and the Australian nation-state? Is it not high time for the settler nation-state to negotiate tripartite treaties with First Nations so as to legitimise its assumed sovereignty over the Australian continent? Such a treaty would bring about a constitutional and governmental regime akin in essence to the Canadian concept of treaty federalism.⁴ That is, Australia’s First Nations’ governmental authorities would constitute a third order in the governance of the federated Australian nation-state.

Who should inaugurate the start of the long overdue treaty journey? Being at the apex of the constitutional and governmental framework of the Australian nation-state, the

⁴ See Henderson 1994; Radmilovic 2004; Lino 2017; Papillon 2019; Scholtz 2019.

Commonwealth Government is the appropriate authority and the one best placed to initiate and coordinate a tripartite treaty-making approach. The Commonwealth Government could do so through a ready-made forum. The Scott Morrison Government and the State/Territory Governments have recently established (on 29 May 2020) the National Federation Reform Council (NFRC) to replace the Council of Australian Governments (COAG).⁵ The Governor-General opened the inaugural meeting of NFRC on 11 December 2020. The NFRC has established “three Taskforces to help progress matters critical to the national agenda.”⁶ One of these is the Indigenous Affairs Taskforce. The chair of this Taskforce is the Commonwealth Minister for Indigenous Australians.⁷ However, on present indications, the Morrison Government might need convincing that tripartite treaties are “matters critical to the national agenda”. But that is the very point: restructuring the political, social and economic relationships between Indigenous Australia and settler Australia is an issue critical to the national agenda. Now is the time for the Australian nation-state’s governmental authorities to respond positively to First Nations peoples’ demand for a decolonised relationship between Indigenous Australia and the Australian nation-state?

As noted in Chapter 6, the ALP is committed to implementing the Uluru Statement from the Heart’s treaty proposal. So, if the ALP were to win government at the next Federal election, First Nations’ aspiration for a decolonised relationship with the Australian nation-state might perhaps be realisable sooner than later. Ideally, however, there should be bipartisan commitment to the treaty-making process in order to avoid the risk that a change in government might undo any progress already made in the process.⁸

Two examples of organisations currently conducting, what I would call, a relatively low-key ongoing treaty-making campaign are ANTaR (Australians for Native Title and Reconciliation) and the National Native Title Council. ANTaR was established in 1997.⁹ It is

⁵ Department of the Prime Minister and Cabinet [n.d.].

⁶ Ibid.

⁷ Department of the Prime Minister and Cabinet [n.d.1].

⁸ As demonstrated in South Australia with a change of government, from Labor to Liberal, following the 17 March 2018 state election (see Chapter 7, subsection 3.2). In the case of a completed treaty, a new government that seeks to abrogate it would not be able to do so without incurring significant penalty, both legally and politically.

⁹ ANTaR [n.d.].

“a national advocacy organisation dedicated specifically to the rights – and overcoming the disadvantage – of Aboriginal and Torres Strait Islander people.”¹⁰ ANTaR:¹¹

... works on many levels to achieve its goals. This includes maintaining close liaison with Aboriginal and Torres Strait Islander leaderships and communities and assisting them to communicate their aspirations and concerns to the wider community; conducting national education and awareness campaigns on Aboriginal and Torres Strait Islander affairs issues, as well as training, advice and support for Aboriginal and Torres Strait Islander leaders.

According to its National Strategic Plan 2019-2022, one of ANTaR’s four strategic goals is:¹²

To lead public discussions about unfinished business, truth-telling (treaty, justice, rights and respect) and a reconciled Australia from a non-Indigenous perspective, in solidarity and conjunction with First Nations leaders and organisations, by:

- a. Providing a platform for dialogue on Treaty and Agreement Making in Australia, working with Aboriginal and Torres Strait Islander partner organisations and peoples;
- b. Actively engaging in the debates by facilitating research and policy discussions that contribute to the knowledge base; and
- c. Developing new ways to communicate to a growing base of supporters and engaged citizens (social media, blogs, supporter communiqués etc.).

ANTaR is working with the National Native Title Council and the University of Melbourne in running a national program called “National Treaties Summit”. The program is described as:¹³

A national dialogue about the importance of agreement-making, a chance to compare and share experiences from the Australian jurisdictions, to explore international experience and to contribute to the momentum of treaty and agreement-making across Australia.

ANTaR is also conducting an ongoing online “National Petition for Treaty” campaign, to push “the Federal Government and other States and Territories [that have not as yet embarked on the journey] to follow” the examples set by Victoria, the Northern Territory and Queensland.¹⁴

The National Native Title Council is “a non-profit, peak body for the native title sector.”¹⁵ It sees itself as providing “a voice on matters of national significance, including

¹⁰ Ibid.

¹¹ Ibid.

¹² ANTaR [n.d.(a)].

¹³ ANTaR [n.d.(b)]. The program’s “physical gathering” has been disrupted in 2021 by “the ongoing uncertainties induced by Australia’s management of the Covid-19 pandemic” (<https://www.nationaltreatiessummit.com.au/>).

¹⁴ ANTaR [n.d.(c)].

¹⁵ NNTC [n.d.].

representing the views of native title organisations at various forums and through the submission process to government policy development and legislative reforms.”¹⁶ The Council was established in 2006 by Native Title Representative Bodies and Native Title Service Providers following the abolishment of ATSIC by the John Howard Government in 2005. The proponents of the Council regarded the abolishment of ATSIC as “the loss of a strong, coordinated Indigenous voice for the native title sector” and so the Council “was formed to fill that void”.¹⁷ In 2017, the Council opened up its membership to Prescribed Bodies Corporate and Traditional Owner Corporations. The Council sees treaty making as “a key land rights issue”.¹⁸

Noting, for example, that the hugely successful outcome of the 1967 Constitutional Referendum was the result of a concerted campaign that lasted over 10 years, it would appear that there would be a need for a highly focused treaty advancement organisation to spearhead a treaty-making campaign. Such an organisation would have to be prepared to run a sustained campaign over a long period. The campaign would be aimed not only at convincing a hesitant Commonwealth Government to initiate a tripartite treaty journey but also to develop a broad base of political support for the treaty-making process. The organisation would require capable and effective leadership as well as sustainable sources of funds to finance a concerted, well-organised and highly visible campaign over perhaps a lengthy period. To build-up a broad base of political support would require the development of a national (including governmental) sentiment that would be accepting of First Nations peoples’ aspirations to be free of settler colonialism. The campaign would need to be premised upon a two-prong approach. One, it needs to be able to persuade its audience (including the governmental authorities of the Australian nation-state) that tripartite treaty-making is the preferable and most effective means of decolonising the relationship between Indigenous Australia and settler Australia. Two, the campaign needs to be able to convince its audience (including the Commonwealth, State and Territory Governments) that UNDRIP is an eminently suitable content guide for a tripartite Australian treaty.

Given that it now appears to be well-established, and in light of its current objectives, could ANTaR perhaps be the right organisation to be at the helm a focused and energetic

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ NNTC [n.d.(a)].

endeavour to convince the Commonwealth Government to initiate a tripartite treaty-making process? Perhaps ANTaR might want to continue its current cooperative relationship with the National Native Title Council and the two could together undertake the task? Or the two might wish to invite Reconciliation Australia to join in a triumvirate pressure group alliance?

There is another possibility. There is the Morrison Government's proposed National Voice. Its envisaged role is to "provide advice to the Australian Parliament and Government on relevant laws, policies and programs" and to "engage early on with the Australian Parliament and Government in the development of relevant policies and laws."¹⁹ If the National Voice comes to fruition, it might perhaps proffer advice – on its own initiative or prompted perhaps by ANTaR/National Native Title Council/Reconciliation Australia – to the Commonwealth Government to consider launching a tripartite treaty-making process. In this regard, it would be following the example of the NAC – the First Nations advisory body established by the Malcolm Fraser Government – which urged that Government to enter into a treaty with First Nations peoples. It was unfortunate that the NAC's treaty proposal fell into the interregnum space created by the electoral demise (in 1983) of the Fraser Government and the in-coming Bob Hawke Government, and was lost or conveniently forgotten. The prospective National Voice would be an ideal body – a government-funded organisation – to maintain persuasive pressure on the powers-that-be to undertake a tripartite treaty-making process.

Where are you going, settler Australia? To which destination are you marching? Are you still bent on pursuing your colonial logic of elimination? Are you still intent on ignoring calls by First Nations peoples for a decolonised relationship between them and you? Are you still intent on achieving the illusive end point of your colonialism? You should know that such ending would never be attainable for so long as First Nations peoples persist in asserting their Indigenous difference and Indigenous rights. Should you not therefore be prepared to undertake the tripartite treaty journey, the end point of which is a decolonised nation-state and the establishment of a regime of peaceful, friendly and respectful coexistence of your governmental authorities, laws and legal systems and First Nations' governmental authorities, laws and legal systems?

¹⁹ Australian Government [n.d.(d)].

Appendix 1
First Formulation of Amended Statement of Claim
Coe v Commonwealth [1979] HCA 68

- [1] The Plaintiff sues on behalf of the Aboriginal community and nation of Australia and for the benefit of that community which is a community of more than seven persons.
- [2] The Plaintiff is a member of the Wiradjeri Tribe and has authority from this and from other tribes and the whole aboriginal community and nation to bring this action.
- [3] The Plaintiff is a member of and a descendant of the aboriginal people of Australia and is a member of the aboriginal nation.
- [4] On or about a day in April 1770 Captain James Cook RN at Kurnell wrongfully proclaimed sovereignty and dominion over the east coast of the continent now known as Australia for and on behalf of King George III for and on behalf of what is now the second named Defendant.
- [5] On or about the 26th day of January, 1788 Captain Arthur Phillip RN wrongfully claimed possession and occupation for the said King George III on behalf of what is now the second named Defendant of that area of land extending from Cape York to the southern coast of Tasmania and embracing all the land inland from the Pacific Ocean to the west as far as the 135th longitude including that area of land now occupied by the first named Defendant at the Commonwealth Offices, Sydney, Commonwealth Bank Building, Martin Place, Sydney.
- [6] The claims of Captain Cook, Captain Phillip and others on behalf of King George III and his heirs and successors were contrary to the rights, privileges, interests, claims and entitlements of the aboriginal people both individually and in tribes and of the aboriginal community and nation as more fully set out in [13] hereof.
- [7] The first named Defendant came into existence in or about the year 1900 claiming sovereignty over what is now known as the continent of Australia contrary to the rights, privileges, interests, claims and entitlements of the aboriginal people both individually and in tribes and the aboriginal community and nation. The first named Defendant thus became the successor in title in Australia to rights and interests of the aforesaid King George III.
- [8] The second named Defendant is the successor in title in the United Kingdom to the rights and interests of the aforesaid King George III.
- [9] From time immemorial prior to 1770 the aboriginal nation had enjoyed exclusive sovereignty over the whole of the continent now known as Australia.
- [10] The aboriginal people have had from time immemorial a complex social, religious, cultural and legal system under which individuals and tribes had proprietary and/or possessory rights, privileges, interests, claims and entitlements to particular areas of lands subject to usufructuary rights in other aboriginal people. Some of the aboriginal people still exercise these rights.
- [11] Clans, tribes and groups of aboriginal people travelled widely over the said continent now known as Australia developing a system of interlocking rights and responsibilities making

- contact with other tribes and larger groups of aboriginal people thus forming a sovereign aboriginal nation.
- [12] The whole of the said continent now known as Australia was held by the said aboriginal nation from time immemorial for the use and benefit of all members of the said nation and particular proprietary possessory and usufructuary rights in no way derogated from the sovereignty of the said aboriginal nation.
- [13] The proclamations by Captain James Cook, Captain Arthur Phillip and others and the settlement which followed the said proclamations and each of them wrongfully treated the continent now known as Australia as terra nullius whereas it was occupied by the sovereign aboriginal nation as set out in paragraphs [10], [11] and [12].
- [14] The aboriginal people being as aforesaid a nation from time immemorial to the present day were and are entitled to the quiet enjoyment of their rights, privileges, interests, claims and entitlements in relation to lands in the continent now known as Australia and were entitled not to be dispossessed thereof without bilateral treaty, lawful compensation and/or lawful international intervention.
- [15] On and after the 26th day of January, 1788 when Captain Arthur Phillip RN landed at Sydney Cove the said Captain Phillip and others including the servants and agents of the first and second named Defendants unlawfully dispossessed certain of the aboriginal people from their lands and have prevented certain members of the aboriginal community from entering into possession of their lands and from hunting and fishing and enjoyment of usufructuary rights in respect of the said lands and have thereby destroyed the culture of the Plaintiff and the aboriginal people, their religion, customs, language and their way of life that they would have otherwise enjoyed.
- [16] As from the date of Federation on or about the year 1900 the first named Defendant has purported to exercise sovereignty over the continent of Australia. From the same date the first named Defendant has had the obligation not to prohibit the free exercise of any religion but yet the said first named Defendant has from that date enacted legislation which has deprived the Plaintiff and the aboriginal community and nation of his and its rights, privileges, interests, claims and entitlements in part and in whole from time to time including his and its rights to freely practice his and its religion to his and its hurt, degradation and humiliation.
- [17] Since the wrongful proclamations aforesaid the first named Defendant has legislated to permit by its servants, agents and licensees without the consent of the aboriginal community and nation to plunder the territory of the continent of Australia of its minerals and oil resources so that the complete destruction of certain fuels and minerals being part of lands of religious significance to the said aboriginal nation is imminent.
- [18] The first named Defendant by its servants and agents has legislated to permit the mining and export from the continent of Australia of that mineral known as uranium part of lands of religious significance from time immemorial to the said aboriginal nation such mining and export being contrary to the rights, privileges, interests, claims and entitlements including religious entitlement of the aboriginal community and nation.
- [19] In 1972 the first named Defendant and the second named Defendant recognised the sovereignty of the aboriginal people and nation by recognising the aboriginal embassy established on that

land immediately in front of Parliament House Canberra and subsequently elsewhere always under the flag of the aboriginal nation.

- [20] In 1975 the Senate, the Upper House of [the] Parliament of Australia passed a resolution accepting the fact that the Plaintiff and the Plaintiff's ancestors, and the aboriginal community, were in possession of the entire continent of Australia prior to 1788 and urging the first named Defendant to introduce legislation to compensate the Plaintiff and the aboriginal community and nation. The first named Defendant has not challenged this resolution and it may be taken as its admission.

And the Plaintiff claims:

- (i) A declaration that all lands and waterways within the continent of Australia presently occupied traversed and/or used by the aboriginal people for the purposes of habitation, hunting, food gathering, fishing, tribal ceremonial or religious usage and/or tribal burial are and shall remain at the absolute command of the aboriginal people free from interference at the suit of the Defendants or either of them or any person or corporation claiming thereunder whether under colour of law or otherwise.
- (ii) A declaration that all legislation of the first named Defendant allowing permitting or facilitating the transfer of land or mining is invalid in so far as it interferes with the religious rights of the Plaintiff and the aboriginal community and nation.
- (iii) An injunction restraining the first named Defendant from authorising any mining or other activity which interferes with the proprietary and/or possessory rights and/or religious rights of the aboriginal people unless and until internationally recognised arrangements are made for the transfer of such rights as may be necessary for such mining.
- (iv) An order against the first named and second named Defendants for compensation to be made to the aboriginal people and nation and to such individuals and tribes as have been deprived of their proprietary and/or possessory and other rights in land and religious rights and for compensation for interference with their culture, religion, customs, language and way of life which they would have otherwise enjoyed.
- (v) Costs.
- (vi) Such further or other order as the Court thinks fit.

Appendix 2

Second Formulation of Amended Statement of Claim

***Coe v Commonwealth* [1979] HCA 68**

- [1] The Plaintiff repeats each of the allegations made in paragraphs {[1], [2] and [3] of Appendix 2}.
- [2] In 1770 Captain James Cook in 1788 Captain Arthur Phillip and others made claims in respect of the territory now known as Australia on behalf of King George III and his heirs and successors. These claims established in the continent now known as Australia the laws, customs, benefits and usages of the Common Law.
- [3] The Plaintiff repeats each of the allegations made in paragraphs {[7], [8], [9], [10], [11], [12] of Appendix 2}.
- [4] The Common Law established by the proclamations set out in paragraph [2] hereof entitled the Plaintiff and the aboriginal people to the continuation of the proprietary and/or possessory and other rights which they had prior to 1770 unless these are taken away by bilateral treaty, lawful compensation and/or lawful international intervention.
- [5] On and after the 26th day of January, 1788 when Captain Arthur Phillip landed at Sydney Cove the said Captain Phillip and others including the servants and agents of the first and second named Defendants and persons claiming through and under them unlawfully and contrary to the common law dispossessed certain of the aboriginal people of certain of their rights, privileges, interests, claims and entitlements in respect of their lands. The Plaintiff and certain of the aboriginal people have therefore lost the benefits of their common law rights in the said lands and have suffered in their culture, religion, customs, language and way of life.
- [6] Since the proclamations aforesaid the first named Defendant has legislated to allow and permit the plundering of the territory of the continent of Australia of its minerals and oil resources so that the complete destruction of certain fuels and minerals being part of lands of religious significance to the said aboriginal people and nation is imminent.
- [7] The first named Defendant by its servants and agents has legislated to permit the mining and export of that mineral known as uranium part of lands of religious significance from time immemorial to the said aboriginal nation contrary to the rights, privileges, interests, claims and entitlements including religious entitlements of the said aboriginal people and aboriginal community and nation.
- [8] As and from the date of Federation on or about the year 1900 the first named Defendant has purported to exercise sovereignty over the continent of Australia. From the same date the first named Defendant has had the obligation not to prohibit the free exercise of any religion but yet the said first named Defendant has legislated to deprive the Plaintiff and the aboriginal community and nation of his and its rights, privileges, interests, claims and entitlements in part and in whole from time to time including his and its rights to freely practice his and its religion to his and its hurt, degradation and humiliation.
- [NB: The Plaintiff claims the same remedies as set out in Appendix 2]

Appendix 3

Third Formulation of Amended Statement of Claim

***Coe v Commonwealth* [1979] HCA 68**

- [1] The Plaintiff repeats each of the allegations made in paragraphs {[1], [2] and [3] of Appendix 2}.
- [2] In 1770 Captain James Cook, in 1788 Captain Arthur Phillip and others made proclamations amounting to claims of conquest of what is now known as the continent of Australia on behalf of King George III and his heirs and successors.
- [3] The Plaintiff repeats each of the allegations made in paragraphs {[7], [8], [9], [10], [11], [12] of Appendix 2}.
- [4] On conquest the radical title in the land vested in King George III but subject to the rights of occupancy and proprietary and/or possessory rights of the aboriginal people and nation.
- [5] After the conquest aforesaid the aboriginal people and nation retained their rights, privileges, interests, claims and entitlements in respect of their lands unless and until these are taken away by specific act of prerogative. No such specific act of prerogative was ever exercised.
- [6] On and after the 26th day of January, 1788 when Captain Arthur Phillip landed at Sydney Cove the said Captain Phillip and others including the servants and agents of the first and second named Defendants and persons claiming through and under the first and second named Defendants unlawfully and contrary to the common law dispossessed certain of the aboriginal people of certain of their rights, privileges, interests, claims and entitlements in respect of their lands. The Plaintiff and certain of the aboriginal people have therefore lost the benefits of their common law rights in the said lands and have suffered in their culture, customs, language and way of life.
- [7] Since the claims of conquest aforesaid the first named Defendant has legislated to allow and permit the plundering of the territory of the continent of Australia of its minerals and oil resources so that the complete destruction of certain fuels and minerals being part of lands of religious significance belonging to the said aboriginal people and nation is imminent.
- [8] The first named Defendant has legislated to permit the mining and export of that mineral known as uranium belonging to and being part of lands of religious significance from time immemorial to the said aboriginal nation contrary to the rights, privileges, interests, claims and entitlements including religious entitlement of the said aboriginal people and aboriginal community and nation.
- [9] As and from the date of Federation on or about the year 1900 the first named Defendant has purported to exercise sovereignty over the continent of Australia. From the same date the first named Defendant has had the obligation not to prohibit the free exercise of any religion but yet the said first named Defendant has legislated from that date to deprive the Plaintiff and the aboriginal community and nation of his and its rights, privileges, interests, claims and entitlements in part and in whole from time to time including his and its rights to freely practice his and its religion to his and its hurt, degradation and humiliation.
- [NB: The Plaintiff claims the same remedies as set out in Appendix 2]

Appendix 4
Statement of Claim
***Coe v Commonwealth* [1993] HCA 42**

- [1]¹ The Plaintiff is a Wiradjuri. The Plaintiff brings this action on her own behalf, and on behalf of the Wiradjuri tribe, nation and peoples (hereinafter generally referred to as the Wiradjuri nation).
2. Since time immemorial, since 1788, since 1813, since 1901 and since within living memory (hereinafter collectively referred to as ‘since time immemorial’) the Wiradjuri people, who are known as Wiradjuri Kooris and who are included in that group of people known as Aboriginal people, are a nation of persons who have continuously lived on and occupied that land now known as central New South Wales, in whole or in part, according to Wiradjuri laws, customs, traditions and practices, with their own language.
 3. The Wiradjuri nation have rights to all [land ... bounded by the common borders it shares with its neighbours ... and extends from the upper reaches of the Wambool (Macquarie) River in its northern border, the Murray River in its southern border, and the Great Dividing Range and the Murrumbidgee (Murrumbidgee) River in its eastern border and the flood plains of the Kalar (Lachlan) River in its western border and comprises approximately 80,000 square kilometres] and have continued to have rights to the said land by reason of their traditional connection to the said land, notwithstanding any wrongful or unlawful extinguishment, forced dispossession, or forced abandonment of the said land pleaded herein.
 4. [The Plaintiff sues the] first named Defendant ... [as] the successor in title to the Colony of New South Wales, Victoria Regina, William IV, George IV and George III and as International Sovereign.
 5. [The Plaintiff sues the] second named Defendant ... [as] the purported owner and occupier of Crown lands within the area of the Wiradjuri nation and purportedly holds the radical title and reversionary title to land within the tribal area of the Wiradjuri excepting that land purportedly owned and occupied by the Commonwealth of Australia – the first named Defendant.
 6. The Wiradjuri are a sovereign nation of people.
 7. In the alternative to paragraph 6 herein, the Wiradjuri are a domestic dependent nation, entitled to self-government and full rights over their traditional lands, save only the right to alienate them to whoever they please.
 8. In the further alternative to paragraphs 6 and 7 herein, the Wiradjuri are a free and independent people entitled to the possession of those rights and interests (including rights and interests in land) which as such are valuable to them.
 9. The second named Defendant – and George III, George IV, William IV, Victoria Regina and the Colony of New South Wales, being predecessors of the second named Defendant – and their servants and agents (hereinafter collectively referred to as ‘the second name Defendant’), by unprovoked and unjustified aggression including murder, acts of genocide and other crimes

¹ This is my own renumbering of this paragraph.

- against humanity, and contrary to international customary law, wrongfully and unlawfully attempted by force to settle, the whole or part of the tribal lands of the Wiradjuri, and partially excluded the Wiradjuri people and the Plaintiff's forebears from Wiradjuri land.
10. The first and second named Defendants have, by way of crimes including particularly genocide and other crime against humanity, wrongfully benefited through their wrongful and unlawful seizure of Wiradjuri land, and their wrongful and unlawful claims to proprietary interests in Wiradjuri land.
 11. The first named Defendant by itself, its servants and agents (hereinafter collectively referred to as 'the first named Defendant') ... wrongfully and unlawfully acquired Wiradjuri land [in the exercise of powers conferred upon the first named Defendant by the Commonwealth Constitution].
 12. Further and in the alternative to paragraphs 6-11 herein, George III, George IV, William IV and Victoria Regina had the sole power as International Sovereign to impair the personal, proprietary and usufructuary rights of the Plaintiff.
 13. The first and second named Defendants have represented by their conduct and otherwise to the Wiradjuri nation that they recognised and continue to recognise: (a) Wiradjuri title; (b) the personal and usufructuary rights of the Wiradjuri; and (c) Wiradjuri laws, customs and practices.
 14. Further by reason of the matters raised in paragraph 13 herein, the first and second named Defendants were and are under a fiduciary duty owed to the Wiradjuri nation.
 15. Further by reason of the matters referred to in paragraphs 13 and 14 herein, the first and second named Defendants became obligated as trustees of a trust on behalf of the Wiradjuri nation. And breached that trust obligation and fiduciary duty by dispossessing the Wiradjuri from their land and alienating Wiradjuri land.
 16. In the alternative to paragraphs 6, 7 and 8 herein, if the Wiradjuri were subjects of George III and his successors from 7 February 1788, then George III and his successors had a Sovereign duty to protect the rights of the Wiradjuri nation and failed to do so.
 17. Further to paragraph 16 herein, the predecessors of the first and second named Defendants wrongfully and unlawfully purported to extinguish the native title rights of the Plaintiff's predecessors in title and the Wiradjuri nation.
 18. In the further alternative to paragraphs 6, 7 and 8 herein, if the Plaintiff, the Plaintiff's predecessors in title, and the Wiradjuri people became subjects of George III on 7 February 1788, and they enjoyed, and continued to enjoy, the right to possession to their said Wiradjuri land.
 19. The predecessors of the first and second named Defendants wrongfully and unlawfully purported to issue freehold title to third parties over portions of Wiradjuri land.
 20. In consequence of the breach of duty by the first and second named Defendants and their predecessors in title, and the wrongful and unlawful alienation of Wiradjuri land, the Wiradjuri nation and the Plaintiff are entitled to: (a) compensation for dispossession of their land; (b) damages for trespass by the first and second named Defendants and third parties; (c) damages

for the unlawful alienation of Wiradjuri lands by the second named Defendants to third parties; and (d) damages for the loss of possessory rights of the Wiradjuri as a result of the adverse possession by third parties.

21. By reason of the existence of the fiduciary duty and the trust referred to in paragraphs 14 and 15 herein, the first and second named Defendants are obliged to compensate the Wiradjuri nation for a breach of that trust obligation.
22. Further to paragraph 21 herein, the first and second named Defendants have a duty to preserve all vacant Crown land within Wiradjuri territory for the benefit of the Wiradjuri nation.
23. Further and in the alternative to paragraphs 6-22 herein, the Wiradjuri have maintained their traditional connection to Wiradjuri land described ... herein and – to the extent that native title has not been extinguished – have native title to those lands.
24. Further and in the alternative to paragraphs 6-22 herein, the first named Defendant has wrongfully and unlawfully sought to extinguish the Plaintiff's title to certain Wiradjuri land by acts and legislation inconsistent with the Commonwealth Constitution s51 (xxxi), in that the purported extinguishment of such Wiradjuri title was an acquisition of property on other than just terms.
25. Further and in the alternative to paragraphs 6-22 herein, the second named Defendant has wrongfully and unlawfully sought to extinguish Wiradjuri title by invalid legislation, namely the *Aboriginal Land Rights Act 1983* (NSW) as amended (to the extent that it derogates from and infringes upon Wiradjuri native title rights), and the *Crown Lands (Validation of Revocations) Act 1983* (NSW) by reason of the inconsistency of the abovenamed Acts with Commonwealth legislation, namely the *Racial Discrimination Act 1975* ss10-11.

AND THE PLAINTIFF CLAIMS

- A. Pursuant to paragraph 6 above, a declaration that the Wiradjuri are a sovereign nation of people.
- B. Pursuant to paragraph 7 above, a declaration that the Wiradjuri are a domestic dependent nation, entitled to self-government and full rights over their traditional lands, save only the right to alienate them to whoever they please.
- C. Pursuant to paragraph 8 above, a declaration that the Wiradjuri are a free and independent people entitled to the possession of those rights and interests (including rights and interests in land) which as such are valuable to them.
- D. Pursuant to paragraphs 6, 7, 8, 9, 10, 11 and 23 above, a declaration that the Wiradjuri people are entitled as against the whole world to possession, occupation, use and enjoyment of Wiradjuri lands.
- E. Pursuant to paragraphs 23 above, a declaration that the Wiradjuri people are entitled as against the whole world to possession, occupation, use and enjoyment of those Wiradjuri lands where native title has not been extinguished.

- F. Pursuant to paragraphs 9, 10, 11, 15, 17, 19, 20, 21, 24 and 25 above, a declaration that the Plaintiff and the Wiradjuri nation and people are entitled to compensation for any loss or abrogation of their rights in their lands.
- G. Pursuant to paragraphs 9, 10, 11, 15, 17, 19, 20, 21, 24 and 25 above, a declaration that the Plaintiff and the Wiradjuri nation and people are entitled to damages for any loss or abrogation of the rights of the Plaintiff and the Wiradjuri nation and people with respect to their lands.
- H. Pursuant to paragraphs 9, 10, 11, 15, 17, 19, 20, 21, 24 and 25 above, a declaration that the Plaintiff and the Wiradjuri nation and people are entitled to exemplary damages for any loss or abrogation of the rights of the Plaintiff and the Wiradjuri nation and people with respect to their lands.
- I. Pursuant to paragraphs 6, 9, 10 and 11 above, a declaration that the Plaintiff and the Wiradjuri nation and people are entitled to reparations for the acts of genocide and other crimes against humanity inflicted upon the Plaintiff and the Wiradjuri nation and people.
- J. An order for an inquiry into compensation.
- K. An order for an inquiry into damages.
- L. An order for an inquiry into reparations.
- M. Pursuant to paragraph 25 above, a declaration that the *Aboriginal Land Rights Act 1983* (NSW) as amended is invalid, insofar as it derogates from and infringes upon Wiradjuri native title rights.
- N. Pursuant to paragraph 25 above, a declaration that the *Crown Lands (Validation of Revocations) Act 1983* (NSW) is invalid.
- O. Further or other relief.
- P. An order for costs.
- Q. An order for interest pursuant to section 77MA of the *Judiciary Act 1903* (Cth).

Appendix 5

Andrew Bolt's First Article

It's so hip to be black

[Date of Publication: 15 April 2009] (Eatock v Bolt)

Why are so many people eager to proclaim their aboriginality, despite it being such a small part of their heritage?

MEET the white face of a new black race – the political Aborigine.

Meet, say, acclaimed St Kilda artist Bindi Cole, who was raised by her English-Jewish mother yet calls herself “Aboriginal but white”.

She rarely saw her part-Aboriginal father, and could in truth join any one of several ethnic groups, but chose Aboriginal, insisting on a racial identity you could not guess from her features.

She also chose, incidentally, the one identity open to her that has political and career clout.

And how popular a choice that now is. Ask Annette Sax, another artist and – as the very correct *Age* newspaper described her – a “white Koori”.

Her father was Swiss, and her mother only part-Aboriginal. Racially, if these things mattered, she is more Caucasian than anything else. Culturally, she's more European. In looks, she's Swiss.

But she, too, has chosen to call herself Aboriginal, which happily means she could be shortlisted for this year's Victorian Indigenous Art Award.

Shall I go on? Not yet convinced that there is a whole new fashion in academia, the arts and professional activism to identify as Aboriginal?

Not yet convinced that for many of these fair Aborigines, the choice to be Aboriginal can seem almost arbitrary and intensely political, given how many of their ancestors are in fact Caucasian?

Then meet now Tara June Winch, who is just 26 and has written only one book, *Swallow the Air*, yet is already an ambassador for the Australia Council's Indigenous Literary Project. Yes, indeed, because despite her auburn hair and charmingly freckled face, she, too, is an Aborigine, who claims her “country is Wiradjuri”.

Yet her mother, who raised her in industrial Wollongong, is in fact boringly English, and her father has both Afghan and Aboriginal heritage.

She could call herself English, Afghan, Aboriginal, Australian or just a take-me-as-I-am human being called Tara June Winch. Race irrelevant.

Instead, she's an official Aborigine, and hired as such in a nation that now institutionalises even racial differences you cannot detect with a naked eye.

Larissa Behrendt has also worked as a professional Aborigine ever since leaving Harvard Law School, despite looking almost as German as her father.

She chose to be Aboriginal as well, a member of the “Euralayai and Kammillaroi nations”, and is now a senior professor at the University of Technology in Sydney’s Indigenous House of Learning.

She’s won many positions and honours as an Aborigine, including the David Unaipon Award for Indigenous Writers, and is often interviewed demanding special rights of “my people”.

But which people are “yours” exactly, mein liebchen? And isn’t it bizarre to demand laws to give you more rights as a white Aborigine than your own white dad?

How much more of this madness can you take? Meet now Associate Professor Anita Heiss, who says she’s a “member of the Wiradjuri nation” who prays to Biami, the tribe’s creator spirit.

Heiss’s father was Austrian, and her mother only part-Aboriginal. What’s more, she was raised in Sydney and educated at Saint Claire’s Catholic College. She, too, could identify as a member of more than one race, if joining up to any at all was important.

As it happens, her decision to identity as Aboriginal, joining four other “Austrian Aborigines” she knows, was lucky, given how it’s helped her career.

Heiss not only took out the Scanlon Prize for Indigenous Poetry, but won plum jobs reserved for Aborigines at Koori Radio, the Aboriginal and Torres Strait Islander Arts Board and Macquarie University’s Warawara Department of Indigenous Studies.

I’m not saying any of those I’ve named chose to be Aboriginal for anything but the most heartfelt and honest of reasons. I certainly don’t accuse them of opportunities, even if full-blood Aborigines may wonder how such fair people can claim to be one of them and in some cases take black jobs.

I’m saying only that this self-identification as Aboriginal strikes me as self-obsessed, and driven more by politics than by any racial reality.

IT’S also divisive, feeding a new movement to stress pointless or even invented racial differences we once swore to overcome. What happened to wanting us all to become colour blind?

Of course, the white Aborigine – or “political Aborigine – is not new.

In 1972, Pat Eatock, founding secretary of the Aboriginal Tent Embassy, officially became the first Aborigine to stand for federal parliament in the ACT, even though she looked as white as her Scottish mother, or some of her father’s British relatives.

Indeed, Eatock only started to identify as Aboriginal when she was 19, after attending a political rally, so little did any racial difference matter to her before her awakening to far-Left causes.

But she thrived as an Aboriginal bureaucrat, activist and academic, leading the way for Leeanne Enoch, who stood for Labor in last month’s Queensland election as its “first Aboriginal candidate” in a winnable seat, despite looking as Aboriginal, or not, as Premier Anna Bligh.

The white Aboriginal artist, too, is more than 15 years old. Kim Scott was hailed as the first Aborigine to win the Miles Franklin Award, and calls himself a Noongar, despite conceding that the Aborigines who did not know him called him a *wadjila* – a white.

No doubt he has Aboriginal ancestry, but why does he not also identify with his obvious European background?

That is now a question even for our most famous Aboriginal leaders. Geoff Clarke, the last chairman of ATSIC, the Aboriginal “parliament”, had an English father. Lowitja O’Donoghue, another ATSIC chairman, had an Irish father. Fair Michael Mansell, the Tasmanian firebrand, clearly has more European than Aboriginal ancestry.

EVEN Professor Mick Dodson, the Australian of the Year and a fierce advocate for a treaty between black and white, had a white father and from the age of 10 was a boarder at a Victorian Catholic school. Sign a treaty with yourself, Mick.

Or take the most prominent Yorta-Yorta leaders – Melbourne University academic Wayne Atkinson and Victorian Traditional Owners Land Justice Group Co-Chair Graham Atkinson. Both are Aboriginal because their Indian great-grandfather married a part-Aboriginal woman.

I think it sad if we harp on about differences and rights based on trivial inflections of race.

And how comic. We get fair-faced Dr Mark Rose, Victorian Aboriginal Education Association head, falsely claiming as “a member of the western Victorian Gundjitamara Nation” that the northern Australia didgeridoo is banned to women.

We get Daniel Browning, host of ABC radio’s *Away!* Program for Aborigines, insisting he’s Aboriginal when he looks more like one of his West Indian ancestors, and could just as correctly claim to be South Sea Islander, English, Australian or who-cares.

To me, this blacker-than-thou offends the deepest humanist ideals, and our “enlightened” opinion is debased when it takes a mere *Australian Idol* winner, to hint at the healthier truth, saying she’s proud of being Aboriginal, but “proud of being half-white, too”.

In fact, let’s go beyond racial pride. Beyond black and white. Let’s be proud only of being human beings set on this land together, determined to find what unites us and not to invent such racist and trivial excuses to divide. Deal?

Appendix 6

Andrew Bolt's Second Article

White fellas in the black

[Date of Publication: 21 August 2009] (Eatock v Bolt)

What's an Aboriginal artist from the bush to think when he or she sees yet another white man lope off with a prize originally meant to inspire blacks?

AS you can see, the two men on the right are from a tribe of people who face terrible racism just because of the colour of their skin.

So, you'll be thrilled that both have won a rare opportunity – one offered to their race alone to end such injustice.

The man to the right, Sydney arts academic Danie Mellor, this week won our richest prize for Aboriginal artists – the \$40,000 Telstra Award.

And the man to the left, Sydney law academic Mark McMillan, has won one of our richest prizes for Aboriginal students – the Fulbright Indigenous Scholarship.

If, studying the faces of these two “Aboriginal” men you think this is surely the most amazing stretch of definition, you're wrong.

McMillan has gone one better still: he's also won the Black Women's Action in Education Foundation Scholarship, originally intended to help educate black women, not white men.

But that's modern race politics at our universities and anywhere else where grants and privileges are now doled out.

Hear that scuffling at the trough? That's the sound of black people being elbowed out by white people shouting “but I'm Aboriginal, too”. *Hark!* – is that a man's voice I now hear bellowing: “And I'm an Aboriginal woman.”

You see, Mellor and McMillan are representatives of a booming new class of victim you'd never have imagined we'd have to support with special prizes and jobs.

They are “white Aborigines” – people who, out of their multi-stranded but largely European genealogy, decide to identify with the thinnest of all those strands, and the one that's contributed least to their looks. Yes, the Aboriginal one now so fashionable among artists and academics.

Let McMillan himself describe the torture he's faced as a result – the shocking pain of having not been discriminated against for being black.

“I am a blonde-haired, blue-eyed, fair-skinned Aboriginal Australian...

“As a child, I grew up expecting everyone to be like me, to look like me – with blonde hair and blue eyes.

“Clearly, my naïve ideas about how Aboriginal people were ‘supposed’ to look were wrong. But being Aboriginal and fair and blonde was normal to me and I grew up in a world where I was treated ‘normally’...

“Impeding my growth from that young person into the adult I wanted to become was the profound issue of identity. I was a white black man... I was becoming a victim.”

You’d swear this was from a satire – a local version of Sasha Baron Cohen’s jive-talking routine as the fashionably aggrieved white rapper Ali G, complaining “Is it cos I is black?”

But no, this is meant seriously, and serious perks and Aboriginal-only benefits flow as a consequence.

McMillan – whose confusion about his identity leads him also to declare he’s both a “proud gay” and a “proud father” – has received all the special help you once thought, when writing the taxman another cheque, would at least go to people who *looked* Aboriginal, but which is increasingly lavished on folk as pink in face as they are in politics.

This trained lawyer has not just won several prizes intended for Aborigines, but has worked for Aboriginal groups such as ATSIC, and is the Aboriginal representative on several boards, including that of a local land council.

Now he’s a researcher at Jumbunna Indigenous House of Learning of the University of Technology, Sydney – an “indigenous” outfit run by the very pale Prof Larissa Behrendt, who may have been raised by her white mother but today, as a professional Aborigine, is chairman of our biggest taxpayer-funded Aboriginal television service.

The blue-eyed and ginger-haired Mellor has been similarly privileged, despite having an “American-Australian” father and a mother with only part-Aboriginal ancestry in her otherwise Irish-Australian past.

He now lectures on “Indigenous and Western perspectives of culture and history” at Sydney University and his indigenous art now hangs in most of our national and state art collections.

Nor are Mellor, McMillan and Behrendt atypical or even rare as “white Aborigines”.

St Kilda artist Bindi Cole, raised by her English mother, explored her own pain at being too white in a Next Wave Festival show, *Not Really Aboriginal*, for which she photographed herself with black powder all over her distressingly white face.

Blond Annette Sax, daughter of a Swiss immigrant, also identified herself as a “white Koori”, which fortuitously allowed her to make the shortlist for the Victorian Indigenous Art Award, alongside other Aboriginal artists as pale as a blank canvas.

THE auburn-haired Tara Jane Winch was just as lucky. She needed to write just one book – and say her dad had Afghan-Aboriginal ancestry – for the Australia Council to snap her up as its Indigenous Literacy Project ambassador.

I’ve written before of a dozen similar cases, several even more incongruous.

For instance, how can Graham Atkinson be co-chair of the Victorian Traditional Owners Land Justice Group when his right to call himself Aboriginal rests on little more than the fact that his Indian great-grandfather married a part-Aboriginal woman?

Yes, yes, I know. What business is it of anyone else how we identify ourselves? In fact, we're so refreshingly non-judgmental these days – so big-hugs-for-all – that the federal Human Rights Commission wants our laws changed so a man can even call himself a woman, should he feel like it.

Hear it from the HRC itself: “The evidentiary requirements for the legal recognition of sex should be relaxed by ... making greater allowance for people to self-identify their sex.”

Lovely! Soon there'll be no end of white men claiming prizes meant for black women. And don't dare then tell the HRC's anti-discrimination police you object.

Yet I *do* object, and not just because I refuse to surrender my reason and pretend white really is black, just to aid some artist's self-actualisation therapy.

That way lies madness, where truth is just a whim and words mean nothing.

I refuse also for two other reasons that should be important to us all.

First, of course, is that the special encouragements and prizes we set aside for Aborigines are actually meant for ... well, *Aborigines*. You know, the ones we fear would get nothing, if we didn't offer a bit extra, just for them.

So, when a privileged white Aborigine then snaffles that extra, odds are that an underprivileged black Aborigine misses out on the very things we hoped would help them most.

Take Mellor's art prize. This white university lecturer, with his nice Canberra studio, has by winning pushed aside real draw-in-the-dirt Aboriginal artists such as Dorothy Napangardi, Mitjili Napanangka Gibson and Walangkura Napanangka, who'd also entered and could really have used that cash and recognition.

DOES this make sense? What's an Aboriginal art prize for, if a man as white and cosseted as Mellor can win it, and with a work that shows no real Aboriginal techniques or traditions?

What's a black Aboriginal artist from the bush to think, seeing yet another white man lope back to the city with the goodies?

Same with McMillan. When a man as white as I, already a lawyer with a job, wins a prize meant to encourage and inspire hard-struggle black students, what must those Aborigines conclude?

And here's my other objection.

It's also exactly what we have too much of already.

Seeking power and reassurance in a racial identity is not just weak – a surrendering of your individuality, and a borrowing of other people's glories.

The noble ideal of Australia, that we judge each other by our character and deeds, and not our faith, fortune or fatherland, is breaking down. We're not yet a nation of tribes, but that's sure the way we're heading.

I've never before seen so many Australian-born people identify themselves by their ethnicity, whether by joining ethnic gangs, living in ethnic enclaves, forming ethnic clubs, demanding ethnic television, playing in ethnic sports clubs, or grabbing ethnic prizes and grants.

Why is that a problem? Because people who feel they owe most to their tribe tend to feel they owe less to the rest. At its worst, it's them against us.

Feel that fracturing yourself?

So, when even academics and artists now spurn the chance to be people of our better future – people of every ethnicity but none – and sign up instead as white Aborigines, insisting on differences invisible to the eye, how much is there left to hold us together?

Appendix 7

Andrew Bolt's Statements in Articles on Witnesses Reaction of Witnesses Justice Bromberg's Findings (*Eatock v Bolt*)

1 Anita Heiss

- (1) The statements, in the first article, concerning Anita Heiss, are as follows:

Meet now Associate Professor Anita Heiss, who says she's a "member of the Wiradjuri nation" who prays to Biami, the tribe's creator spirit.

Heiss's father was Austrian, and her mother only part-Aboriginal. What's more, she was raised in Sydney and educated at Saint Claire's Catholic College. She, too, could identify as a member of more than one race, if joining up to any at all was important.

As it happens, her decision to identify as Aboriginal, joining four other "Austrian Aborigines" she knows, was lucky, given how it's helped her career.

Heiss not only took out the Scanlon Prize for Indigenous Poetry, but won plum jobs reserved for Aborigines at Koori Radio, the Aboriginal and Torres Strait Islander Arts Board and Macquarie University's Warawara Department of Indigenous Studies.

- (2) Heiss' ancestry, and her identification as an Indigenous person, may be summarised (in the words of Justice Bromberg) as follows:¹

Ms Heiss gave evidence that she is and has always been Aboriginal. Her maternal great-grandmother was Aboriginal, as was her maternal grandmother. Both her maternal grandmother and great aunt were part of the Stolen Generation and were removed from their families along with other relatives. Ms Heiss's mother is Aboriginal. Her father was not Aboriginal, he was born in Austria. Her father did not seek to incorporate any Austrian culture, language or heritage into her family life. Her father was part of the Aboriginal family and community in which Ms Heiss was raised. She does not recall how she came to know she was Aboriginal. She has never thought of having a choice about being Aboriginal. That is who she is and has always been as far as she can remember. She has five siblings, three have brown skin and two are fair. All have the same parents.

- (3) Heiss' reaction to the articles and statements about her (as detailed in Justice Bromberg's judgment) may be summarised as follows:

- (a) She saw Bolt as discriminating against her because she was not dark enough.²
- (b) She perceived Bolt as wanting to take away her Aboriginal identity because of the way she looked.³

¹ Justice Bromberg's judgment: paragraph 67.

² Ibid: paragraph 70.

³ Ibid.

- (c) She was offended because she considered that Bolt was claiming that Aboriginal individuals like her were not genuinely Aboriginal because of the way they looked.⁴
 - (d) She was offended by Bolt's suggestion that she chose to identify as Aboriginal in order to pursue better career options. That suggestion challenged her integrity, her ethics and her personal beliefs.⁵
 - (e) She was insulted and offended by Bolt's claim that benefits, awards and prizes that she and others had gained were due to their identification as Aboriginal people.⁶
 - (f) She was offended by Bolt's "blood quantum" approach to racial identity and its focus on how people looked.⁷
 - (g) She was offended that the articles did not recognise Aboriginality in all its diversity, that is, the varied features and attributes of contemporary Aboriginal Australia.⁸
 - (h) She was humiliated and insulted by the reference in the first article to awards she had won and the suggestion that these were encouragement awards rather than recognitions of her achievements.⁹
 - (i) She found offensive Bolt's assertion that her mother was only part-Aboriginal.¹⁰
- (4) Justice Bromberg's findings concerning Heiss' identity, and her response to the articles and the statements about her, are as follows:¹¹

The evidence given by Ms Heiss was not contested and I have no reason to not accept it as truthful. In particular, I find that by reason of Ms Heiss having been raised as Aboriginal she has and does genuinely self-identify as Aboriginal. She has Aboriginal ancestry and communal recognition as an Aboriginal person. She is an Aboriginal person and entitled to regard herself as an Aboriginal person within the conventional understanding of that description. ... She did not consciously choose to be Aboriginal. She has not improperly used her Aboriginal identity to advance her career. She is a person committed to her Aboriginal community and is entitled to regard her achievements as well deserved rather than opportunistically obtained. I accept that she feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by her evidence.

⁴ Ibid.

⁵ Ibid: paragraph 71.

⁶ Ibid.

⁷ Ibid: paragraph 72.

⁸ Ibid.

⁹ Ibid: paragraph 73.

¹⁰ Ibid.

¹¹ Ibid: paragraph 74.

2 Bindi Cole

- (1) The statements, in the first article, concerning Bindi Cole are as follows:

Meet, say, acclaimed St Kilda artist Bindi Cole, who was raised by her English-Jewish mother yet calls herself “Aboriginal but white”.

She rarely saw her part-Aboriginal father, and could in truth join any one of several ethnic groups, but chose Aboriginal, insisting on a racial identity you could not guess from her features.

She also chose, incidentally, the one identity open to her that has political and career clout.

- (2) The statement, in the second article, concerning Cole is as follows:

St Kilda artist Bindi Cole, raised by her English mother, explored her own pain at being too white in a Next Wave Festival show, *Not Really Aboriginal*, for which she photographed herself with black powder all over her distressingly white face.

- (3) Cole's ancestry, and her identification as an Indigenous person, may be summarised (in the words of Justice Bromberg) as follows (my alphabetical numbering):

[a] Ms Cole's father is Aboriginal and her mother was not. Both her mother and maternal grandmother were born in Australia. Her mother did not identify herself as either English or Jewish although her mother had English and Jewish heritage. Ms Cole only learned of her mother's Jewish heritage a few years ago and after her mother's death. Judaism had no influence in her upbringing.¹²

[b] It was Ms Cole's Aboriginal grandmother who instilled in her a sense of pride in her Aboriginal heritage. However, Ms Cole was aware of her Aboriginal heritage before she went to live with her grandmother. Her mother always told her that she was Aboriginal. Ms Cole has always regarded herself to be Aboriginal. She did not choose to be Aboriginal.¹³

[c] She is recognised within the Koori community and the broader Australian art community as an Aboriginal artist.¹⁴

- (4) Justice Bromberg referred to the “Not Really Aboriginal” photographic exhibition by Cole that was mentioned in the second article. He noted:

The photographs in the exhibition portray Ms Cole and members of her family including her father. The photographs show people who have pale skin colour, but whose faces have been painted black.¹⁵

Her idea for the [exhibition] was to question the perception that if a person does not fit the stereotype of an Aboriginal person, that person is not really Aboriginal. ... The exhibition was

¹² Ibid: paragraph 75.

¹³ Ibid: paragraph 77.

¹⁴ Ibid: paragraph 79.

¹⁵ Ibid: paragraph 81.

a very personal expression of her feelings about that issue. The exhibition was about challenging the stereotype of an Aboriginal person being very dark-skinned and living in a remote community. The exhibition was about her saying that she was very proud of her family.¹⁶

(5) Cole's reaction to the articles and the statements about her (as detailed in Justice Bromberg's judgment) may be summarised as follows:

- (a) She found the first article very upsetting. She had calls from her aunties asking "why are they saying that about us?" In her view, the article affected the whole Aboriginal community and Bolt's words offended them.¹⁷
- (b) She was offended by the reference in the second article to her photographic exhibition. Bolt was, in her view, deriding her and giving no artistic reference to what she was trying to convey. She found his use of the phrase "distressingly white face" insulting, humiliating and offensive.¹⁸
- (c) She was intimidated and humiliated by the articles. She did not want to go out in public for a while. She did not want to be seen.¹⁹
- (d) The articles were, in her view, reinforcing the stereotype of the "black" Aboriginal. She found Bolt's focus on looks and his failure to address culture as offensive.²⁰
- (e) She felt that Bolt was taking her identity away. She perceived Bolt as saying that she was not legitimately Aboriginal because she was not dark-skinned.²¹
- (f) She saw the Articles as undermining her achievements. Bolt was, in her view, saying that she and the other named individuals had falsely claimed to be Aboriginal to get ahead and access prizes as a rort, that Bolt was labelling them as opportunistic. She was offended by the suggestion that the only reason she identified as Aboriginal was to gain benefits.²²

(6) Justice Bromberg's findings concerning Cole's identity, and her response to the articles and the statements about her, are as follows:²³

Ms Cole was cross-examined, but in the main her evidence was not contested and I have no reason to not accept it as truthful. In particular, I find that by reason of Ms Cole having been raised as an Aboriginal person she has and does genuinely self-identity as Aboriginal. She has Aboriginal ancestry and communal recognition as an Aboriginal person. She is entitled to regard herself to be an Aboriginal person within the conventional understanding of that description. She did not consciously choose to be Aboriginal. She has not improperly used her Aboriginal identity to advance her career as an artist. She is recognised by her peers in the Aboriginal arts community as an Aboriginal artist and is entitled to regard her achievements as well deserved

¹⁶ Ibid: paragraph 80.

¹⁷ Ibid: paragraph 83.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid: paragraph 84.

²¹ Ibid.

²² Ibid: paragraph 85.

²³ Ibid: paragraph 86.

rather than opportunistically obtained. I accept that she feels offended, humiliated, insulted and intimidated by the Articles or parts thereof in the manner outlined by her evidence.

3 Geoff Clark

- (1) The statement, in the first article, concerning Geoff Clark is as follows:

That is now a question – [that is: “No doubt he has Aboriginal ancestry, but why does he not also identify with his obvious European background?”] (a question posed with reference to one of the other persons mentioned, Kim Scott)] – even for our most famous Aboriginal leaders. Geoff Clarke (sic), the last chairman of ATSIC, the Aboriginal “parliament”, had an English father. [Clark is grouped here with Lowitja O’Donoghue, “another ATSIC chairman [who] had an Irish father” [and] “Fair Michael Mansell, the Tasmanian firebrand, [who] clearly has more European than Aboriginal ancestry”].

- (2) Clark’s ancestry, and his identification as an Indigenous person, may be summarised (in the words of Justice Bromberg) as follows (my alphabetical numbering):

[a] Mr Clark’s mother is Aboriginal. Both his mother’s parents were Aboriginal. His mother was born in the Aboriginal community at the Framlingham Forest in Victoria. Mr Clark’s mother had several siblings, each of them had different skin colour.²⁴

[b] Mr Clark’s father was not Aboriginal. Mr Clark described him as Australian. As his name was McIntosh, Mr Clark’s mother had told him that his father had some Scottish ancestry. His father and mother were not married and never lived together. ... His father had no role in, or influence on, Mr Clark’s upbringing or influence on his identity.²⁵

[c] Mr Clark was essentially raised by his Aboriginal grandmother at Framlingham. Framlingham was established in 1861 and is one of the longest established Aboriginal communities in Victoria. Apart from a six-year period in the 1970s, Mr Clark has lived in Framlingham nearly all of his life. This is where he and his two sisters were raised. It is where he learnt his Aboriginal culture watching his grandmother making traditional baskets and food and hunting and fishing with his Aboriginal uncles. He watched his uncles making Aboriginal cultural artefacts and his grandfather mixing traditional medicines and remedies. Traditional knowledge of sacred sites and stories of the Aboriginal people were passed down to him by his relatives and other elders. He is currently a custodian of this knowledge and an elder of the Tjapwhuurrung people.²⁶

[d] Mr Clark has only ever identified as an Aboriginal person. Mr Clark became active in Aboriginal issues in his mid-20s.²⁷

- (3) Clark’s reaction to the articles and the statement about him (as detailed in Justice Bromberg’s judgment) may be summarised as follows:

²⁴ Ibid: paragraph 87.

²⁵ Ibid: paragraph 88.

²⁶ Ibid: paragraph 89.

²⁷ Ibid: paragraph 91.

- (a) He found the articles insulting and offensive.²⁸
 - (b) Bolt was, in his view, questioning his Aboriginality.²⁹
 - (c) Bolt was suggesting he had disingenuously chosen to identify as Aboriginal.³⁰
 - (d) He was outraged by Bolt's comments.³¹
 - (e) In his view, the first article challenged his human rights, his identity and undermined everything that he had committed his life to.³²
 - (f) He characterised both articles as constituting the essence of prejudice and racism in Australia.³³
 - (g) He was offended by Bolt's suggestion that there had been an advantage for him in claiming he was Aboriginal.³⁴
 - (h) He was very offended by the articles' concentration on skin colour as defining Aboriginal identity.³⁵
 - (i) He perceived the personal attack made in the articles on the individuals named as an attack on the collective rights of Aboriginal people.³⁶
 - (j) He regarded the articles as intimidating Aboriginal people from identifying as Aboriginal.³⁷
 - (k) He found the suggestion that he and others are not genuine Aboriginal people to be humiliating.³⁸
- (4) Justice Bromberg's findings concerning Clark's identity, and his response to the articles and statements about him, are as follows:³⁹

The evidence given by Mr Clark was not contested and I have no reason to not accept it as truthful. In particular, I find that by reason of Mr Clark having been raised as an Aboriginal person he has and does genuinely self-identify as Aboriginal. He has Aboriginal ancestry and communal recognition as an Aboriginal person. He is an Aboriginal person and entitled to regard himself as Aboriginal within the conventional understanding of that description. He did not consciously choose to be Aboriginal. He has not improperly used his Aboriginal identity to advance his career. He is a person committed to his community who has regularly been elected

²⁸ Ibid: paragraph 92.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid: paragraph 93

³⁵ Ibid.

³⁶ Ibid: paragraph 94.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid: paragraph 96.

to represent it. He is entitled to regard his achievements as well deserved rather than opportunistically obtained by reason of his identification as an Aboriginal person. I accept that he feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by his evidence.

4 Wayne Atkinson

- (1) The statement, in the first article, concerning Wayne Atkinson (and his brother, Graham) is as follows:

Or take the most prominent Yorta-Yorta leaders – Melbourne University academic Wayne Atkinson and Victorian Traditional Owners Land Justice Group Co-Chair Graham Atkinson. Both are Aboriginal because their Indian great-grandfather married a part-Aboriginal woman.

- (2) Wayne Atkin's ancestry, and his identification as an Indigenous person, may be summarised (in the words of Justice Bromberg) as follows (my alphabetical numbering):

- [a] Dr Atkinson's parents are both Aboriginal persons and descendants of the Yorta-Yorta and Dja-Dja Wurrung tribal groups of central Victoria and the Murray Goulburn Region. All four of Dr Atkinson's grandparents were of Aboriginal descent. All of his great grandparents were of Aboriginal descent except one of his great grandfathers, Thomas Shadrach James. Thomas James was born in Mauritius and was of Indian heritage. He arrived in Australia in the 1800s and worked as a teacher in Aboriginal communities where he met and married Dr Atkinson's great grandmother.⁴⁰
- [b] Dr Atkinson was raised by his maternal Aboriginal grandmother until his early teens. He grew up with his cousins on the riverbanks of Mooroopna in an Aboriginal fringe camp on the ancestral land of the Yorta-Yorta. Both English and Aboriginal language were used in daily conversation at home. His siblings and cousins are all Aboriginal people who identify as such. He grew up with his Aboriginality continually being reinforced by his parents, grandparents, relations, elders and many significant Aboriginal leaders.⁴¹
- [c] Dr Atkinson says that he has lived every day of his life as an Aboriginal person. At no stage of his life has he regarded himself as choosing or electing to be Aboriginal. Being Aboriginal is what and who he is and always has been.⁴²
- [d] He has always been recognised as an Aboriginal person by the Aboriginal community. He is a respected elder of both the Yorta-Yorta and Dja-Dja Wurrung peoples. This he says is something he has earned over many years.⁴³

⁴⁰ Ibid: paragraph 97.

⁴¹ Ibid: paragraph 98.

⁴² Ibid: paragraph 99.

⁴³ Ibid: paragraph 101.

- (3) Wayne Atkinson's reaction to the articles and the statement about him (as detailed in Justice Bromberg's judgment) may be summarised as follows:
- (a) He perceived the articles to be humiliating because they questioned his identity and integrity.⁴⁴
 - (b) In his view, it was offensive for Bolt to exclude people as not being Aboriginal because they did not have dark skin.⁴⁵
 - (c) He did not regard being Aboriginal as being about skin colour.⁴⁶
 - (d) He found the idea that he had to be sufficiently Aboriginal according to Bolt to claim his heritage and identity to be extremely offensive.⁴⁷
 - (e) He regarded what Bolt had said in the articles to affect a very large number of people in the Aboriginal community.⁴⁸
 - (f) He perceived Bolt's assertion that his only claim to Aboriginality was that his great grandfather Thomas James married his great grandmother, to be highly offensive, insulting and totally inaccurate.⁴⁹
 - (g) He was angry that people like Bolt get away with terrible distortions of the truth.⁵⁰
 - (h) He was distressed and agitated when powerful white people negate Aboriginal history and the right to be Aboriginal.⁵¹
 - (i) He had a deep concern for the children of relatives who he suggested would be subjected to similar identity attacks as a result of the articles.⁵²
- (4) Justice Bromberg's findings concerning Wayne Atkinson's identity, and his response to the articles and the statement about him, are as follows:⁵³

The evidence given by Dr Atkinson was not contested and I have no reason to not accept it as truthful. In particular, I find that by reason of Dr Atkinson having been raised as an Aboriginal person, he has and does genuinely self-identify as Aboriginal. He has Aboriginal ancestry and communal recognition as an Aboriginal person. He is an Aboriginal person and entitled to regard himself as an Aboriginal person within the conventional understanding of that description. He did not consciously choose to be Aboriginal. He has not improperly used his Aboriginal identity to advance his career. He is a highly respected and committed member of his Aboriginal community and is entitled to regard his achievements as well deserved rather than

⁴⁴ Ibid.

⁴⁵ Ibid: paragraph 102.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid: paragraph 103.

⁵³ Ibid: paragraph 105.

opportunistically obtained. I accept that he feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by his evidence.

5 Graham Atkinson

- (1) The statement, in the first article, concerning Graham Atkinson (and his brother, Wayne) is as follows:

Or take the most prominent Yorta-Yorta leaders – Melbourne University academic Wayne Atkinson and Victorian Traditional Owners Land Justice Group Co-Chair Graham Atkinson. Both are Aboriginal because their Indian great-grandfather married a part-Aboriginal woman.

- (2) The statement, in the second article, concerning Graham Atkinson is as follows:

For instance, how can Graham Atkinson be co-chair of the Victorian Traditional Owners Land Justice Group when his right to call himself Aboriginal rests on little more than the fact that his Indian great-grandfather married a part-Aboriginal woman?

- (3) Graham Atkinson's ancestry, and his identification as an Indigenous person, may be summarised (in the words of Justice Bromberg) as follows (my alphabetical numbering):

[a] I have dealt with Graham Atkinson's ancestry in setting out the descent of his brother Wayne [see above, paragraph 4].⁵⁴

[b] Graham is the youngest of seven siblings, each of whom have always identified as Aboriginal. He grew up in Echuca where his mother and father settled in the early 1940s. His family was always recognised as an Aboriginal family. They were one of the first Aboriginal families in Echuca to buy their own block of land and build a house.⁵⁵

[c] He has always known that he was Aboriginal and has always identified as an Aboriginal person. That is not something he has ever had to think about. It was never a matter of choice. At school, he was regarded by others as Aboriginal as were his brothers. The skin tone of his siblings and his own skin tone varies. When he was young his skin was very dark, but it varied.⁵⁶

- (4) Graham Atkinson's reaction to the articles and the statements about him (as detailed in Justice Bromberg's judgment) may be summarised as follows:

(a) Given that both his parents were Aboriginal and each of their parents had Aboriginal ancestors, he was highly offended that Bolt had said that he identified as Aboriginal only because Thomas James had married his great-grandmother.⁵⁷

⁵⁴ Ibid: paragraph 106.

⁵⁵ Ibid: paragraph 107.

⁵⁶ Ibid: paragraph 108.

⁵⁷ Ibid: paragraph 112.

- (b) He perceived Bolt as suggesting that he was not a real Aboriginal person.⁵⁸
 - (c) He regarded the attribution of identity based on skin colour as making no sense. Some Aboriginal people are really dark. Some Aboriginal people are not. Such an attribution was also offensive in a historical sense because it ignored the taking of Aboriginal women by white settlers and the rearing of children of mixed race in the Aboriginal community.⁵⁹
 - (d) He found Bolt's differentiating Aboriginal people with lighter and darker skin offensive and hurtful. Bolt was repeating the same discredited approach which occurred with early governmental assimilation policies.⁶⁰
 - (e) He was offended that Bolt presumed to validate or not validate his identity. In his view, it was not for Bolt to define his Aboriginality. He expected mainstream society to afford him the respect of not questioning who he was.⁶¹
 - (f) He was offended by Bolt's suggestion that because of the colour of his skin he could not genuinely identify as an Aboriginal person.
 - (g) He was also offended by the mocking and scepticism of the achievements of the individuals named in the articles. In his view, the people named were not "professional Aborigines". He perceived Bolt, in his use of the term "professional Aborigines", to be insinuating that he and the other named individuals were part of an Aboriginal industry, where Aboriginal people consciously or opportunistically use their Aboriginal identity for financial gain. He perceived Bolt to have put him in that category when he had never been in that category. He regarded the language used by Bolt as dismissive and served to undermine the achievements of Aboriginal people.⁶²
- (5) Justice Bromberg's findings concerning Graham Atkinson's identity, and his response to the articles and the statements about him, are as follows:⁶³

The evidence given by Graham Atkinson was not contest and I have no reason to not accept it as truthful. In particular, I find that by reason of Mr Atkinson having been raised as Aboriginal, he has and does genuinely self-identify as an Aboriginal person. He has Aboriginal ancestry and communal recognition as an Aboriginal person. He is an Aboriginal person and entitled to regard himself as an Aboriginal person in accordance with the conventional understanding of that racial description. He did not consciously choose to be Aboriginal. He has not improperly used his Aboriginal identity to advance his career. He is a person highly committed to his community and is entitled to regard his achievements as well deserved rather than opportunistically obtained. I accept that he feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by his evidence.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid: paragraph 113.

⁶² Ibid: paragraph 114.

⁶³ Ibid: paragraph 116.

6 Larissa Behrendt

- (1) The statements, in the first article, concerning Larissa Behrendt are as follows:

Larissa Behrendt has also worked as a professional Aborigine ever since leaving Harvard Law School, despite looking almost as German as her father.

She chose to be Aboriginal as well, a member of the “Euralayai and Kammillaroi nations”, and is now a senior professor at the University of Technology in Sydney’s Indigenous House of Learning.

She’s won many positions and honours as an Aborigine, including the David Unaipon Award for Indigenous Writers, and is often interviewed demanding special rights of “my people”.

But which people are “yours” exactly, mein liebchen? And isn’t it bizarre to demand laws to give you more rights as a white Aborigine than your own white dad?

- (2) The statement, in the second article, concerning Behrendt is as follows:

... Jumbunna Indigenous House of Learning of the University of Technology, Sydney – an “indigenous” outfit run by the very pale Prof Larissa Behrendt, who may have been raised by her white mother but today, as a professional Aborigine, is chairman of our biggest taxpayer-funded Aboriginal television service.

- (3) Behrendt’s ancestry, and her identification as an Indigenous person, may be summarised (in the words of Justice Bromberg) as follows (my alphabetical numbering):

[a] Prof Behrendt gave evidence that she is and has always been an Aboriginal person. Her father was Aboriginal and her paternal grandmother was Aboriginal. Her paternal grandmother lived in an Aboriginal camp before she was taken away from her family by the Aborigines Protection Board. Prof Behrendt’s paternal grandfather was not Aboriginal. He was born in England and came to Australia as a child. Prof Behrendt’s mother and maternal grandmother were born in Western Australia and are not Aboriginal. Her maternal great-grandmother came from England.⁶⁴

[b] Prof Behrendt referred to Mr Bolt’s reference in the first article to her “looking almost as German as her father” ... To her knowledge, there is no German descent on either her father or mother’s side of the family although she assumes that because of her father’s Germanic surname, there may have been some German descent. Her paternal grandfather came to Australia from England. Mr Bolt also referred to her father as being white. Her father had dark skin.⁶⁵

[c] Her father was a prominent, well-respected member of the Aboriginal community. He was an expert on oral histories and his works are held by the Australian Institute of Aboriginal and Torres Strait Islander Studies. A detailed obituary was published in the

⁶⁴ Ibid: paragraph 117.

⁶⁵ Ibid paragraph 118.

Sydney Morning Herald on his death about two and a half years ago. It reported that he was Aboriginal and reported his contribution to the Aboriginal community.⁶⁶

- [d] Prof Behrendt's father was always part of her family during her upbringing including after her parents separated when she was 15 years old. Her mother explained to her and her brother that they were Aboriginal and was always supportive of their Aboriginal identity. Her father's negative experience as an Aboriginal had sometimes made him self-conscious about his Aboriginality, but his attitude changed in the 1980s when he became more active in the Aboriginal community. Prof Behrendt was about 11 years old when her father started to reconnect with his Aboriginal family and became part of it. At that time her father became active in telling Prof Behrendt about his family's stories, the dreamtime stories and Aboriginal traditions. Her father also started teaching her and her brother Aboriginal languages. Prof Behrendt's upbringing and experience up to that time was as an Aboriginal person, but her father's role during that period reinforced her identification. She became proud of her Aboriginal heritage and culture and also became conscious of social justice issues in relation to Aboriginal people.⁶⁷
 - [e] Prof Behrendt has identified as an Aboriginal person since before she can remember. She denies Mr Bolt's suggestion that she chose to be Aboriginal and says that she never had a choice, she has always been Aboriginal and has "identified as Aboriginal since before I can remember".⁶⁸
- (4) Behrendt's reaction to the articles and the statements about her (as detailed in Justice Bromberg's judgment) may be summarised as follows:
- (a) She found the first article to be offensive because she regarded it as an attack on who she was as a person.⁶⁹
 - (b) She viewed the article as undermining what she had worked very hard for by implying that she claimed to be Aboriginal to receive certain benefits.⁷⁰
 - (c) She perceived Bolt as saying that she was "too blonde and too light to be Aboriginal" and that she was "not Aboriginal enough". That was completely insulting to her.⁷¹
 - (d) She regarded Bolt's conduct in writing the articles as both intimidating and humiliating to her because he invited members of the public, who knew nothing about her, to challenge her integrity and identity based on how she looked.⁷²
 - (e) She regarded the articles as communicating that she and other Aboriginal people, who were fairer rather than darker skinned, and who had some Aboriginal descent, were not genuinely Aboriginal.⁷³

⁶⁶ Ibid: paragraph 119.

⁶⁷ Ibid: paragraph 120.

⁶⁸ Ibid: paragraph 121.

⁶⁹ Ibid: paragraph 124.

⁷⁰ Ibid.

⁷¹ Ibid: paragraph 125.

⁷² Ibid.

⁷³ Ibid: paragraph 126.

- (f) She perceived Bolt as saying that in identifying as Aboriginal, she was being dishonest and pretending to be Aboriginal to get benefits.⁷⁴
 - (g) For Bolt to say she was not Aboriginal enough because of her skin colour was a denial of her race and identity.⁷⁵
 - (h) She found Bolt's reference to her as a "professional Aborigine" to be hurtful, insulting and offensive. She perceived that as suggesting she identified with her race, not because she was Aboriginal, but because she wanted to exploit the system because identifying as Aboriginal was lucrative.⁷⁶
 - (i) She found Bolt's reference to her as "mein liebchen" particularly offensive, patronising and denigrating.⁷⁷
 - (j) She expressed concern that the articles sent a message to young Aboriginal people that if you were light-skinned and identify as Aboriginal you would be publicly attacked and criticised in the same way as she perceived that she was attacked by Bolt. She regarded that message as very intimidating.⁷⁸
5. Justice Bromberg's findings concerning Behrendt's identity, and her response to the articles and the statements about her, are as follows:⁷⁹

Although she was cross-examined, the evidence given by Prof Behrendt to which I have referred was either not contested or takes account of what she said in cross-examination. I have no reason to not accept her evidence as truthful. In particular, I find that by reason of Prof Behrendt having been raised as an Aboriginal person she has, and does genuinely, self-identify as Aboriginal. She has Aboriginal ancestry and communal recognition as an Aboriginal person. She is an Aboriginal person and entitled to regard herself as such within the conventional understanding of that description. She did not consciously choose to be Aboriginal. She has not improperly used her Aboriginal identity to advance her career. She is a person highly committed to her community. She is entitled to regard her achievements as well deserved rather than opportunistically obtained. I accept that she feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by her evidence.

7 Leeanne Enoch

- (1) The statement, in the first article, concerning Leeanne Enock, is as follows:

Leeanne Enoch, who stood for Labor in last month's Queensland election as its "first Aboriginal candidate" in a winnable seat, despite looking as Aboriginal, or not, as Premier Anna Bligh.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid: paragraph 127.

⁷⁷ Ibid.

⁷⁸ Ibid: paragraph 128.

⁷⁹ Ibid: paragraph 131.

(2) Enoch's ancestry, and her identification as an Indigenous person, may be summarised (in the words of Justice Bromberg) as follows (my alphabetical numbering):

[a] Ms Enoch's father is Aboriginal. Her mother is not. Both her paternal grandmother and grandfather were Aboriginal. Ms Enoch's cultural upbringing and that of her siblings was very much dominated by her father's side of the family. She has always identified as Aboriginal. She spent the earlier part of her childhood on North Stradbroke Island mixing with her family, the majority of whom were Aboriginal. Her mother has always been accepted as part of her father's extended Aboriginal family. She has had only sporadic contact with her mother's side of the family.⁸⁰

[b] Her mother fully supported her Aboriginal identity and her education in Aboriginal culture. She was very much influenced by her paternal grandmother as she was growing up. As the eldest grandchild of the eldest son (her father), she had particular Aboriginal cultural and family responsibilities and she was groomed for those responsibilities from a young age.⁸¹

[c] Ms Enoch has not questioned her identity. She never chose at any particular time to be an Aboriginal person. That is who she is. She has always been recognised as being an Aboriginal person by the Aboriginal communities in which she grew up and the communities in which she has lived. She has a large network of Aboriginal friends and colleagues. They have all recognised her as being an Aboriginal person.⁸²

(3) Enoch's reaction to the articles and the statement about her (as detailed in Justice Bromberg's judgment) may be summarised as follows:

(a) She found the statement highly offensive that Bolt stated she was "not really Aboriginal" or "not genuinely Aboriginal" because of her skin and hair colour.⁸³

(b) She perceived Bolt as suggesting that she had chosen to identify as Aboriginal to further her political career and that she has constructed her career as a bureaucrat suggesting that she was some kind of sell out, riding on her Aboriginal heritage.⁸⁴

(c) She perceived Bolt as saying that her hard work, skill and talent were of no significance.⁸⁵

4 Justice Bromberg's findings concerning Enoch's identity, and her response to the articles and the statements about her, are as follows:⁸⁶

The evidence given by Ms Enoch was not contested and I have no reason to not accept it as truthful. In particular, I find that by reason of Ms Enoch having been raised as an Aboriginal person she has and does genuinely self-identify as Aboriginal. She has Aboriginal ancestry and

⁸⁰ Ibid: paragraph 132.

⁸¹ Ibid: paragraph 133.

⁸² Ibid: paragraph 135.

⁸³ Ibid: paragraph 140.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid: paragraph 141.

communal recognition as an Aboriginal person. She is an Aboriginal person and entitled to regard herself as such within the conventional understanding of that description. She did not consciously choose to be Aboriginal. She has not improperly used her Aboriginal identity to advance her career. She is a person interested in advancing the interests of her community and is entitled to regard her achievements as well deserved rather than opportunistically obtained. I accept that she feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by her evidence.

8 Mark McMillan

- (1) The statements, in the second article, concerning Mark McMillan include the following:

Sydney law academic Mark McMillan, has won one of our richest prizes for Aboriginal students – the Fulbright Indigenous Scholarship.

If, studying the faces of these two “Aboriginal” men [the other person referred to here is Danie Mellor] you think this is surely the most amazing stretch of definition, you’re wrong.

McMillan has ... also won the Black Women’s Action in Education Foundation Scholarship, originally intended to help educate black women, not white men.

Hear that scuffling at the trough? That’s the sound of black people being elbowed out by white people shouting “but I’m Aboriginal, too”. *Hark!* – is that a man’s voice I now hear bellowing: “And I’m an Aboriginal *woman*.”

They [that is, McMillan and Danie Mellor] are “white Aborigines” – people who, out of their multi-stranded but largely European genealogy, decide to identify with the thinnest of all those strands, and the one that’s contributed least to their looks. Yes, the Aboriginal one now so fashionable among artists and academics.

McMillan ... has received all the special help you once thought, when writing the taxman another cheque, would at least go to people who *looked* Aboriginal, but which is increasingly lavished on folk as pink in face as they are in politics.

This trained lawyer has not just won several prizes intended for Aborigines, but has worked for Aboriginal groups such as ATSIC, and is the Aboriginal representative on several boards, including that of a local land council.

Now he’s a researcher at Jumbunna Indigenous House of Learning of the University of Technology, Sydney – an “indigenous” outfit run by the very pale Prof Larissa Behrendt, who may have been raised by her white mother but today, as a professional Aborigine, is chairman of our biggest taxpayer-funded Aboriginal television service.

When a man as white as I, already a lawyer with a job, wins a prize meant to encourage and inspire hard-struggle black students, what must those Aborigines conclude?

- (2) McMillan’s ancestry, and his identification as an Indigenous person, may be summarised (in the words of Justice Bromberg) as follows (my alphabetical numbering):

- [a] Mr McMillan's father was born in Sussex, England. He was not Aboriginal. Mr McMillan's father was not involved in raising Mr McMillan. Mr McMillan was raised by his mother and his grandmother. Both have Aboriginal ancestry. Mr McMillan's great grandmother was the child of an Aboriginal and a non-Aboriginal man. Mr McMillan was raised by his mother until he was eight years old and then moved to Trangie where his maternal grandmother lived. From that point he was raised by his mother and grandmother. His family were all recognised as part of the Trangie Aboriginal community.⁸⁷
 - [b] Growing up, Mr McMillan and his siblings all knew they were Aboriginal. Whilst growing up in Trangie, Mr McMillan and his siblings were told stories about their Aboriginal relatives, including about their maternal great grandmother who was the last Aboriginal language speaker in the town. Those stories helped to shape his identity as an Aboriginal person.⁸⁸
 - [c] Mr McMillan has always actively and willingly identified as an Aboriginal person. His identity and his pride in being an Aboriginal person were reinforced by his great grandmother, grandmother and mother as he was growing up. The Aboriginal community accepts him as Aboriginal. His great grandmother, grandmother, mother, aunties and uncles were all involved in the Trangie Aboriginal Land Council. That Council has also recognised him as Aboriginal.⁸⁹
- (3) McMillan's reaction to the articles and the statements about him (as detailed in Justice Bromberg's judgment) may be summarised as follows:
- (a) He perceived Bolt to be implying that he was "not Aboriginal enough", that he was "too white to be Aboriginal" and therefore he was "not really Aboriginal". He found that offensive.⁹⁰
 - (b) He also perceived Bolt to be inferring that he had only identified with his Aboriginal heritage for political or economic purposes. Bolt was thereby denying him his Aboriginality.⁹¹
 - (c) He was offended, insulted and humiliated by the comment in the second article about "scuffling at the trough". He perceived Bolt to be suggesting that he identified as Aboriginal only for some financial gain.⁹²
 - (d) He was offended by Bolt's treatment of his receipt of the Black Women's Action in Education Foundation Scholarship. Bolt's account was misleading because the scholarship was open to indigenous men and women.⁹³

⁸⁷ Ibid: paragraph 142.

⁸⁸ Ibid: paragraph 143.

⁸⁹ Ibid: paragraph 144.

⁹⁰ Ibid: paragraph 147.

⁹¹ Ibid.

⁹² Ibid: paragraph 150.

⁹³ Ibid.

- (e) As a result of seeing the articles, a person representing the Australian American Fulbright Commission contacted him. Whilst that person confirmed the Commission's support for him, he was asked how the Commission should respond to any media enquiries made to the Commission about him. He was humiliated by the conversation. He perceived that what was being asked of him was confirmation of his Aboriginality. Similarly, the Director of the program he was involved in at the University of Arizona also spoke to him about the articles. Whilst again he was given support, he was embarrassed and humiliated by these conversations because he had to assure the organisations concerned that he was Aboriginal and had not been dishonest about his Aboriginal identity. He was both humiliated and insulted by the fact that the articles put him in a position to have to justify his identity.⁹⁴
 - (f) He was offended, insulted and humiliated by Bolt's use of colour as the determinant of race.⁹⁵
 - (g) He was offended by the suggestion that he and others were taking money from more deserving "black" Aboriginal people.⁹⁶
 - (h) It was hurtful to him to have people talking about his Aboriginal identity in the abstract and it was hurtful to him to have his Aboriginal identity challenged.⁹⁷
- (4) Justice Bromberg's findings concerning McMillan's identity, and his response to the articles and the statements about him, are as follows:⁹⁸

The evidence given by Mr McMillan was not contested and I have no reason to not accept it as truthful. In particular, I find that by reason of Mr McMillan having been raised as Aboriginal he has and does genuinely self-identify as Aboriginal. He has Aboriginal ancestry and communal recognition as an Aboriginal person. He is an Aboriginal person and is entitled to regard himself as an Aboriginal person within the conventional understanding of that description. He did not consciously choose to be Aboriginal. He has not improperly used his Aboriginal identity to advance his career. He is entitled to regard his achievements as well deserved rather than opportunistically obtained. I accept that he feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by his evidence.

9 Pat Eatock

- (1) The statements, in the first article, concerning Eatock are as follows:

In 1972, Pat Eatock, founding secretary of the Aboriginal Tent Embassy, officially became the first Aborigine to stand for federal parliament in the ACT, even though she looked as white as her Scottish mother, or some of her father's British relatives.

⁹⁴ Ibid: paragraph 151.

⁹⁵ Ibid: paragraph 152.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid: paragraph 153.

Indeed, Eatock only started to identify as Aboriginal when she was 19, after attending a political rally, so little did any racial difference matter to her before her awakening to far-Left causes.

But she thrived as an Aboriginal bureaucrat, activist and academic...

- (2) Eatock's ancestry, and identification as an Indigenous person, may be summarised (in the words of Justice Bromberg) as follows (my alphabetical numbering):

[a] Ms Eatock's mother was born in Scotland and came to Australia in about 1928. Ms Eatock's Aboriginal heritage comes from her father. Her paternal grandfather was Aboriginal and her paternal grandmother had an Aboriginal mother and a non-Aboriginal father.⁹⁹

[b] Ms Eatock's evidence was that a lot of her Aboriginal identity was formed by negative experiences of being Aboriginal. She has identified herself as Aboriginal since she was a teenager. The Aboriginality of her family was not talked about much at home as she grew up because it was something her father was very ashamed. Her parents were also scared that the children's Aboriginality would be discovered and that they would be taken away.¹⁰⁰

[c] Ms Eatock left school at age 14 in 1951. This was the first time she identified herself in public as an Aboriginal person. She did that because she didn't want to be accused of hiding her racial background.¹⁰¹

[d] In the 1960s, Ms Eatock went to hear Faith Bandler speak at a political meeting. This meeting awakened her to the nature of Aboriginal disadvantage. As a result of what she had learnt, she decided to be more assertive about her Aboriginality. That, however, was not really a matter of choice for her. It was driven by her sense of oppression and the recognition that she needed to become more proactive about who she is.¹⁰²

[e] She has been involved in a lot of work with the Aboriginal community, including as part of the Aboriginal Tent Embassy in Canberra in 1972 and 1973. She has stood for election in the Australian Capital Territory as an independent Aboriginal candidate. She has attended conferences and other events as a person active in Aboriginal affairs. In that involvement, she was recognised as an Aboriginal person by the people she met.¹⁰³

- (3) Eatock's reaction to the articles and the statements about her (as detailed in Justice Bromberg's judgment) may be summarised as follows:

(a) She was horrified, disgusted, angry and upset and felt sick in the stomach when she saw Bolt's articles.¹⁰⁴

⁹⁹ Ibid: paragraph 154.

¹⁰⁰ Ibid: paragraph 155.

¹⁰¹ Ibid: paragraph 157.

¹⁰² Ibid: paragraph 159.

¹⁰³ Ibid: paragraph 162.

¹⁰⁴ Ibid: paragraph 163.

- (b) She perceived Bolt as disconnecting her from her Aboriginality in every way.¹⁰⁵
 - (c) She was offended by what Bolt had written about her because it was a denial of who she was, her life's work and her ethics.¹⁰⁶
 - (d) Part of the offence she experienced related to Bolt saying she had only begun to identify as an Aboriginal person when she was 19.¹⁰⁷
 - (e) She perceived Bolt as attacking her identity in his saying that she chose to identify as an Aboriginal person for self-gain and that she had "thrived" as an Aboriginal bureaucrat and academic. In her view she had done anything but thrive.¹⁰⁸
 - (f) She perceived Bolt's articles as racist and she remained deeply offended.¹⁰⁹
- (4) Justice Bromberg's findings concerning Eatock's identity and her response to the articles and the statements about her are as follows:¹¹⁰

Ms Eatock was cross-examined, but the evidence I have referred to was largely uncontested. I have no reason to not accept Ms Eatock's evidence as truthful. I find that Ms Eatock does genuinely self-identify as Aboriginal. She has Aboriginal ancestry and communal recognition as an Aboriginal person. She did not choose to be Aboriginal. Her identity is a product of her upbringing. In her adult life she chose to be proactive about her Aboriginal identity. She is an Aboriginal person and is entitled to regard herself as an Aboriginal person in accordance with the conventional understanding of that racial description. She has not improperly used her Aboriginal identity to advance her career. Her professional career involved significant unemployment. She is a person committed to her community and is entitled to regard her achievements as well-deserved rather than opportunistically obtained. I accept that she feels offended, humiliated and insulted by the Articles or parts thereof in the manner outlined by her evidence.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*: paragraph 164.

Appendix 8
Annexure to *Eatock v Bolt (No 2)* [2011] FCA 1180

EATOCK v BOLT AND THE HERALD & WEEKLY TIMES PTY LTD

CORRECTIVE NOTICE

ORDERED BY THE FEDERAL COURT OF AUSTRALIA

In legal proceedings brought by Pat Eatock against Andrew Bolt and The Herald & Weekly Times Pty Ltd, the Federal Court of Australia ordered that this notice, including the following declaration made by the Court on 19 October 2011, be published in the *Herald Sun* in print and online. The reasons for judgment of the Federal Court of Australia in this matter (including a summary of those reasons) are accessible from the Federal Court website [*and in relation to the publication of this notice online – “and via the following link (insert hyperlink)”*].

The Court declares that:

On 15 April 2009, the Herald and Weekly Times Pty Ltd published in the *Herald Sun* newspaper an article written for publication by Andrew Bolt under the title “It’s so hip to be black”. On or about 15 and 16 April 2009, that article was also published by the Herald and Weekly Times Pty Ltd on its website, under the title “White is the new black”. On 21 August 2009, the Herald and Weekly Times Pty Ltd published a second article written for publication by Andrew Bolt in the *Herald Sun* newspaper under the title “White fellas in the black”. On 21 August 2009, that article was also published by the Herald and Weekly Times Pty Ltd on its website, under the title “White fellas in the black” (collectively “the Newspaper Articles”).

The writing of the Newspaper Articles for publication by Andrew Bolt and the publication of them by the Herald and Weekly Times Pty Ltd contravened s 18C of the *Racial Discrimination Act 1975* (Cth) and was unlawful in that:

- (a) the articles were reasonably likely to offend, insult, humiliate or intimidate some Aboriginal persons of mixed descent who have a fairer, rather than darker, skin and who by a combination of descent, self-identification and communal recognition are and are recognised as Aboriginal persons, because the articles conveyed imputations to those Aboriginal persons that:
 - (i) there are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the individuals identified in the articles are examples, who are not genuinely Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and
 - (ii) fair skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.
- (b) the Newspaper Articles were written and published, including because of the race, ethnic origin or colour of those Aboriginal persons described by the articles; and
- (c) that conduct was not exempted from being unlawful by s 18D of the *Racial Discrimination Act 1975* (Cth) because the Newspaper Articles were not written or published reasonably and in good faith:
 - (i) in the making or publishing of a fair comment on any event or matter of public interest; or
 - (ii) in the course of any statement, publication or discussion, made or held for a genuine purpose in the public interest.

Appendix 9

Principles for Indigenous Social Justice and the Development of Relations between the Commonwealth Government and Aboriginal and Torres Strait Islander Peoples¹

1. The relationship between the Commonwealth Government and the Aboriginal and Torres Strait Islander peoples of Australia is founded in full acceptance and recognition of the fundamental rights of Aboriginal and Torres Strait Islander peoples to:

- a. recognition of indigenous peoples as the original owners of this land, and the particular rights that are associated with that status;
- b. the enjoyment of, and protection for, the unique, rich and diverse indigenous cultures;
- c. self-determination to decide within the broad context of Australian society the priorities and the directions of their own lives, and to freely determine their own affairs;
- d. social justice and full equality of treatment, free from racism; and
- e. exercise and enjoy the full benefits and protection of international covenants.

2. In the formulation of policies and delivery of programs that affect Aboriginal and Torres Strait Islander peoples, the Commonwealth, pursuant to powers in relation to indigenous peoples overwhelmingly granted it by the people of Australia in the 1967 Referendum:

- a. shall ensure that policies, the delivery of programs and services, and the effective improvement of service quality is achieved through processes *which are negotiated with and* which protect the rights of indigenous peoples;
- b. recognises the diversity of the Aboriginal and Torres Strait Islander peoples;
- c. accepts the importance of empowerment for decision-making and planning at the community and regional levels, and the need for Government at all levels to cooperate and negotiate with Aboriginal and Torres Strait Islander communities and organisations;
- d. requires that indigenous peoples have full access to, and equitable outcomes from participation in, all relevant mainstream programs;
- e. shall ensure processes of accountability to Aboriginal and Torres Strait Islander peoples and especially shall ensure their involvement in review and evaluation processes;
- f. requires that collaboration and coordination between Government agencies providing services to Aboriginal and Torres Strait Islander people shall be significantly improved;

¹ ATSIC 1995: 10-11.

- g. shall establish a genuine and productive partnership with indigenous peoples through representative bodies at local, regional, State and national levels;
 - h. shall provide quantifiable data and other forms of information on the objectives and outcomes achieved, for all programs which impact on Aboriginal and Torres Strait Islander well-being; and
 - i. shall ensure that the interests of indigenous peoples transcend existing conventions about the division and compartmentalisation of the functions of the various spheres of Government.
- 3. The Commonwealth shall ensure that these principles are also adopted by State, Territory and local Governments throughout Australia, if necessary, by Commonwealth legislation applying to all Governments.
- 4. These Principles shall be observed by all Commonwealth departments and agencies as governing all aspects of their relationships with indigenous peoples. Departmental secretaries and agency heads will be directly responsible for the implementation of the Principles, and for reporting annually on progress.
- 5. The need to achieve an agreed and durable settlement of issues between indigenous and other Australians is recognised as a paramount national objective.

Appendix 10

Roadmap for Reconciliation¹

[1] The National Strategy to Sustain the Reconciliation Process

The National Strategy to Sustain the Reconciliation Process sets out ways to build on progress towards reconciliation between Aboriginal and Torres Strait Islander peoples and the wider community after the Council for Aboriginal Reconciliation completes its term.

These measures address practical, cultural and spiritual dimensions of reconciliation.

Essential actions include:

Leadership for the Reconciliation Process

[a] All levels of Government, the private sector, community and voluntary organisations publicly support the ongoing reconciliation process, provide resources and increasingly involve Aboriginal people and Torres Strait Islanders in their work.

[b] A foundation, Reconciliation Australia, is established to maintain a national leadership focus for reconciliation, report on progress, provide information and raise funds to promote and support reconciliation activities.

[c] State, Territory and local reconciliation groups, involving Aboriginal and Torres Strait Islander people and people from the wider community, lead and support action that promotes reconciliation.

[d] Australian parliaments and political parties address the low level of Indigenous representation in the political system.

Education for Reconciliation

[a] Schools, tertiary education institutions and employers require and support the culturally appropriate teaching of the truth of Australia's history that includes Indigenous perspectives and addresses racism.

[b] The media feature stories that promote reconciliation and challenge racist stereotyping.

People's Movement for Reconciliation

[a] Communities celebrate significant dates and events and take joint action to achieve agreed reconciliation goals.

Protocol and Ceremony

[a] All parliaments, Governments and organisations observe protocols and negotiate with local Aboriginal and Torres Strait Islander elders or representative bodies to include appropriate Indigenous ceremony into official events.

¹ CAR 2000: Appendix 1. My numbering of the four strategies, and, for ease of reference and discussion, I have converted the dot-points in the original to alphabetical/Roman numeric numbering.

Symbols of Reconciliation

[b] Governments, organisations and communities negotiate to establish and promote symbols of reconciliation. This would include changing the date of Australia Day to a date that includes all Australians.

Formal Recognition of the Documents of Reconciliation

[a] All parliaments and local Governments pass formal motions of support for the documents of reconciliation.

[2] The National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights

This strategy proposes a number of actions, including some constitutional and legislative processes, to assist the progressive resolution of outstanding issues for the recognition and enjoyment of Aboriginal and Torres Strait Islander rights. It aims to ensure:

[a] that all Australians enjoy, in daily life, a fundamental equality of rights, opportunities and acceptance of responsibilities; and

[b] the status and unique identities of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia, and achieve recognition, respect and understanding in the wider community.

Essential actions include:

Education

[a] Governments and their agencies, legal, cultural and educational institutions, Indigenous organisations, and the media work together to improve community awareness and appreciation of Aboriginal and Torres Strait Islander peoples as the first peoples with distinct cultures, rights and status.

Legislation

[a] All Governments take steps to ensure the recognition and protection of Indigenous intellectual property as already occurs in some Commonwealth legislation.

[b] All Governments ensure their policies and practices observe Australia's international Indigenous and human rights obligations.

[c] State and Territory Governments consider giving magistrates and judges the discretion to take account of traditional laws in sentencing, as already occurs in some circumstances in the Northern Territory.

[d] Governments establish legislative processes to deal with the 'unfinished business' of reconciliation, allowing for negotiated outcomes on matters such as Indigenous rights, self-determination within the life of the nation, and constitutional reform.

Australian Constitution

[a] Government agencies, legal institutions and educational organisations develop and promote community awareness about the Constitution and its application in protecting the rights of all Australians.

[b] Within the broader context of future constitutional reform, the Commonwealth Parliament enacts legislation for a referendum which seeks to:

[i] prepare a new preamble to the Constitution which recognises the status of the first Australians; and

[ii] remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.

[3] The National Strategy to Overcome Disadvantage

The National Strategy to Overcome Disadvantage aims for a society where Aboriginal people and Torres Strait Islanders enjoy a similar standard of living to that of other Australians, without losing their cultural identity.

This strategy focuses on education, employment, health, housing, law and justice. Priority must be given to achieving comparable outcomes in health and education. Improvement in these areas is critical to advancing reconciliation. It is important that no person is disadvantaged by the inability of Governments and service providers to communicate and cooperate in the delivery of services.

Essential actions include:**Performance Measurement and Reporting**

[a] The Council of Australian Governments (COAG) evaluates and updates its National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders, agreeing on a framework for all Governments and the Aboriginal and Torres Strait Islander Commission (ATSIC) to:

[i] set program performance benchmarks that are measurable, include timelines and are agreed in partnership with Indigenous peoples and communities;

[ii] ensure they have the information systems necessary to monitor performance; and

[iii] annually report their performance to parliaments, councils and their constituents against these benchmarks.

[b] Every five years, the Human Rights and Equal Opportunity Commission works with ATSIC to prepare an independent report on the nation's progress in addressing disadvantage.

Partnerships and Working Arrangements

[a] Peak business and community groups make commitments to overcome disadvantage and encourage their members to make similar commitments.

[b] Services are designed and delivered in a way that is driven by local Indigenous people, strengthens local communities, and forges social coalitions and equal partnerships, drawing on and building the skills and resources of the community.

[c] Service providers, ATSIC and Governments identify and eliminate systemic discrimination and racism, beginning with a review of their own practices.

[d] Governments adopt funding arrangements that are flexible and sufficient to meet local needs and enable the pooling of funds across agencies and between the different levels of Government.

[e] Employers link performance-based salaries in all sectors to improvements in Indigenous outcomes, where appropriate.

Community and Personal Responsibility

[a] Indigenous communities, families and individuals take more responsibility for addressing the causes and consequences of disadvantage within their control.

[b] All Australians accept the responsibility to learn more about the causes and extent of disadvantage and reject racism and related behaviour.

[4] The National Strategy for Economic Independence

The National Strategy for Economic Independence aims for a society where Aboriginal and Torres Strait Islander peoples and communities can share the same levels of economic independence as the wider community.

This strategy is not for everyone. For some, economic independence will be defined in terms of their traditional economy and lifestyle.

For most Australians, pathways to economic independence include getting a job and/or running a business.

In both of these cases, an education substantially improves the likelihood of success.

Essential actions include:

Access to Jobs and Resources

[a] All employers establish strategies for employing and training more Aboriginal people and Torres Strait Islanders.

[b] Banks and other financial institutions actively adopt culturally-responsive banking and financing regimes and facilitate better access to capital.

[c] Governments increase the value of Indigenous assets by legislating for Indigenous intellectual property and cultural rights and by working in partnership with Indigenous communities to protect biodiversity and rehabilitate and sustain lands and waters under the control of those communities.

Effective Business Practices

[a] Indigenous people and communities develop their existing competitive advantages in respect of their cultural assets and special knowledge of the land and the environment.

[b] Governments, ATSIC, and the private sector all research and develop successful business models that can be applied in regional and remote communities. Priority should be given to developing commercial activities on Indigenous-owned land.

[c] Private-sector organisations seek opportunities for joint ventures with Indigenous businesses. Governments promote such joint ventures.

[d] Governments and industry work in partnership with Indigenous communities to ensure their projects strengthen Indigenous communities by supporting the local economy and enhancing regional employment opportunities.

Skills Development

[a] Schools, TAFEs, universities and other education providers, working with families, develop and implement flexible programs to improve student attendance, retention rates, academic results and career pathways.

[b] TAFEs and other vocational education providers target their programs to the employment opportunities in the local labour market, aiming for available jobs or business opportunities on the completion of training programs and schemes.

[d] With local community involvement, education providers, banks and other financial institutions develop money-management programs that increase the capacity of people to plan, save and invest in their future.

[e] Indigenous leaders actively encourage their people to equip themselves with the skills, knowledge and experiences that are valued in the local employment market.

Appendix 11

Uluru Statement from the Heart¹

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from ‘time immemorial’, and according to science more than 60,000 years ago.

This sovereignty is *a spiritual notion: the ancestral tie between the land, or ‘mother nature’, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.* It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia’s nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

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.

Makarrata is the culmination of our agenda: *the coming together after a struggle.* It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.

¹ Uluru Statement from the Heart: <<https://assets.documentcloud.org/documents/3755370/ULURU-STATEMENT-FROM-the-HEART.PDF>>. A copy of the Statement is also included in the Referendum Council’s Final Report (Referendum Council 2017).

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