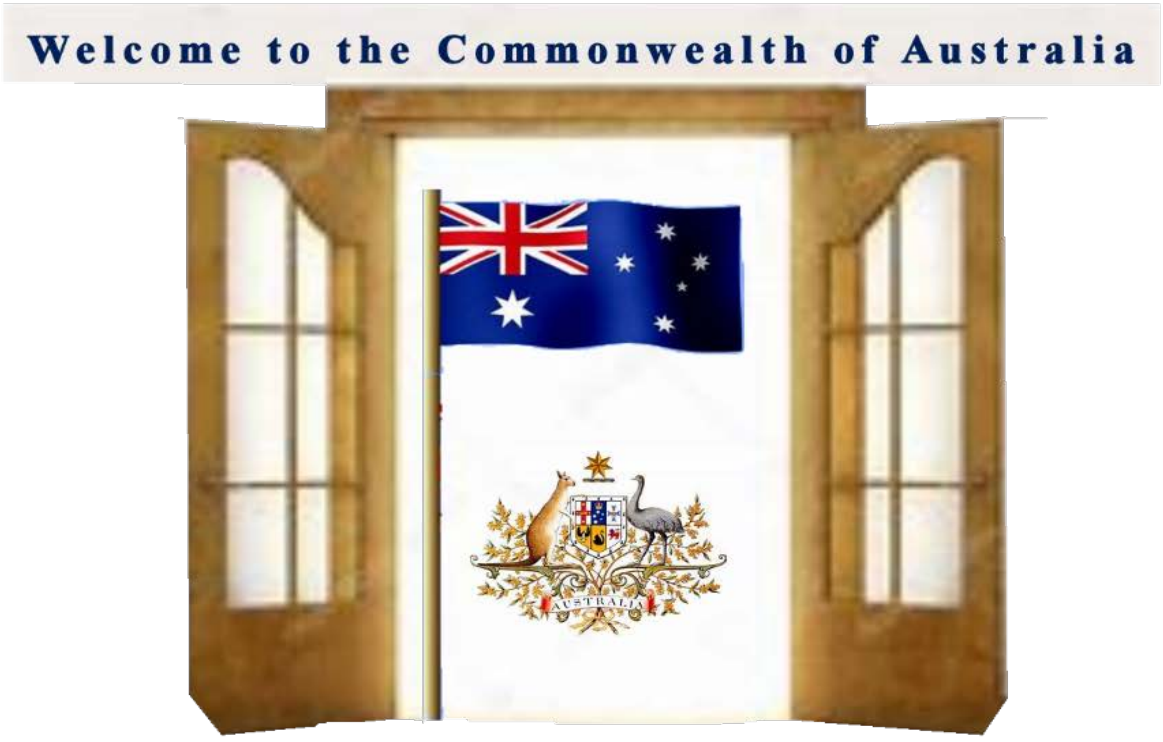
Submission to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples



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Introduction

I, Peter Wayne Fisher, as the holder of membership within the Commonwealth of Australia represented by citizenship, take this opportunity as presented by the Commonwealth of Australia, to contribute this submission to advance the settling of the past and securing the future for the Commonwealth of Australia.

In making this submission, I come in good faith in an attempt to point out the shortcomings in the current debate and direction surrounding the constitutional recognition of the Aboriginal and Torres Strait Islander peoples within the Australian Constitution. Though this submission is my opinion within the debate, however, I rely on the materials as produced by eminent experts within the fields of constitutional law, the judicial arms and parliamentary procedures and legislation interpretation to support the proposed method of advancing this issue of constitutional recognition and ultimately unification.

I further rely heavily on a number of key documents and instruments ratified by the Commonwealth of Australia, or produced by Federally commissioned bodies, including but to limited to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Uluru Statement from the Heart (Uluru Statement).

The following paragraphs are set out in this order to demonstrate the current standing of the Commonwealth of Australia, its citizens, and the members of the numerous continuing pre-settler Indigenous Nations, this is essential, and to demonstrate the current direction may not be inline with the technical sense of the instruments and their application resulting in some much confusion and division. They are so arranged to emphasis a possible solution if the Commonwealth of Australia and its citizens have the both the legal and moral fortitude.

They are:

- A Problem- that is caused by the Commonwealth of Australia
- The Australian Constitution- to whom and how it applies
- The United Nations Declaration on the Rights of Indigenous Peoples- Australia's intention
- Uluru Statement from the Heart- multiple sovereignties, one location
- Territory- who is upon whose territory
- Recognition- already completed unless it is a doorway to Australia
- Treaty- the ultimate unification process

- Solution- an invitation and a forum to consult and cooperate

I must start with some basic understandings of the Commonwealth of Australia and the application of legal fictions to man, all starting with how the Commonwealth of Australia came into being as this is where the fatal flaw that was self-inflicted by the Commonwealth of Australia resulting in this current situation.

To further move the debate, I must question what is it exactly that the Commonwealth of Australia is trying to achieve through the constitutional recognition of the Aboriginal and Torres Strait Islander peoples? This important question and limitations to such constitutional recognition will be covered within this submission.

A Problem

"In a controversial interview with Sky News, the One Nation leader also said she considered herself "Indigenous" because she was born in Australia. I've got nothing against the Aboriginals but I'm sick and tired of being made to feel as it I'm a second-class citizen in my own country…"[1]

This controversial statement received great coverage in the Australian news, and while I do not support racist opinions it highlights an issue that is the stumbling block for the current processes of trying to contain the lack of formal agreement or treaty to within the Commonwealth of Australia and, technically Pauline Hanson is correct in her statement as to be an indigenous Australian, however, she is just not an indigenous Australian citizen of the Aboriginal or Torres Strait Islander race, descent, or heritage. The person Senator Pauline Hanson is legally and politically seen through is created pursuant to the Australian Constitution and thus within the Commonwealth of Australia she is indigenous to the Commonwealth of Australia unlike immigrants that migrated their legal and political person to the Commonwealth of Australia from another sovereign state of the United Nations member states.

The members of the numerous continuing pre-settler Indigenous Nations were never afforded the ability to migrate their legal and political person into the Commonwealth of Australia, they were excluded. The exclusion processes by the Commonwealth of Australia "White Australia" policy left those members of the numerous continuing pre-settler Indigenous Nations no other choice but to remain within their own systems of authority and decision-

[1] Paulin Hanson MP, Sky News, 6th April 2018

making pursuant to the sovereignty that is now acknowledged to co-exist with that of the Crown.

This comment of Senator Pauline Hanson raises many issues for the Commonwealth of Australia; where is the Australian homeland, where do they belong, where is the territory of the Commonwealth of Australia, is the Commonwealth of Australia the true sovereign authority to which there is no other superior authority that does not interfere with the Commonwealth of Australia's' sovereign authority?

The flip side of the statement made by Senator Pauline Hanson; are the members of the Aboriginal and Torres Strait Islander pre-settler Indigenous Nations Australian citizens, citizens that have been given full disclosure, people that have given their free, prior, and informed consent to take up membership in the Commonwealth of Australia? Do these people abandon their territories to participate in the life of the Commonwealth of Australia?

Further, have the Australian citizens given their free, prior, and informed consent to enable the members of the Aboriginal and Torres Strait Islander pre-settler Indigenous Nations participate fully in the life of the Commonwealth of Australia?

To resolve these questions history must be understood, and why it matters so much today. This I am attempting to do with this submission, trying to put into words something that I can so clearly see.

The Constitution, the source of all things Australian

"The purpose of the Constitution was the creation of a new State, the Commonwealth of Australia, intended to take its place amongst the free nations, with all the attributes of sovereignty as were consistent with its being still under the Crown."[2]

The Australian Constitution is the creation of the "*legal universe*"[3] of all things Australian, the Australian government, the Australian territory, the Australian states, the Australian citizen, it is the entirety of the Commonwealth of Australia.

The Australian Constitution is the basic norm, or the foundation of all other acts, statutes, laws, authority, and control within the claimed territory of the Commonwealth of Australia.

The Commonwealth of Australia was the culmination of the wishes of the British subjects of the Colonies within the geographical location known as Australia, it was those people who

[2] China Ocean Shipping Co. *v* South Australia (1979) 145 CLR 172
[3] Robert French, Chief justice, "Theories of Everything and constitutional Interpretation, 19th February 2010

overwhelmingly agreed to unite under the Australian Constitution and Crown in a federal system of government, *"The Commonwealth must be true to itself and to the people who created it. It was established to act for itself, not as a mere collection of states or for them, but as a unit – a nation"*[4].

The Commonwealth of Australia was officially born on the 1st of January 1901 on the commencement of the Australian Constitution. The Australian Constitution created the sovereignty of the Crown in what has been described judicially as the sovereignty of the Australian people, so *"…the people are acknowledged in the preamble as the actors of the fundamental agreement to unite in one indissoluble Commonwealth…The agreement founding the Constitution was not expressed as an agreement between the colonies but between their people"*[5]. Section 128 of the Australian Constitution requires the approval of the people of Australia to make any changes to the basic norm that creates their legal and political identity. The importance of the establishment of the Australian Constitution and its method of alteration cannot be stressed enough as this is the core of the issue.

Further to this, the Commonwealth of Australia was never a colonial power in the true sense of the word, *"…Australian law is the historic successor of, and an organic development from, the law of England"*[6], the Commonwealth of Australia was never colonized by the British, but a result of the earlier colonization process, *"Although the Constitution was brought into being by the Commonwealth of Australia Constitution Act, it is not of the same order as the United Kingdom Acts generally."*[7] and that *"Australia's constitutional history, from the perspective of the colonisers, began with the taking of the possession of the eastern part of the continent by James Cook in 1770"*[8] The Australian Constitution *"…represents the position under Australian law, of which the Constitution is the ultimate expression. It does not affect how Aboriginal people view their own sovereignty. As a result, it does not prevent them from asserting their own independence and continuing validity of their laws and customs."*[9]

[4] Alfred Deakin, October 29th, 1903
[5] Robert French, Chief Justice, "The Constitution and the People"
[6] Robert French, Chief Justice, "The Constitution and the People"
[7] China Ocean Shipping Co. *v* South Australia (1979) 145 CLR 172
[8] Robert French, Chief Justice, "The Constitution and the People"
[9] Megan Davis, George Williams, "Everything you need to know about the referendum to recognise indigenous Australians", page 121

White Australia, the Exclusion

"The Australian Constitution was intended to unite Australia under the original and continuing agreement of the Australian people, but the first peoples of Australia were not included in this agreement."[10]

The Australian Constitution was initially established on the platform of the "White Australia" policy. This is best described as the intention of the Australian Constitution of which Prime Minister Curtin summed it up as; *"This country shall remain forever the home of the descendants of those people who came here in peace in order to establish in the South Seas an outpost of the British race."*[11]. This intention has been recorded in the numerous election speeches of the early incoming Prime Ministers, *"…I laid special stress upon the white Australia policy of the government… we proposed to exclude the undesirable and colored aliens…"*[12] and *"to ensure the maintenance of our White Australia policy…"*[13]

The Aboriginal and Torres Strait Islander peoples at the time were considered as undesirable and not worthy of citizenship being colored and were excluded. *"the 'people' referred to in the Australian Constitution of 1900 did not include Aboriginal and Torres strait Islander people"*[14] and this position is supported in the preamble of the Constitution, *"The 'people' were included in the preamble of the 1897 draft Australian Constitution, as an expression of its creators' democratic ideals"*[15]

The "White Australia" policy was further reinforced through legislation being progressively introduced from the creation of the Commonwealth of Australia, including being excluded from the Commonwealth franchise, *"No aboriginal native of Australia…shall be entitled to have his name placed on an Electoral Roll…"*[16]

This exclusion process was the self-inflicted harm that has resulted in the current situation of multiple sovereignties that co-exist in the same geographical location, but ultimately one of these co-existing sovereignties will have to give way to the other, and this is the true way to reconcile the past.

[10] Constitutional reform: Fact Sheet - Recognising Aboriginal & Torres Strait Islander people in the Constitution
[11] Prime Minister John Curtin, 1941
[12] Alfred Deakin, October 29th, 1903
[13] Stanley Bruce 1925 "Australia's National Values Policy"
[14] National Australian Achieves "Constitution for a Nation"
[15] National Australian Achieves "Constitution for a Nation"
[16] Commonwealth Franchise 1902, section 4

Interpretation of the Constitution

"…the interpretation of the Australian Constitution is the interpretation of a statute of the Imperial Parliament… although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to ordinary law…remember that it is a Constitution, a mechanism under which laws are made, and not a mere Act which declares what the law is to be"[17]

The Australian Constitution was established with the intention of the creators to be reflected through the Australian Nation. It was this intention of excluding the Aboriginal and Torres Strait Islander peoples from the start that has the Commonwealth of Australia grappling at varying theories in a vain attempt to minimize the impact on the Commonwealth of Australia from history. This intention was, and still is, the problem, it is the mistake recently referenced to by the leaders of the Australian nation, *"Ignoring Indigenous Australians a big error…A mistake when our Constitution was framed over a century ago…"*[18]

The modern Commonwealth of Australia may be a multicultural nation, but the underlying intention has never been altered and when interpreting such an instrument this intention must be considered, *"…in interpreting a statute it is necessary to determine the meaning of the words used as they were understood at the time when the statute was passed. But that is not all, particularly when it is a constitution that is being interpreted. For a constitution creates and underpins a body politic, providing an instrument of government that is intended to endure."*[19]

Whilst the Australian Constitution is the basis of all law and authority for the peace, order and good governance of all Australians, it still retains the undertones of the "White Australia" policy that it cannot divorce itself of, as this was the intention of the people who agreed to unite under the Constitution and the Crown that is creating so much confusion within Australia. Have the people that have been conferred Australian citizenship been given the necessary information, in a form that they can understand, for them to make an informed decision before applying for Australian citizenship, especially in light of the intentions behind the Australian Constitution?

[17] Australian Capital Television Pty Ltd and New South Wales *v* the Commonwealth (1992) 177 CLR 106
[18] PM Malcolm Turnbull, December 14th, 2015, the Guardian News
[19] Brown *v* The Queen (1986) 160 CLR 171

Australian Citizenship

"Whether a person is a foreign citizen…is necessarily determined by reference to the law of the relevant country because it is only that law which can be the source of that status of citizenship or the rights and duties in that status"[20]

The Australian Constitution is the legal foundation upon which rests the law to enable the creation of Australian citizenship and associated rights and duties. It was this citizenship that the members of the numerous continuing pre-settler Indigenous Nations were excluded from, from the beginning of the Commonwealth of Australia. The sovereignty of the Australian Constitution creates the citizenship within the Commonwealth of Australia.

Australian citizenship is defined in the Commonwealth of Australia as: *"The Parliament recognises that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity."*[21] Citizenship is contractual in nature and it is through consent to this contract that validity is given to the Australian Constitution to empower the Parliament to make such laws that govern them. This contractual arrangement was never explained to the peoples of the numerous continuing pre-settler Indigenous Nations. The peoples of these numerous continuing pre-settler Indigenous Nations were in recent times forced to assimilate into the Commonwealth of Australia.

Citizenship is conferred to those who the Commonwealth of Australia consider as desirable, but this does not alter the intention of the "White Australia" policy of the Australian Constitution. The hope with the 'White Australia' policy was, *"…indigenous children…would, over time merge with the non-indigenous population"*[22] making those who take up Australian citizenship forget the connection to their ancient continuing pre-settler Indigenous Nation.

This intention of the original founders of the Commonwealth of Australia needs to be amended in which the Australian citizens are requested to participate in accord with section 128 of the Constitution to do so. To do otherwise is to go against the Australian polity as they may not want the peoples of numerous continuing pre-settler Indigenous Nations to participate in the life of the Commonwealth of Australia. Such intention can be determined

[20] Re Callagher [2018] HCA 17
[21] Australian Citizenship Act 2007, Preamble
[22] Commonwealth of Australia, 'Bringing Them Home Report'

by referendum through a question as simple as **"Do we as Australian citizens agree to invite the peoples of the numerous pre-settler Indigenous Nations to participate in the life of the Commonwealth of Australia and unite with us under the Australian Constitution?"** This is the democratic process whereby the Australian citizens have the ultimate say in such matters that affect them.

UNDRIP and Assimilation

Participation in Australia

Even if the Australian citizens agree to invite the members of the numerous continuing pre-settler Indigenous Nations to participate in the life of the Commonwealth of Australia, the members of the numerous continuing pre-settler Indigenous Nations are under no obligation to participate in the life of the Commonwealth of Australia if they do not so choose.

UNDRIP was ratified by the Commonwealth of Australia in April 2009, thus defining the intention of the Commonwealth of Australia. Though this declaration is not binding in international law as a treaty would be, it clearly shows the intention of the nation who has ratified it. In using the declaration, the definition as to who the indigenous peoples are needs to be clarified. There are no hard and fast definitions within the United Nations other than a fact sheet compiled by the United Nations, *"…an official definition of indigenous has not been adopted… Instead the system has developed a modern understanding of this term on the following…self-identification…at the individual level and accepted by the community as their member, historical continuity with pre-colonial and or pre-settler societies… distinct social, economic or political systems…"*[23] The indigenous peoples are just one party to this definition, the other party to this definition are those peoples who have citizenship within the post-colonial or post-settler society, the society of these people are construed to be the State, and in this geographical location that would be the citizens of the Commonwealth of Australia.

This definition must be remembered when interpreting the declaration as this makes it very clear for the path that must be taken to settle the past and secure the future for the Commonwealth of Australia. With this in context, are the members of the numerous continuing pre-settler Indigenous Nations of the Australian continent who hold Australian citizenship Australian citizens by free, prior and fully informed consent?

[23] United Nations Permanent Forum on Indigenous Issues Factsheet "Who are indigenous peoples"

The exclusion of the peoples of the numerous continuing pre-settler Indigenous Nations means that these peoples are not bound by the intention of the declaration if they are not yet considered as Australian citizens, unless they have voluntarily assumed Australian citizenship, and even then, done so with informed consent.

The peoples of these numerous continuing pre-settler Indigenous Nations cannot be forced to assimilate into the Commonwealth of Australia as they are of a Nation whose sovereignty pre-dates that of the Commonwealth of Australia and, has not been ceded or extinguished.

Was it not the intention of the Commonwealth of Australia that *"Indigenous peoples and individuals have the right not to be subject to forced assimilation or destruction of their culture."*[24]

The purpose without forced assimilation

This brings about the question as asked in the introduction as to what the Commonwealth of Australia trying to achieve through constitutional recognition, what is the purpose?

The Commonwealth of Australia through the Australian Constitution *"…have power to make laws for the peace, order, and good government of the Commonwealth…"*[25] for all citizens within the Commonwealth of Australia, be it Australian citizens of British heritage, or Australian citizens of Aboriginal heritage. All Australian citizens possess the same civic and legal obligations and rights under the Australian Constitution.

Can the power to make laws for the peace, order and good government of the Commonwealth of Australia be forced upon the members of another separate and distinct nation without their free, prior, and informed consent? If the members of the numerous continuing pre-settler Indigenous Nations cannot be forced to participate in the life of the Commonwealth of Australia, then what is the purpose of creating this division as highlighted by the comment of Senator Pauline Hanson of indigeneity.

The UNDRIP article 5 states *"…participate fully, if they so choose, in the…life of the State"*[26] gives the members of the numerous continuing pre-settler Indigenous Nations a choice, and this brings about the question; **"What if they do not so choose to participate in the life of the State?"**

[24] United Nations Declaration on the Rights of Indigenous Peoples, Article 8
[25] Commonwealth of Australia Constitution Act, section 51
[26] United Nations Declaration on the Rights of Indigenous Peoples, Article 5

Uluru Statement from the Heart

The Uluru Statement from the Heart (Uluru Statement) is the compilation of some of the best eminent minds that the Commonwealth of Australia could muster and years of research in regard to constitutional and international law. This event produced a historic instrument that is now heavily referred to in the reasoning of this submission as its authors are considered by the Commonwealth of Australia as leaders in the fields of constitutional law.

The Uluru Statement raises more issues than it resolves, the mention of other nations from time immemorial, ownership of the soil, sovereignties that co-exist. With this powerful document, certainties were created where there may have some doubts.

"…Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and adjacent islands…"[27] gives the position in time that cannot be disputed. Further it describes these tribes as sovereign Nations within the geographical location. Should their sovereignty be continuing then their nations have a superior basic norm to that of the Commonwealth of Australia.

"…from time immemorial…"[28] supports the position of a time prior to the establishment of the Commonwealth of Australia.

"This sovereignty…is the basis of the ownership of the soil…"[29] defines the material continent as being owned by other societies of peoples who are not of the Commonwealth of Australia.

"…sovereignty. It has never ceded or extinguished…"[30] is the acknowledgement that these numerous continuing pre-settler Indigenous Nations possess what is considered by the Commonwealth of Australia as systems of authority and decision-making (sovereignty) that can be recognized and described as sovereign authority within a certain geographical location, and authority and decision-making is still retained by those numerous continuing pre-settler Indigenous Nations. This sovereignty can be ceded if the continuing pre-settler Indigenous Nation decides to do so, but there is no guarantee that this sovereignty, is to be, will be ceded to the Commonwealth of Australia should these numerous continuing pre-settler Indigenous Nations ever choose to cede that sovereignty.

[27] Uluru Statement from the Heart
[28] Uluru Statement from the Heart
[29] Uluru Statement from the Heart
[30] Uluru Statement from the Heart

"…and co-exists with the sovereignty of the Crown"[31] describes a pluralistic situation where there are two or more systems of sovereignty within the same place at the same time. If the usual meaning of sovereignty as understood within the Commonwealth of Australia, *"It is essential to the attribute of sovereignty of any Government that it shall not be interfered with by any external power…"*[32] is used in this instance, then the Commonwealth of Australia does not possess the absolute sovereignty that is required by a system of governance to be effective, as these other mentioned co-existing sovereignties are external to the Commonwealth of Australia. The sovereignty of these numerous continuing pre-settler Indigenous Nations is not impacted upon by the international norms and treaties that curtail the sovereignty of the Commonwealth of Australia, due to the fact that these Indigenous Nations were excluded from being internationally represented by the member state of the United Nations who excluded them from participating in the life of the State from its inception.

This issue of multiple competing sovereignties can only be determined by what is now commonly used to settle such issues in modern cases of conflicts. The Uluru Statement raises the question, are the numerous continuing pre-settler Indigenous Nations on the Australian territory or are we as Australian citizens occupying the territories of the numerous continuing pre-settler Indigenous Nations? This important question will be addressed in the following section and this has very serious implications.

Territory

Where is the territory of the Commonwealth of Australia? With this question all Australian citizens, be they Australian citizens of British ancestry or from aboriginal ancestry, they all claim the Australian territory is as described by the Commonwealth of Australia on its surveys, but is this correct? At the time of federation *"…it is expedient to provide for the admission into the Commonwealth of other Australian Colonies and possessions of the Queen"*[33] claims that the so-called territory may have been a possession of the Queen to be gifted to the Commonwealth. How can this position now be maintained when the Uluru Statement makes it clear that the first in time sovereign Nations are the owners of the material continent and surrounding islands pursuant to systems of sovereignty that do not originate from within the Australian Constitution? To further compound the issue of territory, the

[31] Uluru Statement from the Heart
[32] China Ocean Shipping Co. *v* South Australia (1979) 145 CLR 172
[33] Commonwealth of Australia Constitution Act, preamble

Federal Court of Australia through the various native title determinations further refines the ownership of territories to regional locations within the so-called territory of Australia, *"Neither the Australian Parliament, nor the Australian Government, nor the Australian Courts have created the native title … The Act simply provides a way in which Aboriginal people can prove traditional ownership of land, which ownership has existed since before European settlement in Australia."*[34] If the numerous continuing pre-settler Indigenous Nations are the acknowledged owners of land through systems of sovereignty that is not of Australian origin, within territories that can be recognized by the Commonwealth of Australia, then where is the territory of the Commonwealth of Australia?

Prime Minister John Howard acknowledged *"We recognize this land and its waters were settled as colonies without treaty or consent"*[35] means that the colonies and all that derive from them are occupying someone else's territory, and without consent to make matters worse.

Would this situation of being within the territory of another sovereign Nation not make the Commonwealth of Australia subject to the authority of that continuing pre-settler Indigenous Nation? *"Qui in territorio meo est, etiam meus subditus est- that which is in my territory is my subject; old rule of a state's authority over persons and things found within its territory."*[36] Is this the mechanism that the Commonwealth of Australia use to control all those within the so-called Australian territory? Is this how the Commonwealth of Australia applies authority over the unlawful non-citizens (boatpeople) who cross the so-called Australian border?

If the Australian citizens are within the territory of one of the numerous continuing pre-settler Indigenous Nations without consent, then would that not make the Australian citizen an unlawful non-citizen and subject to the sovereignty of that first in time Indigenous Nation whose sovereignty has been acknowledged as still existing by the Commonwealth of Australia? And, would that not make the Commonwealth of Australia a belligerent occupational State to which the people of the continuing pre-settler Indigenous Nation do not owe allegiance to?

[34] Mundraby on behalf of the Combined Mandingalbay Yidinji- Gunggandji People *v* State of Queensland [2012] FCA 1039
[35] Prime Minister John Howard, Media Release, 11th May 2000
[36] Dictionary of International & Comparative Law 3rd Edition

Recognition

"Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government…"[37] and *"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."*[38]

This situation as described within the UNDRIP makes it clear that there are, or can be, multiple sovereignties recognized in international law within a single geographical location, and one of the parties as mentioned in those articles have a choice, and it is not the peoples of the State that have it.

Is constitutional recognition merely creating a doorway to enable the people of the numerous continuing pre-settler Indigenous Nations to participate in the life of the State if they so choose in accord with article 5 of UNDRIP? The only logical answer to this question is yes, the Commonwealth of Australia must create the doorway and invite the members of the numerous continuing pre-settler Indigenous Nations to come through to participate fully in the life of the Commonwealth of Australia if they so choose, hence the image at the start.

The Aboriginal and Torres Strait Islander Nations were never part of the history of the Commonwealth of Australia, history which began on the 1st of January 1901. All history before that was of the colonial nature, of the British Empire. The "White Australia" policy is the history o the Commonwealth of Australia, the stolen generations is the history of the Commonwealth of Australia, the stolen wages is the history of the Commonwealth of Australia, but until the members of the Commonwealth of Australia agree to invite in those that they excluded then there will be no history of the Aboriginal and Torres Strait Islander Nations being part of the Commonwealth of Australia, remember we cannot force them to assimilate, or choose for them in the affirmative to participate in the life of the Commonwealth of Australia.

The Commonwealth of Australia has acknowledged the existence of other nations possessing sovereignty within the same geographical location to that of the Commonwealth of Australia.

There numerous continuing pre-settler Indigenous Nations whose sovereignty co-exists with that of the Crown are foreign to the Commonwealth of Australia and as such domestic

[37] United Nations Declaration on the Rights of Indigenous Peoples, Article 4
[38] United Nations Declaration on the Rights of Indigenous Peoples, Article 5

Australian law would not apply to those foreign nations. For *"Recognition- In international law, a unilateral political act by a state acknowledging and confirming a specific legal situation or consequence, such as the emergence of a new state or government. No entity can claim to be recognised as a matter of right; nor is there a duty to recognise. There are two theories of the effect of recognition. The constitutive theory maintains that recognition constitutes statehood, while the declaratory theory in contrast holds that recognition only declares the independent existence, or implied. Recognition may be de facto, de jure, express or implied. Although a political act, recognition entails legal consequences"*[39] and as such the minute that the Commonwealth of Australia recognised that these continuing pre-settler Indigenous Nations existed with sovereignty that could be quantified and that still existed to co-exist with the sovereignty of the Crown is constitutive theory of recognition, *"Constitutive Theory of Recognition- theory that a community does not become a state merely by asserting its statehood, but is rather 'constituted' by the willingness of other states to deal with it as a new state"*[40]

The numerous continuing pre-settler Indigenous Nations are further recognised by the numerous Native Title Determinations of the Federal Court of Australia. The Federal Court of Australia relies on the studies concluded by experts in the field of anthropology to supply the necessary evidence that is recognisable in the Courts of Australia that there are other societies whose systems of authority and decision-making can be recognised by the Commonwealth of Australia. Such evidence provides the Justice the ability to make a determination that another society exists with a quantity of sovereignty to constitute a society; this is further recognition by the Commonwealth of Australia.

Should it not be the numerous continuing pre-settler Indigenous Nations who are the true and correct owners of the lands pursuant to sovereignty that co-exists to that of the Crown that recognises the Commonwealth of Australia in their respective constitutions?

Exceeding the Powers of the Constitution

"The Australian Constitution is the set of rules by which Australia is governed. The Australian Constitution…describes how Parliament works, what powers it has…"[41]

Everything Australian is constrained by the Australian Constitution, including the legal system, *"… the Australian legal system is one in which all government powers are derived*

[39] LexisNexis Concise Australian Legal Dictionary 4th Edition
[40] Dictionary of International & Comparative Law 3rd Edition
[41] "The Australian Constitution" Closer Look Series, Parliamentary Education Office.

and delineated by a superior Constitution…"[42] and as stated by Justice Fullagar *"…a stream cannot rise above its source…"*[43] limits the Australian legal system to be within the Australian Constitution, *"The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or consequence of the act is within the constitutional power upon which the law in question itself depends for its validity"*[44].

The Australian Constitution is the governing instrument of the Australian Nation, this instrument that *"…exercise sovereign power on behalf of the Australian people."*[45] is for Australian citizens and not the numerous continuing pre-settler Indigenous Nations that were excluded from participating in the life of the Commonwealth of Australia. *"The Constitution creates the space in which all other domestic laws operate in this country. It defines the extent of our legal universe"*[46]

"…the legislative power of the Commonwealth is, of course, qualified. Sections 51 and 52 stipulate that the power is 'subject to this Constitution'. Hence the legislative power of the Commonwealth is plenary, but only within the limitations imposed by the Constitution."[47] makes clear that the plenary power given to the Australian Parliament by the Australian Constitution is also limited by the Australian Constitution to within that jurisdiction. The question that arises from this is "Can the Commonwealth of Australia exceed that plenary power given and constrained by the Constitution be applied to sovereign nations who are excluded from the Commonwealth of Australia.?" This is a direct challenge on the sovereignty of the Commonwealth of Australia by the sovereignty of the numerous continuing pre-settler Indigenous Nations whose sovereignty has been acknowledged by the Commonwealth of Australia as co-existing alongside the so-called sovereignty of the Crown.

As the Uluru Statement makes clear, the numerous continuing pre-settler Indigenous Nations retain their own systems of sovereignty that includes ownership of the land itself under systems of authority that are beyond the Australian Constitution. Should the Commonwealth of Australia try to apply the power vested by the Australian Constitution to these nations that are not within the legal universe of the Commonwealth of Australia, then this would be exceeding the power and authority as created by the Australian Constitution. This position

[42] Lisa Burton Crawford, "The Rule of Law and the Australian Constitution", page 200
[43] Australian Communist Party *v* the Commonwealth [1951] HCA 5
[44] Australian Communist Party *v* the Commonwealth [1951] HCA 5
[45] Australian Capital Television Pty Ltd and New South Wales *v* the Commonwealth (1992) 177 CLR 106
[46] Chief Justice Robert French, "Theories of Everything and Constitutional Interpretation", 19th February 2010
[47] Lisa Burton Crawford, "The Rule of Law and the Australian Constitution", page 47

cannot be sustained at law, membership being contractual in nature cannot be forced upon people who have not been fully informed and or given their free, prior and informed consent. The peoples of the numerous continuing pre-settler Indigenous Nations who have chosen not to participate in the life of the Commonwealth of Australia do not receive the benefits of the Commonwealth of Australia, likewise they are not obliged to the civic duties and obligations of the Commonwealth of Australia, *"Pacta tertiis nec nocent nec prosunt- agreements neither harm nor benefit third parties."*[48]

The peoples of the numerous continuing pre-settler Indigenous Nations do not owe allegiance to the Commonwealth of Australia, to force them to do so would be excluding the powers vested in the Parliament of Australia by the Australian Constitution. One of the responsibilities of being conferred citizenship within the Commonwealth of Australia is to *"…defend Australia should the need arise…be committed to joining together to defend the nation and its way of life"*[49] however, without formal agreement or treaty, the Commonwealth of Australia is nothing more than a belligerent occupational force upon the territories of the numerous continuing pre-settler Indigenous Nations and as such, there can be no so-*called "Oath of Allegiance- Attestation of the inhabitants of a territory to be faithful and obedient to their sovereign or government. When territory is occupied by a belligerent, the authority of the occupant is not sovereignty and the inhabitants do not owe it allegiance and may not be compelled to pledge allegiance to it"*[50]

The judicial arm of the Commonwealth of Australia cannot operate effectively when a portion of the people within the geographical location are not subject to the authority vested in the courts of Australia by the Australian Constitution, and the decisions made in those courts regarding those excluded peoples can be ignored, *"Extra territorium jus dicenti impune non paretur- One who gives a judgment outside his jurisdiction is disobeyed with impunity. There is no punishment for disobeying"*[51], these people are foreign to the Commonwealth of Australia as they exist under the other sovereignty that *"co-exists with the sovereignty of the Crown"*[52] How can this situation continue to exist if the peoples of Aboriginal and or Torres Strait Islander descent revitalise the sovereignty of their continuing pre-settler Indigenous Nations?

[48] LexisNexis Concise Australian Legal Dictionary 4th Edition
[49] Australian Citizenship Our Common Bond, page 20
[50] Dictionary of International & Comparative Law 3rd Edition
[51] Black's Law Dictionary 9th Edition
[52] Uluru Statement from the Heart

Reconciliation

"Reconciliation- Restoration of harmony between persons or things that had been in conflict."[53]

Reconciliation is fundamentally linked to the debate surrounding constitutional recognition and treaty with the numerous continuing pre-settler Indigenous Nations.

By simply including the words "Aboriginal" or "Torres Strait Islander" within the Australian Constitution cannot be seen as possessing the ability to force the authority that the Australian Constitution vests on the Australian Parliament on societies of people who were not only excluded from uniting under the Australian Constitution, but have not given their free, prior, and informed consent to be governed by that Constitution, *"Consensus ad idem- agreement to do the same thing. The common consent necessary for a binding contract."*[54] and citizenship is contractual, given rights while agreeing to be bound to the duties.

As described in the Uluru Statement, there are multiple sovereignties of multiple nations within the same geographical location and it is this conflict of sovereignties, or disharmony that must be reconciled. This cannot be done within the Commonwealth of Australia, as the Commonwealth of Australia is just one of the actors in the situation, the other actors are foreigners (*"Extraneus est subditus qui extra terram, i.e. potestam regis, natus est- A foreigner is a subject who is born out of the territory"*[55]) to the Commonwealth of Australia and, until some form or formal agreement or treaty is concluded between these multiple nations in the same geographical location, this unreconciled situation or conflict will remain.

This harmony can only be restored when the Commonwealth of Australia reverses its current position of being a belligerent occupational entity upon the territory of another nation and enters formal agreements with those nations that is being occupied by the Commonwealth of Australia granting free, prior, and informed consent to do establish the Commonwealth of Australia.

Treaty

Australia, the Belligerent Occupier

A formal agreement or treaty will be a necessity, something that should have been done at the very start of the European settlement of the Australian continent, or something that should

[53] Black's Law Dictionary 9th Edition
[54] LexisNexis Concise Australian Legal Dictionary 4th Edition
[55] Black's Law Dictionary 9th Edition

have been done with the establishment of the Commonwealth of Australia, *"Until we have acknowledged that that we will be an incomplete nation and a torn people. We only have to look across the Tasman to see how things could have been done better. Thanks to the Treaty of Waitangi in New Zealand two peoples became one nation…our challenge is to do now in these times what should have been done 200 or 100 years ago…to embrace the future as a united people."*[56]

There is no formal agreement or treaty that the Commonwealth of Australia can use to prove that it has the validity to make laws for the peace, order, and good government for all peoples present in the geographical location known as Australia and surrounding islands. By all contemporary standards the Commonwealth of Australia is little more than a belligerent occupational entity, in the full sense of *"Belligerent occupation- condition arising when a state occupies territory of another sovereign State and does not attaint sovereignty over the territory"*[57]

Treaty

The Commonwealth of Australia cannot grant a formal agreement or treaty to the numerous continuing pre-settler Indigenous Nations, as it is the belligerent occupational entity that is within the territories and jurisdictions of the numerous continuing pre-settler Indigenous Nations, basically the Commonwealth of Australia has very little to bring to the negotiation table other than administration abilities.

There are States of Australian that are claiming to be entering into treaty negotiations with the indigenous Australians within their states. There are a number of concerns regarding this situation, firstly it is the Commonwealth of Australia, that is empowered by section 61 *"Executive Power"*[58] of the Australian Constitution, that enters into formal agreements and or treaties with other sovereign states, and this would include such negotiations with the numerous continuing pre-settler Indigenous Nations whose sovereignty co-exists with that of the Crown. Anything less than that is not a treaty in the true sense of the word, *"…no amount of wishful thinking will make these agreements treaties or their signatories nations, in law or reality, in the way many indigenous people desire…Not only could the Australian Parliament legislate to abrogate treaty provisions or nation status but, to the extent that state-authorising legislation was inconsistent with Commonwealth enactments, it would be*

[56] Tony Abbott MP, Aboriginal and Torres Strait Islander Recognition Bill 2012, second reading speech 13th February 2012
[57] Dictionary of International & Comparative Law 3rd Edition
[58] Commonwealth of Australia Constitution Act

unconstitutional. These are treaties that do not bind, nations that in law will not exist and sovereignty that carries no authority…another worthless gesture by white Australia."[59].

The various States of Australia do not possess the plenary authority to enter into treaties in the true sense of the word, for their *"…Constitutions…now have their source in section 106…of the Commonwealth of Australia Constitution Act…"*[60] and that *"There is no proper constitutional relationship between the governments of the States of Australia and the government of another country…"*[61]

Treaties must be entered into by equals, for that means *"…sovereign equality and independence of all States"*[62] and it is through these sovereignties that co-exists referred to in the Uluru Statement that the parties to a treaty are considered as sovereign equals.

Treaty of Waitangi

Before proceeding with the Treaty of Waitangi, it must be comprehended that the current situation in New Zealand and its relationship with its ex-colonial master is very similar to the relationship between the Commonwealth of Australia and the same ex-colonial master. The current evolution of the decolonisation process is whereby the United Kingdom is a separate and distinct nation to that of the Commonwealth of Australia and New Zealand. *"Laws enacted at Westminster will not apply of their own force in Australia even if expressed to do so… The original authority for our constitution was the United Kingdom Parliament, but the existing authority as its continuing acceptance by the Australian people…The United Kingdom Parliament could…repeal the Statute of Westminster. It could repeal the Commonwealth of Australia Constitution Act. But such repeals would have no effect in Australia."*[63] demonstrates that these nations are separate and distinct nations created pursuant to their separate and distinct constitutions, the same applies to New Zealand and the Treaty of Waitangi.

The treaty of Waitangi was between the British monarch Her Majesty Victoria, Queen of the United Kingdom of Great Britain and Ireland and the Native Chiefs of the tribes.

Though there is mention of the Treaty of Waitangi, this is another situation in which the New Zealand nation does not have the free, prior, and informed consent to be the administrative

[59] Greg Craven, vice-chancellor Australian Catholic University, media release the Australian, 17th December 2016
[60] Bistricic *v* Rokov (1976) 135 CLR 552
[61] Bistricic *v* Rokov (1976) 135 CLR 552
[62] Vienna Convention on the Law of Treaties, preamble
[63] Bistricic *v* Rokov (1976) 135 CLR 552

nation over that geographical location. The Treaty of Waitangi was a treaty negotiated between the Maori Nations and the British with no transfer clause, in which any party can unilaterally transfer the rights and obligations as negotiated be transferred to another entity that was never party to the negotiations. Under the Treaty of Waitangi, Her Majesty the Queen of England extended her royal protection of the Maori peoples and imparts to them all the rights and privileges of British subjects. As the New Zealand Parliament acknowledges that the Treaty of Waitangi is still valid and binding, then the Maori peoples would still be extended the royal protection of Her Majesty the Queen of England and not the Queen of New Zealand.

The citizens of New Zealand are not afforded the rights and privileges of British subjects, or the royal protection of Her Majesty the Queen of England, they are New Zealand citizens. The Maori nations in theory, could request that Her Majesty uphold that royal protection to protect their nations from the New Zealand Nation. What would be the situation should Her Majesty the Queen of England fail to uphold the terms of the treaty and afford the royal protection against a nation that was not party to the treaty and occupying the territories of the Maori nations without their free, prior, and informed consent?

Solution?

Resolved Together = Unification

The Commonwealth of Australia must question what exactly it is trying to achieve with the constitutional recognition of the Aboriginal Torres Strait Islander peoples. Is this to achieve the ability to make laws for the peace, order, and good government in accord with section 51 of the Australian Constitution, or is it to achieve reconciliation with the Aboriginal and Torres Strait Islander people, or is it to create an entry point for the members of the numerous continuing pre-settler Indigenous Nations to be able to participate in the life of the Commonwealth of Australia in accord with article 5 of UNDRIP?

There can only be one way of achieving long lasting settlement of the past and security of the future to the misdeeds that the Commonwealth of Australia inflicted upon itself with its discriminatory practices of the past. This can neither be done internally in the Commonwealth of Australia, nor can it be done alone by the Commonwealth of Australia.

The first step that can be done by the Commonwealth of Australia is to conduct a poll of the Australian citizens to gauge if they want to allow the members of the numerous continuing

pre-settler Indigenous Nations to unite under the Australian Constitution and Crown and participate fully in the life of the Commonwealth of Australia if they so choose.

This step can only be done within the Commonwealth of Australia and is to remove the discriminatory "White Australia" policy at the heart of the inception of the Commonwealth of Australia. It further demonstrates the willingness of the citizens of the Commonwealth of Australia; the free, prior, and informed consent to empower the executive of the Commonwealth of Australia to enter into formal agreements or treaties with the numerous continuing pre-settler Indigenous Nations for the benefit of all Australian citizens in which the ultimate authority lies in accord with section 128 of the Australian Constitution.

The members of the continuing pre-settler Indigenous Nation must also conduct a poll of their members to gauge the support of that nation as to if its members want to participate fully in the life of the Commonwealth of Australia under the Australian Constitution and Crown or through some other formal agreement according to the terms and conditions of that formal agreement or treaty. These continuing pre-settler Indigenous Nations are empowered by the citizenry of that nation to enter into formal talks with the Commonwealth of Australia in offering a treaty or formal agreement and or to appoint the Commonwealth of Australia as an administrator for their territory and or the representative person for issues of international significance that may be affecting the continuing pre-settler Indigenous Nation.

It is through the appointment of an equivalent (to the Commonwealth of Australia) governing representative body of the continuing pre-settler Indigenous Nation that any negotiations, consultations and co-operation take place, *"Indigenous peoples and individuals have the right to belong to an indigenous community or nation…"*[64] and *"Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures…"*[65] and *"States shall consult and cooperate…with the indigenous peoples concerned through their own representative institutions…"*[66] and that the Commonwealth of Australia can uphold its intention by ratifying the UNDRIP in 2009 without creating division and discrimination within the Australian polity. This process is unification when compared to the current path that is becoming more divisive..

[64] United Nations Declaration on the Rights of Indigenous Peoples, Article 9
[65] United Nations Declaration on the Rights of Indigenous Peoples, Article 18
[66] United Nations Declaration on the Rights of Indigenous Peoples, Article 19

It is these actors in their true and correct standings, as sovereign equals, that are empowered by their citizens to reconcile the past, to settle the past and secure the future for their citizenry.

Equality within Australia Paramount

This is the only way things can proceed without creating any further issues of inequality within the Commonwealth of Australia, it is the only way that the Commonwealth of Australia can reconcile the past, it is the only way that the Commonwealth of Australia can uphold its intentions of UNDRIP.

"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," the statement said.

"A constitutionally enshrined additional representative assembly for which only Indigenous Australians could vote for or serve in is inconsistent with this fundamental principle."[67]

All Australian citizens are equal, all Australian citizens are conferred the same rights and obligations at the time of citizenship, and yes Pauline Hanson got no more or no less rights and obligations than any other Australian citizen, she got the same terms and conditions of membership within the Commonwealth of Australia as those Australian citizens held by people who are of the Aboriginal or Torres Strait Islander race, descent or heritage.

Forum

"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institution in order to obtain their free, prior and informed consent…"[68]

The forum or point of consultation and cooperation cannot be within the Commonwealth of Australia, as all within the Commonwealth of Australia is for the Australian citizens who by their very nature, are the State *"…therefore any member of such a community may be looked upon is its organ…"*[69], and not of the other nations that may participate in *"the life of the State"*[70] if they so choose. Similarly, this forum cannot be within any one of the numerous continuing pre-settler Indigenous Nations, as this impacts upon the ancient protocols of these

[67] Prime Minister Malcolm Turnbull, media release, ABC News, 26th October 2017
[68] United Nations Declaration on the Rights of Indigenous Peoples, Article 19
[69] Hans Kelsen, "Pure theory of Law"
[70] United Nations Declaration on the Rights of Indigenous Peoples, Article 5

Indigenous Nations, one Indigenous Nation cannot talk for or on behalf of another Indigenous Nation.

To have an advisory committee based on race that can alter or affect legislation within the Commonwealth of Australia and can unduly influence that legislation in favour of a group of Australian citizens based on race is discriminatory and divisive, as highlighted by the comments of Senator Pauline Hanson. If we want this process to be unifying and beyond challenge within the Australian Courts, then there can only be one solution to this self-inflicted harm.

As in any international negotiations, there must be a neutral forum created by agreement of the parties concerned in which those negotiations are conducted, whereby the parties concerned can air points of view without impacting on the sovereignty of each sovereign state or being considered as discriminatory to one group of citizens based on race within the States concerned. The Aboriginal Australians have no more rights or duties than the Chinese Australians, the British Australians, or the Australian Australians, they are all Australian citizens under the Australian Constitution.

However, the people who can identify with, and have connection to the numerous continuing pre-settler Indigenous Nations have the ability, and right, to go back to that pre-settler Indigenous Nation and revitalise that Nation under the acknowledged sovereignty that co-exists with the sovereignty of the Crown, using the UNDRIP as a roadmap to settle the past and secure the future with the Commonwealth of Australia and their Indigenous Nation.

Conclusion

Is the Commonwealth of Australia just 'kicking the treaty can down the road' in an attempt to delay the inevitable, one where the numerous continuing pre-settler Indigenous Nations revitalise their sovereignty and authority over their respective territories, *", it does not prevent them from asserting their own independence and continuing validity of their laws and customs"*[71]?

What will be the position of the Commonwealth of Australia should one of the continuing pre-settler Indigenous Nations offer negotiations with the Commonwealth of Australia with the aim of granting the Commonwealth of Australia the free, prior, and informed consent for the Commonwealth of Australia to administer their territory and be the international

[71] Megan Davis, George Williams, "Everything you need to know about the referendum to recognise indigenous Australians", page 121

representative in international affairs, and settle the past and secure the future? Will the Commonwealth of Australia accept or decline this offer?

What will be the position of the Commonwealth of Australia if the Commonwealth of Australia decline the offer and the continuing pre-settler Indigenous Nation offers that consent of administration and representation to another member state of the United Nations? Can the Commonwealth of Australia afford this situation eventuating?

Please do not bring the Australian Constitution into further disrepute and correct the foundational error from the past properly. We as the holders of Australian citizenship must have the will to make the change of the intention of the Australian Constitution and invite the members of the numerous pre-settler Indigenous Nations to take their positions as Australian citizens of equal stature, we must make it appealing to them to unite with us for they are not compelled to do so.

This can be truly a time of unification and the strengthening of the Commonwealth of Australia to be a world leader in governance of the people for the people, or it can be just another blight on the already tarnish historical record of Australia.

I thank the Commonwealth of Australia for providing this platform enabling all Australian citizens the opportunity to express views and concerns that affect our Constitution, institutions and citizens.

Peter Wayne Fisher
[redacted]

11th May 2018