

**Competing Notions of Constitutional
'Recognition': Truth and Justice or Living
'off the Crumbs that Fall off the White
Australian Tables'?***

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As a lawyer I have been intimately involved in the development of the current iteration of constitutional recognition as a member of the former prime minister's Expert Panel on the Constitutional Recognition of Indigenous Australians. Prior to that I had written extensively on constitutional reform and Indigenous peoples, which includes my doctoral thesis where I explore the importance of a constitutional right to equality for Aboriginal women.

Recently I was here in Canberra with my former expert panel colleague Henry Burmester QC. We were presenting to lawyers at the Australian Government Solicitor on constitutional recognition and we were reflecting on the fact that it is now 2014 and we have been giving exactly the same speech for almost four years since the panel handed its recommendations to the prime minister in January of 2012. Henry and I were reflecting on the much anticipated report of the current Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples as a useful way to focus or refocus the current, although relatively faint, public discourse on constitutional recognition.

Recently the ABC ran a story about a growing Aboriginal resistance to recognition and in *The Spectator* the issue attracted a somewhat spiteful commentary on the supporters of recognition. Consolidating thinking around options for reform is critical to sharpening the debate and tempering overblown allegations that such reform undermines Aboriginal claims to sovereignty, or undermines the right to equality for all Australians, or that it will lead to the reintroduction of child brides or Aboriginal spearing.

In light of this, rather than speaking about the expert panel's recommendations, although I will refer to them, I wanted to approach the current recognition iteration from a different perspective or through an alternative lens. That is, to attempt to capture both historically and in a contemporary sense the competing notions of constitutional recognition—that of the State and that of Aboriginal and Torres Strait Islander peoples. One can see that beginning to play out in the faint but growing

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public discussion on this issue, and I think it can be amplified in a negative way when there is no actual model for people to debate and discuss. One is hesitant to ventilate these competing notions but I do not want to shy away from the fact that they exist. I don't think by speaking about them it should detract from the importance of the contemporary task of constitutional recognition of Aboriginal people. As an expert panel member and Aboriginal person and a constitutional lawyer, I support constitutional recognition and reform wholeheartedly, subject to a model. What I suppose I did not see as an expert panel member is how these competing notions, ideas and motivations are playing out. How they intersect, overlap, reinforce, conflict or indeed sometimes cancel each other out.

Indigenous and non-Indigenous Australians ought to come to understand that these competing notions of recognition exist and understand why they exist. I certainly do not make claim to any definitive or exhaustive explanation of them, but if we come to understand these competing sentiments then we can proceed with integrity and not be sidelined by petty irritations. This lecture will map, chronologically and somewhat discursively, these competing beliefs.

First of all the expert panel and the current process did not emerge from nowhere. It doesn't exist in a vacuum, it is part of a historical trajectory in this country. Secondly, mapping this trajectory out is an important exercise because if 1967 was a form of recognition, which I believe it was, why are we back here? The answer to that question is complicated. It is likely that the State as the recogniser and Indigenous peoples as the recognised, are back here, motivated and informed by divergent forces. For example, the starting point for mainstream conversations in Australia on constitutional reform is always, by necessity, the notorious double majority that plagues constitutional evolution in Australia. Yet for many Aboriginal and Torres Strait Islander peoples, it is not an inescapable proposition that the recognition project and/or the model of recognition should be understood apropos the question of justice and redress. That is to say, the starting point for many Aboriginal and Torres Strait Islander peoples is what is fair and what is just. This is unfinished business foremost in the minds of the community and somewhat of a utilitarian calculus in the minds of the State.

The relatively crude exercise of calculating reform on the basis of what minor, inoffensive gesture is likely to receive bipartisan support and thus automate a majority of states in a national majority, is of course at odds with the question of fairness and justice, because that agenda, that Indigenous people themselves have mapped out over 50 or 60 years, is an agenda that is quite formidable. If one is to consider the concept of what is fair and just in regard to constitutional recognition, and I am not sure the community is convinced that that is the case in this current iteration, equity cannot be

viewed solely through the eyes of the State. It needs to be considered through the eyes of the people who have been dispossessed and disempowered, a people who are still grieving the loss, who feel deeply and sincerely that they have been wronged and for which there has been no resolution.

The historical trajectory since 1967 is an essential part of this story of Indigenous constitutional reform and recognition as it animates why Aboriginal and Torres Strait Islander peoples are likely not to accept a mere symbolic gesture when it comes to constitutional recognition. By mere symbolic gesture, I mean things like a 1999-style preamble, or indeed deletion of section 25 and section 51(xxvi) because they mention the word race. The literature reveals to us that indeed from an Aboriginal and Torres Strait Islander perspective we are back here because of a technical problem with the text of the Constitution. We are back here for reform rather than recognition in a strict sense. Still, that reform agenda, amendment or repeal of section 51(xxvi), was accepted by the expert panel as a type or form of recognition. If anything, this lecture explores how this current recognition project carries with it a confluence of ideas that if not made more coherent by leadership, meaning concrete options for discussion and debate, risks confusing the public.

So I suggest that the historical trajectory of the current project can be viewed through three phases. First, the post-1967 referendum era, then the reconciliation era, in which in particular I will draw upon two High Court decisions. The reconciliation era in particular saw the consolidation of Indigenous peoples' notions of recognition. Then the post-1999 referendum recognition era, where State notions of recognition really start to take shape. So that is the order I will follow. In my comments I will interchange recognition with reform. While recognition is the word adopted by the State, the recogniser, it is the case however, that in a textual sense anyway the word does tend to convey the image of a weaker form of constitutional recognition. It tends to obfuscate and I suppose for many in the Indigenous community, there is a fear that it excavates Indigenous aspirations or Indigenous visions of equity of their substantive features. For that reason I interchange it with reform.

Post-1967 referendum era

A few comments first about the 1967 referendum. I do agree with scholars such as John Chesterman, Brian Galligan, Bain Attwood and Andrew Markus about the mythology of 1967 and overstating the significance of it.¹ There is an over reliance on the so-called popular movement or campaign as the primary driver of that success. We know that the key factor was bipartisan support. The evidence tells us that the

¹ Bain Attwood and Andrew Markus, 'Representation matters: the 1967 referendum and citizenship', in John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship*, Cambridge University Press, Cambridge, 1997, pp. 118–40.

State can succeed at virtually anything at referendum if bipartisan support is there, although one knows that the nature of Australian history means that may not be the case in the future. Significantly, bipartisan support was related to external factors, important geopolitical factors that exerted pressure on the Australian polity including an international normative shift to racial non-discrimination and equality at the United Nations. Keep in mind that at the time Aboriginal people lived in subhuman conditions in reserves and missions around the country. This was the tail end of the protection era; the protection era that was preceded by the frontier period, or what is known as the killing times. This was a period when states and territories regulated the lives of Aboriginal people, including their freedom of speech, freedom of movement, right to marry and right to have an income. So these geopolitical forces were critical to that bipartisan support. Also there had been growing agitation by politicians themselves, for example, Opposition leader H.V. Evatt in 1957.

In addition, more time and energy was spent on the 'nexus' question of the referendum. The Aboriginal question was not as prominent. In fact, the nexus question attracted so much negativity that it aided the success of the Aboriginal question. This explains why some are attracted to running a recognition referendum at the same time as an election, so the ballot box attracts the negativity. That is all I wanted to say about the referendum.

What is significant about the 1967 referendum is that it provided the federal parliament with constitutional authority to make laws for Aboriginal and Torres Strait Islander peoples and this ushered in a new era of law and policy making. Not at first, because the initial response of the Commonwealth Parliament was to continue to defer to the states and not use the race power. Indeed the evidence reveals that for Aboriginal and Torres Strait Islander peoples the elation of 1967 quickly dissipated with the dawning realisation that perhaps the State was not going to use section 51(xxvi) to pursue the political agenda that they had hoped for.

The election of the Whitlam Government in 1972 saw a new era of law and policy begin with a number of measures aimed at improving the plight of Aboriginal and Torres Strait Islander peoples. The Whitlam government supported the right to self-determination as the foundation of its Indigenous policy. New measures included the creation of Aboriginal legal and medical services and the establishment of a land commission for the pursuit of land rights in the Northern Territory. Whitlam also ratified the International Convention on the Elimination of All Forms of Racial Discrimination and legislated for the Racial Discrimination Act, an Act that has become the most important statute for Indigenous peoples in their continuing fight against racial discrimination and for equality. As Noel Pearson has written of the significance of this Act, 'at the level of legal policy at least, we were at last free from

those discriminations that humiliated and degraded our people'.² The Whitlam legislation meant freedom.

In this historical trajectory there are two significant things: the Racial Discrimination Act, extremely important to Aboriginal and Torres Strait Islander peoples and their rights, and the use of section 51(xxvi) reveals the potential of this head of power to achieve redress and self-determination, a promise that it will achieve the political agenda that Aboriginal and Torres Strait Islander peoples had determined for themselves.

Next, following a double dissolution election in 1975, the Fraser Government was elected. Important here in the historical trajectory towards constitutional recognition is the establishment in 1977 of a new representative body, the National Aboriginal Conference (NAC). This was the first Aboriginal organisation to be incorporated under the *Aboriginal Councils and Associations Act 1976*, supported by the race power. The NAC advocated on issues of sovereignty, land rights, the right to self-determination and racial non-discrimination. The work of the NAC is significant here because it advocated for a treaty between the Aboriginal people and the State as a way to resolve the unsettled issue of Aboriginal sovereignty. The Fraser Government responded by committing to future discussions. Meanwhile NAC resolved to replace the word 'treaty' with the word *makarrata*. This is a Yolngu word that has a number of interpretations but essentially means cessation in a conflict or 'things are alright again after a conflict' or 'coming together after a struggle'.

During 1981 the NAC travelled Australia consulting with communities. Their interim report laid out a vision of what it was that Indigenous peoples wanted of the State, in particular with respect to the use of section 51(xxvi). The report demanded recognition of Indigenous sovereignty and the recognition of Indigenous laws. It expressed a desire to negotiate land rights including freehold title of all that land upon which Aboriginal people presently live. The subcommittee also argued for greater participation of Aboriginal and Torres Strait Islander peoples in the Australian political life. That included the reservation of parliamentary seats at a federal, state and local level. Other proposals included the repatriation of Indigenous human remains and the teaching of Aboriginal culture in schools. The subcommittee also called for the abolition of statutes in any part of the Commonwealth that make the Aboriginal status different in any other way than that of other citizens.

² Noel Pearson, 'The reward for public life is public progress: an appreciation of the public life of the Hon. E.G. Whitlam AC QC, Prime Minister, 1972–75', address delivered to the Whitlam Institute, University of Western Sydney, 13 November 2013.

Early in 1981, the Minister for Aboriginal Affairs and the NAC exchanged letters about the issue of makarrata, in which the minister encouraged the NAC to commence negotiations with the states and territories. However the NAC's work was impeded by a lack of funding and its abolition by the Hawke Labor government in 1985. But it is important to note that in this trajectory the NAC plays a very important part. Prominent in the communities they consulted were aspirations for treaty and sovereignty and better political participation through reserved seats. There were extensive consultations and substantive thinking about these issues. How could it be done in our Constitution? How could it be done in this federation? The one thing I will briefly note here is that with the abolition of the NAC you can see that our history is littered with representative bodies set up by government, whether statutory or not, and abolished by government. No doubt this informed the decision of the National Congress of Australia's First Peoples in choosing a corporate model which, after initial funding from government, is meant to be, or to become, self-sustaining.

I return to Bob Hawke, because Australia was now preparing to celebrate its bicentenary year, and Aboriginal people declared a Year of Mourning. The Hawke Government established a new commission to review the Australian Constitution called the Constitutional Commission. The final report made a number of recommendations on Aboriginal and Torres Strait Islander peoples and the Constitution. The commission recommended the deletion of section 25 of the Constitution, stating it was no longer appropriate to include in the Constitution a provision which contemplates the disqualification of members of a race from voting. The commission expressed concern section 51(xxvi), which had been amended in the 1967 referendum, enabled the Parliament to pass both special and discriminating laws that could be in favour or adverse; prescient in terms of the historical trajectory.

The commission recommended a new power that would authorise the Parliament to make laws with respect to 'Aborigines and Torres Strait Islanders'. In addition, the commission recommended the insertion of a racial non-discrimination clause titled section 124G. The 2011 expert panel's recommendations mirror very closely the recommendations of the 1988 commission. The commission also seriously considered the contemporaneous treaty debate and the potential constitutional authority for an agreement between the Commonwealth and Aboriginal and Torres Strait Islander communities. They were not talking about some pan- Aboriginal agreement, they were talking about negotiations in individual communities. The commission built upon the work of the Senate Standing Committee on Constitutional and Legal Affairs in 1983, which had drafted a section 125A as a new constitutional provision for the power of the Commonwealth to enter into agreements with representatives of the Aboriginal people. Such a power could not be used until an agreement was already negotiated.

This work of the Constitutional Commission was and remains significant and was drawn upon by the expert panel. It is, after all, important that we do not keep reinventing the wheel. In 1983 and 1988 we have non-Indigenous state public institutions laying intellectual and constitutional bases for a potential agreement-making power in the Constitution. Also the Constitutional Commission identifies a non-discrimination clause as appropriate in a review of the Constitution noting the potential discriminatory power of the Parliament and impact of section 51(xxvi).

Reconciliation era

Continuing along this history, Australia celebrated its bicentenary in 1988 and during the celebrations the Barunga statement, two paintings and a text, was presented to Prime Minister Bob Hawke. The Barunga statement—inspired by the 1963 Yirrkala bark petitions that objected to mining on Yolngu country and the failure of Parliament to consult with Yolngu on the mining lease—called upon the Commonwealth to use its 1967-granted authority under section 51(xxvi) to recognise Aboriginal and Torres Strait Islander peoples' right to self-determination, including a nationally elected organisation to oversee Aboriginal and Torres Strait Islander affairs, a national system of land rights and a police and justice system. It also called upon the Commonwealth Parliament to negotiate a treaty recognising the prior ownership, continued occupation and sovereignty of Aboriginal and Torres Strait Islander peoples and affirming Aboriginal and Torres Strait Islander peoples' human rights and freedom. In response, Bob Hawke said that there would be a treaty within the life of the Parliament.³

Prime Minister Hawke was able to deliver on the Barunga statement's call for a representative body and in 1989 the Parliament gave effect to the Aboriginal and Torres Strait Islander Commission, known as ATSIC. However, he was unable to deliver on two successive promises, one for national land rights and secondly for a treaty. Hawke's inability to deliver on these two issues important to the Aboriginal and Torres Strait Islander peoples ushered in the next phase of this journey to constitutional reform: reconciliation.

It is important to note here that this is not reconciliation as in the ventilating of stories or a truth and justice process, such as that which is common in many jurisdictions around the world. Rather, reconciliation as a kind of political confection as a compromise for reneging on those promises made to the Aboriginal and Torres Strait Islander peoples. That might sound cynical but it is certainly the view of many Aboriginal and Torres Strait Islander peoples.

³ Prime Minister Robert Hawke, Speech delivered at the Barunga Sports and Cultural Festival, Northern Territory, 12 June 1988, <http://pmtranscripts.dpmc.gov.au/browse.php?did=7334>.

The statutory Council for Aboriginal Reconciliation had three goals: to create documents of reconciliation, to develop partnerships in reconciliation and to build a people's movement for reconciliation. Throughout the 1990s we see this reconciliation movement grow, led by the Council for Aboriginal Reconciliation. However, before moving on from the reconciliation phase we cannot understand the current iteration of constitutional recognition without contemplating two particular events or, to be more specific, decisions of the High Court. So I want to look at two matters briefly: the aftermath of *Mabo*, the *Wik* decision⁴, and the High Court decision in *Kartinyeri*.⁵

Before we look to *Wik*, it is important to note that after the High Court's decision in *Mabo*, there was actually a three tier response: a Native Title Act, the creation of a land fund for Indigenous people who may not benefit from native title and a social justice package (led by the Council for Aboriginal Reconciliation, ATSIC and HREOC, or the Australian Human Rights Commission as it is known today). This social justice package was aimed at addressing dispossession as a response to *Mabo*. The social justice report, *Recognition, Rights and Reform*, included ways in which the federal parliament could build upon its post-1967 authority that was granted overwhelmingly to it by the people of Australia, to better include Aboriginal and Torres Strait Islander peoples in the delivery of services and development of policies that affect their lives. So this included major institutional and structural change including constitutional reform and recognition, recognition of regional self-government and regional agreements and the negotiation of a treaty or comparable document which must address the issue of compensation. By the time that report was completed there was a change in government and the new government declined to embrace the social justice package, but it is important for me to raise because the failure to implement the third tier of the Parliament's response to *Mabo* was raised during the consultations with communities conducted by the expert panel. Every Aboriginal and Torres Strait Islander community around Australia asked what had happened to the social justice package. It is important because it was the State's full response to *Mabo*, but it also gives you an insight into what Aboriginal and Torres Strait Islander peoples thought was an appropriate settlement with respect to dispossession as recognised by the High Court. Fifteen years after the National Aboriginal Conference it was exactly the same thing. It was about some form of agreement to facilitate settlement, reconciliation and ultimately forgiveness with respect to dispossession.

⁴ *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁵ *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

The *Wik* decision was a very difficult stage in the reconciliation era. The High Court found that pastoral leases could co-exist with native title. I do not want to dwell on the vehement reaction from those sections of the Australian community who opposed *Wik*, except to say the racial tensions were so acute that some feared that there would be a race-based election.

The negotiations for the Native Title Amendment Act were brutal. We know this because the many leaders involved in these negotiations have written or spoken extensively about it, including on the 10-point plan or 'bucket-loads of extinguishment' that saw, among many things, the introduction of a strict registration test for Aboriginal and native title applicants and limited the right to negotiate for claimants. Relevant to the recognition project, is this: the Native Title Amendment Act suspended the application of the Racial Discrimination Act so that the government could single out Aboriginal native title claimants for adverse treatment on the basis of their race. So in this case reducing the rights of native title claimants and advancing the rights of other landholders. The UN committee overseeing this legislation, the UN Committee on the Elimination of Racial Discrimination, determined the amendment was a clear cut example of racial discrimination, but it is not necessary for me to descend into forensic detail about the politics of this. The relevant point for this excursion is the way in which principle statute, the way in which this Racial Discrimination Act that Indigenous peoples rely upon so much, is so easily disallowed by the Commonwealth Parliament with barely a whimper from the Australian population. Every entity in Australia is bound by the principle of racial non-discrimination except for the federal parliament.

The next significant challenge to reconciliation is the High Court's decision in *Kartinyeri* in 1998. One of the first acts of the new government in 1996 was to pass legislation under section 51(xxvi), the race power that was amended in 1967, to deny the Ngarrindjeri Aboriginal women the Aboriginal and Torres Strait Islander Heritage Protection Act to prevent the construction of a bridge over an area that encompassed what the women asserted was secret women's business. This Act, the Hindmarsh Island Bridge Act, suspended the Racial Discrimination Act from operating with respect to this legislation so that the Aboriginal and Torres Strait Islander Heritage Protection Act applied everywhere in the country except for Hindmarsh Island. So here contemporaneously to *Wik*, the Racial Discrimination Act has been suspended in order to discriminate in an adverse fashion against Aboriginal and Torres Strait Islander peoples.

This legislation was challenged by the Ngarrindjeri women in the High Court on the basis that the race power as amended in 1967 couldn't be used in an adverse or detrimental manner by the Commonwealth. The High Court split on whether the race

power could be used to discriminate against Indigenous peoples. The judgement was inconclusive and left open the possibility that the Commonwealth still possesses the power to enact racially discriminatory laws. However, as the expert panel found, it is almost universal legal consensus that the race power does permit the federal parliament to single out one group for adverse discriminatory treatment on the basis of race.

This decision was a turning point. The very power that was amended in 1967 and had been the focus of so much post-1967 referendum advocacy was now regarded as a power to make laws that discriminate in a negative way against Aboriginal and Torres Strait Islander peoples. I refer to those two decisions because we must recall these two events if we are to fully contemplate the motivation for a non-discrimination clause in the Constitution. Not as some ambit claim for a bill of rights for Aboriginal people, but a reasonable and unremarkable response to the majoritarian tendencies of the Australian polity. Before moving on it is important to note that we were quite taken, especially myself as an Aboriginal lawyer, by the deep memories of these two decisions in the High Court in communities during our expert panel consultations. These two cases were cited and are alive and well in indigenous community narratives about the State.

Before I wrap up the reconciliation phase, it is important here to note that we begin to understand recognition from the perspective of the recogniser or the State. In many ways it departs at this point from entertaining Indigenous claims. During the second term of the Howard Government we see this new phase of reconciliation and that is the potential recognition of Aboriginal and Torres Strait Islander peoples in the preamble of the Constitution as part of a broader referendum on the republic. Prime Minister Howard himself took the lead in drafting a new preamble leading up to the 1999 referendum which included Indigenous recognition. The eventual vote in the referendum, of course, saw the preamble rejected by every state and territory and nationally by 60.7 per cent of the population. This was especially pronounced in electorates with Aboriginal and Torres Strait Islander population.

The significance of recalling this, however, is not to rehearse the controversies associated with the language that was chosen. It is to make this point: that after decades of advocacy for Indigenous rights, the political agenda that I have described to you in part, set out, or laid down by Aboriginal and Torres Strait Islander communities had been cherry picked by the State and by 1998 gave singular prominence to recognition in a preamble. We identify this as the point where the State and Indigenous ideas about recognition diverge, with structural reform giving way to mere recognition or 'poetry' as it is so disparagingly referred to in communities.

Following the failed referendum, the nation moved towards the final chapter of the reconciliation era. In its final recommendation to the Australian Government, the Council for Aboriginal Reconciliation recommended the following measures:

The Commonwealth Parliament prepare legislation for a referendum which seeks to:

- recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution; and
- 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.

In addition it recommended that:

Each government and parliament:

- 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
- negotiate a process through which this might be achieved that protects the political, cultural and economic position of Aboriginal and Torres Strait Islander peoples.

Finally it recommended that the 'Commonwealth Parliament enact legislation ... 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'.⁶

Post-1999 referendum recognition era

We then move into this post-1999 recognition phase which continues with advocacy for a treaty. I will truncate that by merely mentioning that a treaty campaign was led by ATSIC, building upon the final report of the Council for Aboriginal Reconciliation, not negotiating a treaty but facilitating a process for consulting with communities. It is also interesting to reflect that on 8 November 2000, *The Sydney Morning Herald* reported an increase in the number of Australians who supported a treaty with Aboriginal people. The Herald/AC Nielson poll found 53 per cent of Australians in favour of a treaty with those opposed dropping 6 per cent to 34 per cent. The poll also found support for reconciliation had risen. These figures are interesting because they illustrate two things: firstly, how a campaign can sharpen the

⁶ Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge: Final Report of the Council for Aboriginal Reconciliation*, Council for Aboriginal Reconciliation, Canberra, 2000, pp. 105–6.

population's focus on an issue that they would not normally be engaged with, and secondly, the importance of leadership. In any event ATSIC was criticised by the government for its treaty campaign for elevating symbolic measures over practical measures and addressing Aboriginal disadvantage. In part it led to its demise.

This brings us to about circa 2005 and it is important to note again here that the desire for a treaty is well and alive in Aboriginal and Torres Strait Islander communities. It is at this point we witness the consolidation of the federation's appetite for only symbolism.

The post-republic recognition phase leads a number of state governments to recognise Aboriginal and Torres Strait Islander peoples in their constitutions: Victoria in 2006, Queensland in 2010 and then New South Wales. Finally in 2013 South Australia also passed an amendment of recognition. However each of these states includes in this recognition a non-justiciability clause, or no legal effect clause, stating that the parliament does not intend this section to have any legal force or effect. This is despite the fact that unlike the double entrenchment of the Australian Constitution, state constitutions are mere Acts of Parliament. They do not require referendums for amendment. Any subsequent Act of Parliament can override any recognition clause. The fact that the states felt compelled to include such a clause was justifiably regarded during the expert panel consultations as a form of non-recognition.

Constitutional recognition was well and truly back on the agenda. Three days before the 2007 federal election, Prime Minister Howard announced his renewed support for recognition in a new preamble. This is significant of course because the prime minister had an irrefutably difficult relationship with Indigenous peoples during his very long term of office. Also he had eschewed symbolism preferring hard-headed, pragmatic measures aimed at real, substantive change: practical reconciliation over symbolic reconciliation. In any event, his last-minute and welcome conversion to symbolism created bipartisan support, given that the ALP policy platform at the time also supported recognition of Indigenous peoples in the preamble. And although defeated at the 2007 federal election, there has been a steady momentum in the public conversation on recognition in a preamble.

I will skip over the much maligned Australia 2020 Summit except to say that it was an outcome of the final report, although it did note the importance of not just symbolic recognition but substantive changes in the text of the Constitution.

Following on from 2020 however, the federal government conducted one of its community Cabinet meetings in Eastern Arnhem Land. While there, Prime Minister Rudd was presented with a Yolngu leaders' statement of intent. This document was

developed following meetings at Maningrida in 2007 and other related meetings over the previous 18 months representing seven homelands and 8,000 Indigenous peoples. It argued for recognition of their fundamental right to live on their land and practice their culture and constitutional recognition of Indigenous prior ownership of the land. In accepting this communique, the prime minister pledged his support for recognition of Indigenous peoples in a preamble to the Constitution, essentially cherry picking substantive recognition for preambular recognition. This was a misreading of the Yolngu statement of intent, this expression of an Indigenous vision of truth and justice by the Yolngu merely seven years ago.

This brings us to the expert panel in 2010, where Prime Minister Julia Gillard constituted a panel to report to government on the possible options for constitutional change. It is important to note here that the Greens and the Independent Rob Oakeshott in their letters of agreement in supporting the prime minister or the government, specified that Gillard put into action these continual indications of political support for recognition.

So over the course of 2011, we conducted a broad national consultation program which included a formal public submissions process and a process of public consultation meetings. We agreed on four principles to guide our assessment of proposals for constitutional recognition, namely that each proposal:

- contribute to a more unified and reconciled nation;
- be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
- be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
- be technically and legally sound.⁷

Of course, the fourth one picks up on the unintended consequences of the drafting in section 51(xxvi) in the 1967 referendum.

The recommendations of the expert panel, like those of the Constitutional Commission, included the repeal of sections 25 and 51(xxvi). We recommended that a new section 51A be inserted. Due to the many constitutional risks identified by the many constitutional lawyers we consulted, we rejected a standalone recognition preamble at the beginning of the Constitution and placed a recognition statement as a preamble to a new head of power in section 51A. We also recommended, like the commission did, a section 116A be inserted, a prohibition of racial discrimination, and

⁷ Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 4.

lastly, that a new section 127A be inserted which is a recognition of Indigenous languages, on the strength of the overwhelming concern about the rapid disappearance of Aboriginal languages.

Conclusion

I want to conclude by drawing together some of the insights in that not entirely comprehensive trajectory. I have outlined some of the competing notions of recognition. What does this mean? There are different expectations of this current project. It explains in part the confusion and misunderstanding about the current iteration. Of course it does not explain some of the deliberate mischief, some of it organised by some members of the Aboriginal community itself. But my concern and the concern of many expert panel members is how is this to be managed?

Non-Indigenous people frequently tell me that only preambular recognition will succeed. We are told that time and time again by constitutional lawyers and politicians. Indigenous people tell us that they will not support symbolic recognition. The task is not aided by the State's waning interest in reconciliation. The 1990s reconciliation was somewhat of a confected process of political convenience that emerged from a failed executive promise to enter into negotiations for a treaty with Aboriginal people in the 1980s. Today the contemporary version of reconciliation is focused on things like employment covenants, while meritorious, avoid engaging with a substantive question of all reconciliation movements globally—truth and justice.

It is not surprising that scholars note that Australia's reconciliation process is rarely, if ever, cited in the literature on Indigenous peoples and reconciliation around the world. We saw during the Howard era that rights became decoupled from recognition, partly informed by a desire to focus on the practical and not the symbolic. Still, the architects of practical reconciliation embrace symbolic reconciliation, again partly because of the double majority and a desire to achieve *anything* as opposed to nothing, but equally because of a genuine, normative rejection of any concept of wrongdoing.

The expert panel's work signified a major shift in the trajectory of Aboriginal and Torres Strait Islander peoples' advocacy for rights and recognition. The panel consisted of Indigenous and non-Indigenous people of left and right and of politicians of all political parties. It is not true to say that the panel was a bunch of ranting lefties, nor is it accurate to generalise the panel as conservative. For us, *Wik* and *Kartinyeri* were a conundrum: majoritarianism trumps statute as in *Wik* and the Constitution trumps statute as in *Kartinyeri*. The upshot is that section 51(xxvi), as amended in 1967, is a problem. The ease with which a parliament, without check or balance—save for the ballot box every three years; a most flippant but common refrain—can

discriminate against Aboriginal people on the basis of race, troubled many during that process. The *Wik* amendments were often referenced, as I said, during panel consultations because it was difficult for the community to swallow, almost 20 years after the fact, the very real potential of economic development in addressing disadvantage through native title had disappeared before their very eyes. I am not referring to those who have had very significant economic development outcomes as a consequence of native title. I am talking about those many communities that do not. And because we are 2 million of 22 million people, very few people raised an eyebrow.

It is difficult for those Indigenous peoples that we consulted. All other comparative developed liberal democracies within Indigenous populations have adopted measures aimed at ameliorating the harsh majoritarian tendencies of minimalist ballot box participation through treaties, agreements, other constructive arrangements, parliaments, designated parliamentary seats, Indigenous electoral roles, entrenched Indigenous rights, non-discrimination clauses in the Constitution, the list goes on. Why is it that Australia, once regarded as an innovator in public policy, is incapable of conceiving and implementing similar measures here at home?

Can I return to end on the Indigenous community's criticism of the expert panel and this is feeding, in part, the Aboriginal resistance to this current movement. That is that we ignored the substantive: treaty and sovereignty. The expert panel took seriously Aboriginal and Torres Strait Islander peoples' desires for a treaty and settling the unfinished business of sovereignty and we reflected those concerns in the report. There are two chapters devoted to that, but on the basis of the methodology that I referred to we decided that it was not the time to go ahead with those. I do not think sovereignty can be dealt with in that process—or a treaty.

Constitutional recognition will not impact upon Indigenous claims for sovereignty. To quote the legal advice, 'the fact of settlement from its beginning produced institutions of government that necessarily, continuously proclaimed their own legitimacy. Given the previous presence of Indigenous people, now comprising the territory of the nation Australia, contemporary legal doctrine implies acceptance that the basis of settlement of Australia is and always has been ultimately the exertion of force by or on behalf of British arrivals. They did not ask permission to settle. No one consented; no one ceded. Sovereignty was not passed from Aboriginal peoples to the settlers by any actions of legal significance voluntarily taken by or on behalf of the former or any of them'.⁸ It goes on to say 'recognition of Aboriginal and Torres Strait Islanders in the Constitution as equal citizens could not foreclose on the question of how Australia was settled because the reasoning noted above proceeds on the basis of the common

⁸ Expert Panel on Constitutional Recognition of Indigenous Australians, op. cit.

law constitutional consequences of perceived and judicially received history. That will not be altered by future amendments to the text of the written Constitution'.⁹ It is mischief on the part of those who proclaim the contrary although it is a complex legal question. And some of that mischief is being conducted in the most abusive and unproductive fashion.

On the issue of treaty it was argued that communities themselves were not ready for a treaty. Some communities were. Some communities were quite advanced in negotiating with local governments and state governments on the basis of a number of different forms of tenure right across Australia. But essentially it was felt that communities were not ready yet to enter into those treaties. But primarily the fault, we felt, lay fairly and squarely at the political class in Australia. When we handed down the report, the climate was toxic, much as it is today. We felt the current class of political leadership was incapable of leading a nationwide settlement between Aboriginal and Torres Strait Islander peoples and the State.

So to conclude, I have referred to this notion of truth and justice throughout this lecture. What do I mean by that? It means the ventilating of stories of a narrative that is inconclusive of Aboriginal and Torres Strait Islander peoples in Australia. If one thinks that is already the case then one really needs to get out to more Aboriginal communities. This is about the frontier wars, the killing times. This is about the protection era. It is about stolen wages. It is about stolen generations. Not as just an Indigenous narrative, as an Indigenous story, but as a shared national experience. A reconciliation process that is a shared national exercise becomes about forgiveness.

This process has not occurred in Australia. My fear is that the current iteration is somewhat dislocated from reconciliation in the pursuit of truth and justice. Reconciliation will require reorientation if it is to achieve the ends of truth and justice, and this includes the anger in the Aboriginal community, which while normatively valuable, is unproductive in the long term. It must give way to something else. I had wondered whether I was being too provocative when I used Charles Perkins' quote, living 'off the crumbs that fall off the White Australian tables' but I think we must take seriously the characterisation in many parts of the Aboriginal community of symbolic recognition as weak and insincere and we must recognise resistance as a stance worthy of defence.

Four years ago when we comprehensively consulted communities they only spoke of sovereignty and treaty. I took you all the way back post-1967 and measured that trajectory where communities talked about sovereignty and treaty. Communities are alive to this. Truth and justice is not only what the coloniser wants, or what the

⁹ *ibid.*

coloniser can convince an elite leadership into compromising on, it is also about listening to what it is that the community is saying. To label the advocates of treaty and sovereignty as radical is unfair. Those comparative jurisdictions that have engaged in this process have comparably better health and wellbeing outcomes. This year's *Closing the Gap* statistics revealed that life expectancy has not changed and unemployment went backwards. Yet the polity continues to condescendingly reject Indigenous ideas based on a curious reversal of that which is considered practical and concrete in other jurisdictions, but regarded as symbolic or pilloried as a rights agenda in Australia. Yet the fact remains we have never tried it. All of those other jurisdictions have done something we have not done and that is grapple with our history in an open and honest way.

When I was writing this lecture it made me reflect on a recent book review written by the inimitable Nicolas Rothwell who was reviewing a really excellent book by scholar Timothy Bottoms.¹⁰ It is a new book on the frontier, or the killing times, called *Conspiracy of Silence*. In this review he noted that the frontier wars were pretty much endorsed by academic experts today. He lamented that the nation has not caught up. In fact the media is still stuck in some sort of Windschuttle-era binary. But in fact history has moved on; historians have moved on. Rothwell pondered 'a history once suppressed, now accepted, but not exactly embraced and enshrined at the heart of modern Australia's image itself. How could it be? Chapter by chapter, region by region, killing by killing, tale by tale' and he concluded, as I do when I reflect on this process, that 'so we stand gazing back on our past, on the deeds that made the nation, unsure quite what to think, how to feel, what steps to take'.¹¹

I am a fully-fledged supporter of recognition but what I do not want is mob backed into a corner where they feel obliged to accept another political confection. If that were to occur, there would be no revisiting of constitutional reform. We would be the one State that had gone the other way, successfully executing recognition in a way that the State has never had to give up an inch of space in its public institutions, in its public law to the recognition of first peoples, except for a mere nod or, as Charles Perkins so presciently captured, 'the crumbs that fall off the White Australian tables'. A sign of maturity will also be that Aboriginal and Torres Strait Islander peoples have the space to politely decline the offer of recognition.

¹⁰ Nicolas Rothwell, 'Mapping the massacres of Queensland Aboriginal society', *Australian*, 29 June 2013.

¹¹ *ibid.*

