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Unfinished business: addressing Australia's constitutional gap and the non-recognition of First Nations peoples from the perspectives of international law and multinational federalism

HUMR5200

Thesis in The Theory and Practice of Human Rights

Number of words: 19499

Submission deadline: 1st December 2020

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Acknowledgements

Foremost, I would like to thank my supervisor Inger-Johanne Sand for her invaluable advice, encouragement and guidance throughout this process.

This thesis would not have been possible without the many wonderful, caring and generous friends and family members I had supporting me along the way. Special thanks goes to my mum, Robin, for the constant support, cheerleading and 'home-cooked' meals. To my brother Nic and my sister Tam, for their patience and support. And to Kate, Kylie, Nina and Erling – thank you for making me feel like I wasn't in it alone.

And lastly, I would like to acknowledge and pay my respects to Aboriginal and Torres Strait Islanders peoples, their elders and ancestors, and acknowledge they were the first peoples of Australia. In particular I wish to acknowledge the Noongar people as the traditional custodians of the land in which part of my research was undertaken.

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Abbreviations

AGP	Aboriginal Provisional Government
COAG	Council of Australian Governments
EMRIP	UN Expert Mechanism on the Rights of Indigenous Peoples
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IPA	Institute of Public Affairs
RANZCP	Royal Australian and New Zealand College of Psychiatrists
RDA	Racial Discrimination Act 1975
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
WGIP	Working Group on Indigenous Populations

1. Introduction

The debate on how to constitutionally recognise Australia's First Nations peoples[1] has been ongoing for more than two decades.[2] While the debate endures, 'stark disparities' persist between First Nations peoples and Australia's non-indigenous population.[3] Indeed from her most recent visit to Australia, the current Special Rapporteur on the rights of indigenous peoples reported that she was 'deeply disturb[ed]' at the prevalence of racism, the 'extraordinarily high rate of incarceration' of First Nations peoples and the 'shocking rate' of suicide.[4] The Special Rapporteur found also that the quality of life indicators for First Nations peoples had 'deteriorated significantly' since 2009 when her predecessor visited Australia.[5]

Evidently, the social and economic disadvantage facing most indigenous Australians today is a 'national crisis'.[6] The dimensions of this crisis demonstrate that indigenous affairs have been 'an area of longstanding and comprehensive policy failure' by the Australian Government.[7] Reform is needed, and given the current state of disagreement on how to constitutionally recognise First Nations peoples, much work is needed to find the solution.

In May 2017, First Nations peoples from across the country gathered together to collectively present the 'Uluru Statement from the Heart' ('Uluru Statement) to the Australian Government.[8] The document calls for 'substantive constitutional change and structural reform', in order to address the 'torment of [their] powerlessness' and

[1] This thesis will use the term 'First Nations peoples' to collectively refer to Aboriginal and Torres Strait Islander peoples in Australia.
[2] See, eg, Aboriginal and Torres Strait Islander Commission, 'Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures' (1995) 1 *Australian Indigenous Law Reporter* 76, 78.
[3] Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) [11] ('Special Rapporteur Report').
[4] Ibid [30],[52] and [66].
[5] Ibid [11].
[6] Standing Committee on Aboriginal and Torres Strait Islander Affairs, *House of Representatives,* 'Doing Time – Time for Doing: Indigenous youth in the criminal justice system' (Report, 20 June 2011) [2.4].
[7] Michael Dillon and Neil Westbury, 'Indigenous affairs: how we're choosing by not choosing', *Inside Story* (19 June 2019).
[8] Uluru Statement from the Heart (2017)<https://www.1voiceuluru.org/the-statement/>('Uluru Statement').

empower their people to take their 'rightful place' in their own country. The Uluru Statement sets out a 'roadmap to recognition', commencing with constitutional entrenchment of a First Nations Voice to Parliament ('Voice'), then the establishment of a Makarrata Commission to supervise a process of treaty-making ('Treaty') and a 'truth-telling about our history'. While the proposal for truth-telling is relatively uncontroversial, the Australian Government has rejected[9] the claims of First Nations people that the Voice and Treaty proposals are necessary to address the structural dimensions of this national crisis, and will result in a 'fuller expression of Australia's nationhood'. Accordingly, this thesis focuses on those two proposals and ultimately rebuts the Australian Government's assertion that they 'undermine the principles of unity and equality' underpinning Australia's constitutional democracy.

1.1 Research objectives

Against this backdrop, this thesis addresses constitutional recognition from the complimentary perspectives of international law and multinational federalism. My research addresses this deadlock in the recognition debate, with the main aim to provide normative arguments supporting Australia's adoption of the Uluru Statement. In particular, my objective is to critically engage with the arguments that have continued to block the advancement of First Nations peoples' demands for so long. As a non-indigenous scholar, my contribution comprises of reasons as to why, within Western frames of understanding rights and legitimate state rule, Australia should adopt the Voice and Treaty proposals laid out in the Uluru Statement. In this sense, I demonstrate how Western law and theory can be used as tools to advance the agendas of First Nations peoples and in fact support democratic cohesion for all.

1.2 Research questions

This thesis is primarily guided by the question: how do the Voice and Treaty proposals fit within the principles of Western legal and political thought? And more specifically, how can First Nations peoples use these frameworks as tools to advance their agenda, as articulated in the Uluru Statement? These guiding questions are broken down into the

[9] Senator The Hon. Nigel Scullion, 'Response to Referendum Council's report on Constitutional Recognition' (Media Release, 26 October 2017) <https://ministers.pmc.gov.au/scullion/2017/response-referendum-councils-report-constitutional-recognition>('Response Statement').

following sub-questions, which respectively drive Chapters Three, Four and Five: how do the Voice and Treaty proposals fit within Australia's obligations under international human rights law? How can these proposals be reconciled with the principles of liberalism that underlie Australia's democratic system of government – particularly the principles of equality and unity? Lastly, how are these proposals compatible with Australia's constitutional framework and culture?

1.3 Research design

This thesis adopts an interdisciplinary approach to answer these questions, mixing methods in both law and political theory. The choice for interdisciplinarity was influenced by the complex nature of the topic. This is a topic where 'no discipline has a monopoly on the answer.'[10] The debate's trajectory shows that only a radical rethinking of the issue will produce a solution. In this sense, this thesis aims for what former Chief Justice of the Australian High Court Robert French terms 'informed prophecy' as to the future of Australian constitutionalism. While the judge must stick within strict legal boundaries, the scholar: [11]

> [C]an range across large fields of history, political, social and economic sciences and public policy. That scholar can describe, analyse, explain, criticise, synthesise and even prophesy. Informed prophecy will give rise to new perceptions of possible future histories depending upon choices made and pathways taken by the various actors in the field. In doing these things, the constitutional scholar can stand back and reflect upon what has happened, what is happening and what is likely to happen in Australian constitutionalism without having to erect 'no entry' signs between its political and legal suburbs.

As such, the following thesis embarks on the ambitious goal of 'informed prophecy' – creating a hopeful vision for a future Australia built on diversity and harmony rather than

[10] Malcolm Langford, 'Interdisciplinarity and Multimethod Research' in Bård Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights* (Elgar 2017) 161,183.

[11] Robert French, 'The Future of Australian Constitutionalism' (Speech, International and Comparative Perspectives on Law: A 21st Anniversary Celebration for the Centre for Comparative Constitutional Studies, Melbourne, 27 November 2009) <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj27nov09.pdf>, 2.

uniformity and oppression. In doing so, it transcends the borders that separate the legal, political, historical and social suburbs of Australian constitutionalism.

The methodological approach taken in each chapter is as follows. Chapter Two contextualises the relevant issues and familiarises s reader with the nuances of the Australian case. Its main contribution is a presentation of external Australian legal history in Section 2.2, which is essentially a history of law in practice: 'of legal institutions at work in society rather than legal rules existing in a social, economic, and political vacuum.'[12] Chapter Three locates Voice and Treaty proposals within the framework of self-determination and advances a *lex lata* analysis of Australia's obligations under international human rights law. The discussion primarily focuses on the sources of law specified in art 38(1) of the *Statute of the International Court of Justice*, and is buttressed with political and historical analysis to add an external perspective on the development of self-determination. This section also draws on the rules of interpretation outlined in the *Vienna Convention on the Law of Treaties* ('VCLT').[13] Chapter Four advances the moral case for the Voice and Treaty proposals, by translating them into the framework of multinational federalism. Using the method of applied normative theory, I specifically apply Canadian Professor Will Kymlicka's theory of multicultural liberalism. Chapter Five applies Australian constitutional law and theory to counter the arguments, prevalent within Australian political and popular discourse, that the Voice and Treaty proposals are inconsistent with features of Australian constitutionalism.

1.4 Ethical considerations

My choice of topic and methodology raise ethical issues, not least because I employ two tools – liberalism and international law – which have historically, have facilitated imperialism and the colonisation of indigenous peoples around the world.[14] However Chapters Three and Four demonstrate, the use of these norms has changed in an attempt to remedy the historical injustice and current inequalities facing indigenous peoples. As

[12] David Ibbetson, 'Historical Research in Law', in Mark Tushnet and Peter Cane, *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005).
[13] Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
[14] Will Kymlicka, 'Beyond the Indigenous/Minority Dichotomy?' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart, 2011)183, 183.

James Anaya, former UN Special Rapporteur on the rights of indigenous peoples, argues: 'international law, although once an instrument of colonialism, has developed and continues to develop, however grudgingly and imperfectly, to support indigenous peoples' demands'.[15] Further Chapter Three explains how, international law and the provisions of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP')[16] were a 'key influence on the decision-making' behind the Uluru Statement.[17] In terms of the broader human rights discourse, prominent Aboriginal lawyer and professor Megan Davis supports its employment 'in the relationship with the State [as] a powerful and effective tool.'[18]

The *AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research* ('AIATSIS Code') has also influenced my research choices.[19] Recognition of, and respect for, the right to self-determination of First Nations peoples is the first principle of the AIATSIS Code,[20] which is why Chapter Three prioritises this right in its treatment of Australia's legal obligations. Pursuant to the second principle to respect indigenous led-research, I have also endeavoured to highlight and engage with First Nations peoples' perspectives, knowledge and data throughout my research process.[21]

1.5 Relevance and contribution

As prominent Australian constitutional law scholar Dylan Lino notes, Australian legal scholarship into constitutional recognition presently lacks theoretical grounding.[22] Lino argues that in this context, 'theory is vital': 'Thinking more deeply about the central concept through which these debates are channelled helps to clarify the normative claims underlying it, the social and political preconditions for achieving it and the kinds of

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[15] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 1996)4.
[16] GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).
[17] Sean Brennan and Megan Davis, 'First Peoples' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018)35.
[18] Megan Davis, 'The Recognition of Aboriginal Customary Law and International Law Developments' in Greg Marks (ed), *Indigenous Peoples: International and Australian Law* (International Law Association, 2006) 25, 27.
[19] AIATSIS, *Code of Ethics for Aboriginal and Torres Strait Islander Research* (2020)<https://aiatsis.gov.au/research/ethical-research/code-ethics>.
[20] Ibid [1.1].
[21] Ibid [1.2.a],[2.5].
[22] Dylan Lino, *Constitutional Recognition: First Peoples and the Australian State* (Federation Press, 2018) 4-6,69.

political projects supported by it."[23] Further, while the application of federalism to this area is growing,[24] it remains an underexplored area[25] with none of those applications adopting an interdisciplinary approach grounded in the legal framework of the right to self-determination. Accordingly, this thesis therefore addresses an important gap in the literature and makes an original and timely contribution to an important and complex area of public policy debate.

[23] Ibid 69.
[24] For scholarship engaging with federal theory, see ibid; Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016); Harry Hobbs, 'Aboriginal and Torres Strait Islander Peoples and Multinational Federalism in Australia' (2018) 27(3) *Griffith Law Review* 307; Michael G. Breen, 'Federalism, constitutional recognition and Indigenous Peoples: how a new identity-based state can be established in Australia' (2020) 55(3) *Australian Journal of Political Science* 311; Jane Robbins, 'A nation within? Indigenous peoples, representation and sovereignty in Australia' (2020) 20(2) *Ethnicities* 257.
[25] Lino, *Constitutional Recognition,* above n 22, 217.

2. Background to the recognition debate in Australia

This chapter traverses key features of the Australian social, political, legal and historical landscape to demonstrate the crisis currently faced by First Nations peoples is a result of governmental failure to legally recognise them, to protect their culture and allow them to participate in decision-making on matters that affect them. It is, as the Uluru Statement says, 'the torment of [their] powerlessness'.[26] The chapter first begins by outlining the social dimensions of this crisis, before tracing the history of Australian laws and policies in Australia that entrench the structural disempowerment of First Nations peoples. With necessary brevity, I divide this important, nuanced and complex history into four periods which while overlapping temporally are distinguished by the different policy objectives of the Australian state. Chapter Two concludes by canvassing the proposals for change, and elaborating on the Voice and Treaty proposals outlined in the Uluru Statement.

2.1 Current situation facing First Nations peoples

First Nations peoples currently face a dark and overwhelming picture. They are proportionately the most incarcerated people in the world, representing one in four prisoners,[27] despite constituting around 3.3% of the total Australian population.[28] For youth in detention, the statistics are even more dire, with 48% of juveniles in custody being First Nations.

The widening gap between First Nations and non-indigenous levels of health is equally as alarming. In 2007 the Council of Australian Governments ('COAG'), a body which represents the Commonwealth, State, Territory and local governments, developed the 'Closing the Gap' strategy aimed at equality for First Nations peoples in health status and life expectancy.[29] Applying a human rights framework, the strategy sets seven specific

[26] Uluru Statement, above n 8.
[27] Jens Korff, 'Aboriginal prison rates', *Creative Spirits* (online, 22 November 2020) <https://www.creativespirits.info/aboriginalculture/law/aboriginal-prison-rates>.
[28] The latest population estimates of First Nations peoples are from the 2016 census: Australian Bureau of Statistics, 'Estimates of Aboriginal and Torres Strait Islander Australians', reference period June 2016, released 31 August 2018, <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release>.
[29] Council of Australian Governments, 'Communique', 20th meeting, Melbourne (20 December 2007)

targets for governments in respect of gaps in infant mortality, education, employment and life expectancy. The twelfth report released earlier this year found that while early childhood education and year 12 attainment were on track, the other five targets had little to no improvement, with the life expectancy gap widening since 2019.[30] This correlates with the increasing suicide rates amongst First Nations peoples, with suicide the fifth leading cause of death;[31] and First Nations youth almost four times more likely to commit suicide than their non-indigenous peers.

This year, the official monitors of the COAG's implementation of the Closing the Gap strategy - the Closing the Gap Steering Committee – condemned the governments' lack of progress,[32] and directly attributed it to a failure to 'address the structural and systematic discrimination that inhabits [First Nations] cultures, and to undertake the reforms needed to truly embrace a culturally centred approach.' Accordingly the Committee called for 'system reforms that support Indigenous ways of knowing, being and doing in health policies, programs and services – approaches that centralise self-determination and respect their voices and choices.'[33] Both of the Royal Australian and New Zealand College of Psychiatrists ('RANZCP') and the Western Australian Centre for Health Promotion Research concur with the Committee in emphasising the centrality of constitutional recognition to addressing the current inequalities faced by First Nations peoples.[34] The RANZCP in particular called for Australia 'as a nation' to 'take the steps to put right what can be put right and to provide appropriate restitution to the communities and individuals who have been injured by historical policies.'[35]

<https://www.coag.gov.au/sites/default/files/communique/communique-20-dec-2007.pdf>.

[30] Commonwealth of Australian Government, Department of the Prime Minister and Cabinet, *Closing the Gap Report 2020* (online) <https://ctgreport.niaa.gov.au/sites/default/files/pdf/closing-the-gap-report-2020.pdf>.

[31] Jens Korff, 'Aboriginal suicide rates', *Creative Spirits* (online, 13 August 2020) <https://www.creativespirits.info/aboriginalculture/people/aboriginal-suicide-rates#:~:text=Western%20Australia%20leads%20the%20Aboriginal,and%20twice%20the%20Queensland%20rate.>.

[32] Lowitja Institute for the Close the Gap Steering Committee, *Close The Gap* (Report, March 2020).

[33] Ibid 9-10,12,13.

[34] Cited in Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (Report, 2012) 40, 41.

[35] Ibid.

2.2 History of indigenous-state relations

2.2.1 Extermination and exclusion

When the British arrived to Australia in 1770 there were around 1 million First Nations peoples already living there,[36] making up over 250 distinct nations.[37] Despite this the British decided Australia was practically uninhabited – enough at least to justify the British colonisation on the basis of *terra nullius*.[38] Then, *terra nullius* was a well-established doctrine of international law, justifying the acquisition of territory by occupation (as opposed to conquest of the territory's inhabitants or cessation by treaty with them).[39]

For present purposes, two comments can be made. First, is that the application of this doctrine meant the automatic application of English common law and the effective extinguishment of First Nations sovereignty.[40] The second point of note, however, was that First Nations sovereignty was never recognised. In order for the *terra nullius* doctrine to apply, the land had to be either uninhabited, or inhabited only by 'backwards people', who were not 'organized in a society that was united permanently for political action.'[41] This was justified on the bases that occupation would bring the 'benefits of Christianity' to such people and that Europeans had a 'right' to bring uncultivated lands into production. The legitimacy of British occupation therefore required First Nations peoples to be a 'lawless peoples' and to give 'no cause to negotiate the acquisition of their territory'.[42] But in reality, this was far from the situation. These nations were 'rich and diverse' nomadic, hunter-gather societies living according to a complex system of laws and customs.[43] Aboriginal lawyer and academic Larissa Behrendt explains further the special relationship First Nations peoples had with the land:[44]

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[36] Larissa Behrendt, 'Doctrine of Discovery', in Robert J. Miller, Jacinta Ruru, Larissa Behrendt and Tracey Lindberg (eds) *Discovering Indigenous Lands* (Oxford University Press 2010) 171,175;
[37] Expert Panel, above n 34, 22.
[38] Ibid.
[39] William Blackstone, *Commentaries on the Laws of England: On Four Books (1723-1780),* (London: T. Tegg, 17th ed, 1830) vol 1, 106-107.
[40] Ibid; Behrendt, above n 36.
[41] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*') [33] (Brennan J).
[42] Ibid.
[43] Behrendt, above n 36, 176.
[44] Behrendt, above n 36, 173.

> People had affiliations with tracts of country and had the right to hunt and feed in certain areas and to perform religious ceremonies in certain places. These custodians were also responsible for ensuring that the resources of a certain area were maintained.

Further, First Nations peoples strongly resisted this British 'occupation' once realising their presence was permanent.[45] This resistance took the form of a violent, guerrilla-style warfare commonly referred to as the 'frontier wars', which continued even up into the early 1930s as the British colonists 'pushed further into the interior.'[46] During this time First Nations peoples were progressively 'dispossessed, massacred, and subjected to dwindling food resources and European diseases.'[47] By the 1920s, it is estimated that the population of First Nations peoples had declined by 96%.[48]

The 'savage frontier conflict' directly challenged the application of *terra nullius,* as it clearly establishing that the British took Australia by force rather than by occupation.[49] To preserve the fiction of *terra nullius,* the 'old orthodoxy' of Australian legal historiography was silent on the conflict and resistance.[50] Instead, it recounted an 'essentially peaceful' European occupation, and explained the demise of the First Nations race with Darwinist assumptions about biological inferiority.[51] Apparently, when faced with the superior white race, these 'stone-age', 'miserable Aborigines'[52] were 'incapable of surviving'[53] and

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[45] Behrendt writes that: 'Oral histories from the Sydney region show that Aboriginal people had not expected British presence to be permanent. As it became clear that the British were staying, conflict and tensions with local Aboriginal tribes increased': Behrendt, above n 36, 176.
[46] Expert Panel, above n 34, 23. The Coniston massacre of 1928 is one of the last documented massacres of First Nations Peoples: see further Andrew Markus, *Governing Savages* (Allen & Unwin, 1990) 3.
[47] Jennifer Nielsen, 'Breaking the Silence: The Importance of Constitutional Change', in Simon Young, Jennifer Nielsen and Jeremy Patrick (eds), *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (Federation Press, 2016) 2, 6.
[48] John Harris, 'Hiding the bodies: the myth of the humane colonisation of Aboriginal Australia' (2003) 27 *Aboriginal History* 79, 81.
[49] '[U]ltimately the basis of settlement in Australia is and always has been the exertion of force by and on behalf of the British Crown. No-one asked permission to settle. No-one consented, no-one ceded. Sovereignty was not passed from the Aboriginal peoples by any actions of legal significance voluntarily taken by or on behalf of them': Expert Panel, above n 34, 22.
[50] Bob Reece, 'Inventing Aborigines' (1987) 11 *Aboriginal History* 14, 16.
[51] Harris, above n 48, 81.
[52] John Wrathall Bull, *Early experiences of life in South Australia and an extended colonial history* (ES Wigg & Son, 1884) 72.
[53] Harris, above n 48, 82.

'simply faded away'.[54] A convenient alternative to facing the true reasons for their depopulation: 'massacre, sexual abuse and disease.'[55]

By the end of the nineteenth century the British had established six colonies, being New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania. These colonies were self-governing, though the British parliament at Westminster retained ultimate power over them.[56] By the 1890s, a movement towards federation was growing and a series of constitutional conventions took place to draft a new federal constitution. This new constitution was then approved in referendums held between 1898 and 1900, and after ratification of the colonies, was presented to the Imperial Parliament for its enactment in 1901.[57]

The *Constitution* was heralded as the 'outcome of exhaustive debates, heated controversies, and careful compromises', and celebrated for representing 'the aspirations of the Australian people in the direction of nationhood, so far as is consistent and in harmony with the solidarity of the Empire'.[58] Importantly, this idea of the 'Australian people' did not include First Nations peoples: they were excluded from the drafting process for the *Constitution*, unable to vote for delegates to the constitutional conventions, and then subsequently excluded from the eventual voting on the *Constitution*.[59]

This exclusion from the constitutive process was then reflected in the text of the *Constitution* at federation, which consisted of 'patent racial exclusions'[60] and reflected the desire Australia 'be one people, and remain one people without the admixture of other races'.[61] Section 127, for example, expressly excluded First Nations peoples from the census, stating that: 'In reckoning the numbers of the people of the Commonwealth, or

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[54] Reece, above n 50, 16.
[55] Harris, above n 48, 83.
[56] Expert Panel, above n 34, 13.
[57] *Commonwealth of Australian Constitution Act 1900* (UK) ('*Constitution'*); Expert Panel, above n 34, 13.
[58] John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1910)vii.
[59] Expert Panel, above n 34, 13-19.
[60] Nielsen, above n 47, 31.
[61] Alfred Deakin (Australia's first Attorney-General), cited in Marcia Langton, 'The Nations of Australia' (2002) 4 *Balayi* 29, 29.

of a State or other part of the Commonwealth, aboriginal natives shall not be counted.' This provision purported to prevent certain States from 'using their large Aboriginal populations' in order to gain a greater share of taxation revenue and seats in the federal Parliament.[62] Even s 51(xxvi), which conferred power on the Commonwealth to make laws with respect to 'the people of any race', was qualified so as to exclude 'the aboriginal race in any State.'

Scholars have noted that records of the constitutional conventions confirm the drafters essentially 'paid no attention at all to position of the Australian aboriginal race', with no delegate seeming to have considered 'even in passing that there might be some national obligation to Australia's earliest inhabitants'.[63] As explained by Professor Geoffrey Sawer, this indifference was mostly due to the same Darwinist assumptions reinforcing the *terra nullius* fiction, that 'aborigines were a dying race whose future was unimportant.'[64]

As such there was little discussion of the effect of their exclusion from the scope of the *Constitution* and 'no acknowledgment of any place for them in the nation created by the Constitution.'[65]

2.2.2 Protection and assimilation

Subsequently, the belief that First Nations peoples were a vulnerable and inferior race 'headed towards extinction' came to justify oppressive legal control of First Nations peoples in the name of 'protection'.[66] From 1860, the colonies each appointed a 'Chief Protector' whose primary obligation was to watch over the interests of First Nations peoples and to 'smooth the dying pillow'.[67] By 1912 all mainland States, along with the Northern Territory, had enacted similar 'protective' legislation, collectively known as the 'Aborigines Acts'.[68] These Aborigines Acts required First Nations peoples to live on reserves where a Chief Protector or Protection Board closely monitored and controlled

[62] Expert Panel, above n 34,14.
[63] Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17, 17-18.
[64] Ibid 18.
[65] Expert Panel, above n 34, 18.
[66] Ibid 24.
[67] Toni Buti, 'Aboriginal Children: "They took the children away"' (1995) 20(1) *Alternative Law Journal* 35, 35.
[68] Expert Panel, above n 34, 25.

most aspects of their lives. In the name of 'protection', for example, First Nations peoples' capacity to marry, work and travel was strictly regulated.[69]

'Protection' also involved removing children of mixed First Nations and European descent from their families. Ideally, they would eventually 'merge' into the non-indigenous population by working for non-indigenous families.[70] For example, at the 1937 Commonwealth-State Native Welfare Conference,[71] the delegates of the States agreed that 'assimilation' should be the policy aim of all 'native welfare measures':[72]

> [T]his conference believes that the destiny of the natives of aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to that end.

This policy of assimilation was again endorsed at the 1961 Native Welfare Conference, in slightly amended language:[73]

> [A]ll Aborigines and part-Aborigines are expected eventually to attain the same manner of living as other Australians and to live as members of a single Australian community, enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, hopes and loyalties as other Australians.

Disguised under this terminology of 'rights and privileges', however, was the same discriminatory policy. Pursuant to this policy, as many as one in three First Nations children were forcibly removed from their families and communities in the period between 1910 and the 1970s.[74] Meaning that most, if not all, First Nations families during this time experienced the trauma of forced removals.[75]

It was not until 1972 that these policies of protection and assimilation were officially abandoned. Until this time, as the Expert Panel notes, the law was 'characterised by

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[69] See further Nielsen, above n 47, 6-7.
[70] Human Rights and Equal Opportunity Commission, 'Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Straight Islander Children from Their Families' (Commonwealth of Australia, 1997) ('Bringing Them Home Report'), 24.
[71] Ibid 26.
[72] Ibid.
[73] Expert Panel, above n 34, 26.
[74] Bringing Them Home Report, above n 70, 31.
[75] Ibid.

systematic racial discrimination', and 'virtually all aspects of the lives of Aboriginal peoples were subject to control'.[76]

2.2.3 Acknowledgement and accommodation

There were some changes in the law before this time, however, that marked the beginnings of a new era of indigenous-state relations. In 1949, for example, the *Commonwealth Electoral Act 1918* (Cth) was amended to extend, for the first time, the franchise to any 'aboriginal native of Australia' who was either entitled to vote under State laws or had 'been a member of the Defence Force'.[77] In support of the amendment, State Senator Arthur Calwell stated: 'At last, our consciences have been stirred, and we are now admitting some of our obligations to the descendants of Neanderthal man, whether he be full-blood, half-caste or three-quarter caste.'[78] Though it was not until 1962 that the franchise was extended to all First Nations peoples, regardless of whether the State laws allowed them to vote.[79]

In 1967 a referendum was held to amend the *Constitution* to remove the clauses discussed above that expressly excluded First Nations peoples from the census (s 127) and the ambit of the Commonwealth Parliament's races power (s 51(xxvi)). The intention behind this amendment was to remove discriminatory references to First Nations peoples and allow the Commonwealth Parliament to enact special laws for First Nations peoples that would 'secure the widest measure of agreement with respect to Aboriginal advancement.'[80] The proposed amendment passed through both Houses of Parliament without dissent.[81] When put to the Australian people, a resounding 90.8% of voters voted in favour of the proposal.[82] Speaking in 2013, then Prime Minister Julia Gillard observed that the referendum 'gave us abundant cause for… hope. In an era when the

[76] Expert Panel, above n 34, 26.
[77] *Commonwealth Electoral Act 1949* (Cth) s 3.
[78] Commonwealth, *Parliamentary Debates,* Senate and House of Representatives, 3 March 1949, 1456.
[79] *Commonwealth Electoral Act 1962* (Cth).
[80] Commonwealth, *Parliamentary Debates,* House of Representatives, 1 March 1967, 263.
[81] The process for amending the *Constitution* is set out in s 128.
[82] Expert Panel, above n 34, 32.

nation was perhaps less open and socially aware than our own time, the ballot yielded the highest yes-vote ever recorded in an Australian referendum.'[83]

The referendum marked a 'decisive reshaping of constitutional culture' in Australia towards greater recognition of First Nations citizenship.[84] In the two decades after the 1967 referendum, the Commonwealth Government set out to legislate to advance the rights of First Nations peoples, particularly in relation to land rights,[85] the protection of cultural heritage,[86] and the protection against racial discrimination.[87] In the words of then Prime Minister Gogh Whitlam, these actions were consistent with the spirit of the 1967 referendum, which 'imposed upon the Commonwealth the constitutional responsibility for aborigines and Torres Strait Islanders'.[88]

A key part of the campaign to expand First Nations citizenship rights was the *Racial Discrimination Act 1975* (Cth) ('RDA'). The RDA incorporated into domestic law Australia's obligations under the 1965 *Convention on the Elimination of All Forms of Racial Discrimination.*[89] Though the Act was expressed generally, it was intended specifically to enable the Commonwealth Parliament to pass federal laws overriding the policies of States that discriminated against First Nations peoples. Of particular concern were the States' 'protection' policies described above, which were still in place in Western Australia and Queensland in the 1970s. The enactment of the RDA therefore held special significance for First Nations peoples in ending these discriminatory legal regimes,[90] with Davis describing it as 'the most important statute for Indigenous peoples in their continuing fight against racial discrimination and for equality'.[91]

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[83] Commonwealth, *Parliamentary Debates,* House of Representatives, 13 February 2013, 1121.
[84] Lino, *Constitutional Recognition,* above n 22, 164.
[85] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
[86] *World Heritage Properties Conservation Act 1983* (Cth); *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).
[87] *Racial Discrimination Act 1975* (Cth).
[88] Gogh Whitlam, 'It's Time for Leadership' (Speech, 1972 Australian Labor Party Campaign Launch, Sydney, 13 November 1972) 30-31.
[89] Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 2969).
[90] See further Lino, *Constitutional Recognition,* above n 22, 162-164.
[91] Megan Davis, 'Competing Notions of Constitutional "Recognition": Truth and Justice or Living "Off the Crumbs that Fall Off the White Australian Tables"' in Paula Waring (ed), *Papers on Parliament: Lectures in the Senate Occasional Lecture Series, and Other Papers – Number 62* (Department of the Senate, 2014) 113, 116-117.

It was also the RDA, through its provision enabling the courts to invalidate State laws discriminating on the basis of race, which led to the historic decision of *Mabo v Queensland (No 2)* ('*Mabo*') in 1992.[92] In a unanimous judgement, the High Court abolished the legal fiction of *terra nullius* and recognised the legal doctrine of native title at common law. In rejecting the doctrine of *terra nullius,* the Court referenced the advisory opinion of the International Court of Justice ('ICJ') in the *Western Sahara* case[93] before finding that:[94]

> If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depend on the nation that native peoples may be 'so low in the scale of social organization' that it is 'idle to impute to such people some shadow of the rights known to our land' can hardly be retained.

The decision effectively recognised that First Nations peoples had pre-existing rights to the land 'in accordance with their laws and customs' – termed 'native title' – and these quasi-property rights were not extinguished by the British acquisition of sovereignty. The decision was widely celebrated as a 'turning point for justice for Aboriginal People and indeed the turning point to lay the firm foundations and a vision for the whole of this country."[95]

2.2.4 Unfulfilled promises

Mabo was indeed a 'historic turning point', however the significant retrenchment of rights in the three decades since the *Mabo* decision has shown that the promise of *Mabo* and the 1967 referendum remains 'incomplete' and unfulfilled.[96] As Aboriginal lawyer and activist Noel Pearson notes, while 'the 1967 referendum reversed our exclusion', 'it left us with a Constitution that now makes no mention at all of this nation's indigenous history and heritage' and 'still contains racially discriminatory provisions.'[97] Further, the High Court has not constrained s 51(xxvi) to beneficial interpretation, despite Australians voting for its amendment in order to end 'the odious policies of oppression and neglect of

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[92] (1992) 175 CLR 1.
[93] [1975] ICJ Rep 12, 85-6.
[94] *Mabo* [41] (Brennan J) citing *In re Southern Rhodesia* (1919) AC 211, 233-234.
[95] Kevin Gilbert, *Aboriginal Sovereignty: Justice, the Law and Land* (3rd ed, Burrambinga Books, 1993) 3.
[96] Lino, *Constitutional Recognition,* above n 22, 147-174; Expert Panel, above n 34, 42, 74.
[97] Noel Pearson, 'Next Step is for the Nation to Leave Race Behind', *The Australian* (Sydney), 25 May 2013, 19.

Aboriginal citizens'.[98] Therefore, whilst the amendment to the races power has enabled the Commonwealth Parliament to pass important legislation protecting the rights of First Nations peoples as discussed above, it has also enabled the Commonwealth Parliament to subsequently pass laws retrenching these rights.[99]

Two important examples reflect this retrenchment of rights and the constitutionally vulnerable position that First Nations peoples now occupy. First was when former Prime Minister John Howard enacted his 'Wik Ten Point Plan' in 1998, which, in the words of then deputy Prime Minister Tim Fischer, sought to achieve 'bucket-loads of extinguishment' of First Nations land rights,[100] and overrode the operation of the *Racial Discrimination Act 1975* (Cth).[101] The legislation responded to *Wik Peoples v Queensland,*[102] in which the High Court determined that native title rights under common law were not extinguished, but could coexist with the leaseholder rights of pastoralists. The Government, through its subsequent legislation, prioritised these pastoral rights and substantially 'watered down' native title rights.[103]

The second example is the widely controversial Northern Territory Intervention of 2007. In a spirit of paternalism on par with that of the 'protection' era, the Commonwealth Parliament passed a suite of legislation[104] in response to evidence of disproportionate levels of alcohol and drug abuse, poverty, violence, and sexual abuse against women and

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[98] *Kartinyeri v The Commonwealth* (1988) 195 CLR 337. See further Robert French, 'The Race Power: A Constitutional Chimera' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180, 199-208.
[99] See eg, *Hindmarsh Island Bridge Act 1997* (Cth) repealing provisions of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), which was enacted pursuant to the Commonwealth Parliament's race power in s 51(xxvi) of the *Constitution.* These amendments were the subject of the *Kartinyeri* decision referenced above n 98.
[100] Cited in George Williams, 'Race and the Australian Constitution' (2013) 28(1) *Australasian Parliamentary Review* 4, 13.
[101] *Native Title Amendment Act 1998* (Cth) s 7.
[102] (1996) 187 CLR 1.
[103] Shireen Morris, '"The Torment of our powerlessness": Addressing indigenous constitutional vulnerability through the Uluru Statement's call for a First Nations Voice in their affairs' (2018) 41(3) *UNSW Law Journal* 629.
[104] *Northern Territory National Emergency Response Act 2007; Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007; Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007; Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008; Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007-2008.*

children in First Nations communities in the Northern Territory. The legislation was passed pursuant to the 'Territories power' under s 122 of the *Constitution,* which gives the Commonwealth Parliament general power to legislate for federal Territories.[105] Without any prior consultation with First Nations peoples, these Acts introduced a range of extreme cuts to First Nations citizenship and land rights, with a view to 'inculcating responsible behaviour among the inhabitants' of these communities.[106] The restrictions included a 'quarantining' of welfare payments, bans on alcohol and pornography, an increase in policing levels, and the compulsory acquisition of 65 First Nations townships.[107]

Ironically, 2007 was also the year that incoming Prime Minister Kevin Rudd issued a formal apology to the stolen generations of First Nations peoples – being those children taken away pursuant to the assimilation policies of States discussed above ('Apology').[108] Simultaneous to his Apology, however, was also his decision to keep in place most of the harsh measures of the NTER.[109] Whilst the Apology was indeed a historic and important event in Australia's history, the surrounding circumstances show that mere symbolism will not alleviate the structural disadvantage entrenched in Australia's constitutional framework. What is needed is significant and substantial structural reform. In the words of Aboriginal Activist Russell Taylor, 'there remains some important, unfinished constitutional business to be conducted.'[110]

2.3 Proposals for change

The proceeding sections have focused on the vulnerability of First Nations peoples and their experience of discrimination, disadvantage and dispossession by the Australian settler state. However this is only part of the picture. Missing from this story is the evidence of the significant resilience, determination and spirit of First Nations peoples

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[105] *Wurridjal v Commonwealth* (2009) 237 CLR 309, 405 (Kirby J).
[106] Lino, *Constitutional Recognition,* above n 22, 41.
[107] See further, Morris, above n 103.
[108] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 172.
[109] Lino, *Constitutional Recognition,* above n 22, 55-58.
[110] Russell Taylor AM, 'Indigenous Constitutional Recognition – 1967 Referendum and Today', (Speech, Australian Senate Occasional Lecture Series, Canberra, 26 May 2017) <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/Papers_on_Parliament_68/Indigenous_Constitutional_Recognition_The_1967_Referendum_and_Today#ftn>.

throughout and despite this history of injustice. While this paper focuses on the Uluru Statement as the most recent articulation of First Nations peoples' demands for justice, First Nations peoples have a long history of advocating and agitating for change. Powerful examples include the establishment in 1972 of the Aboriginal Tent Embassy outside Parliament House on Australia's national holiday, where First Nations advocates petitioned for greater recognition of land rights after the 1967 referendum.[111] And in 1988, when Aboriginal activists presented the Commonwealth Government with the Barunga Statement, which called on Parliament 'to negotiate a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedoms'.[112] In 1990, the Aboriginal Provisional Government ('AGP') was formed to establish a First Nations state 'with all of the essential control being vested back into Aboriginal communities.' The AGP envisioned a First Nations state 'exercising total jurisdiction over its communities to the exclusion of all others.'[113] Accordingly it is important to emphasise that there is a significant history of political organisation and mobilisation of First Nations peoples in Australia.[114]

This thesis focuses on the Uluru Statement as the latest and most authoritative statement of the demands of First Nations peoples for constitutional recognition. Its authority derives from the process leading up to the Uluru Statement, which many have regarded as a significant constitutional moment for First Nations peoples. Importantly, this process was 'Indigenous-designed and -led', consisting of a series of 'regional dialogues across the nations designed to elicit from First Nations what meaningful constitutional recognition would mean to them.'[115]

The Voice and Treaty proposals emerged from these dialogues with significant support. The idea behind the Voice is to create a representative body that the Commonwealth

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[111] See further, Gary Foley, Edwina Howells and Andrew Schaap (eds), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2013).
[112] Council for Aboriginal Reconciliation, *Documents of Reconciliation,* 'Attachment A – The Barunga Statement' (1998) ('Barunga Statement').
[113] Aboriginal Provisional Government, cited in Sean Brennan, Brenda Gunn and George Williams, '"Sovereignty" and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26 *Sydney Law Review* 307, 315.
[114] For a fuller picture of this history, see, eg, Lino, *Constitutional Recognition,* above n 22, ch 2; Megan Davis, 'The long road to Uluru' (2018) 60 *Griffith Review* 41.
[115] Gabrielle Appleby and Megan Davis, 'The Uluru Statement and the Promises of Truth' (2018) 49(4) *Australian Historical Studies* 501, 501.

Parliament would be required to consult with and receive advice from when passing legislation that directly affects First Nations affairs.[116] The proposal envisions a Voice created by legislation passed through the Commonwealth Parliament, with the body's existence constitutionally guaranteed.[117]

The Treaty proposal seeks a process of agreement-making negotiated between representatives of First Nations and the Commonwealth Government, to be supervised by a 'Makarrata Commission'. The word 'makarrata' comes from the language of the Yolngu people in Arnhem Land.[118] Pearson has explained this word captures 'the idea of two parties coming together after a struggle, healing the divisions of the past. It is about acknowledging that something has been done wrong, and it seeks to make things right.'[119] The Treaty proposal would not require amendment to the written *Constitution*, as the Commonwealth Executive has the power to enter into treaties under s 61 of the *Constitution*, and the Commonwealth Parliament can implement the terms of the treaties into domestic law under 51(xxix) (the 'foreign affairs power').[120]

Along with recognising prior ownership and continued sovereignty, First Nations peoples hope that the content of the treaty or treaties negotiated will cover a wide range of issues, including land rights, reparations, recognition of customary law, and guarantees of respect for First Nations rights.[121] At the regional dialogues, the Treaty proposal was strongly supported and seen as the key vehicle 'to achieve self-determination, autonomy

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[116] Referendum Council, 'Final Report of the Referendum Council' (Final Report, 30 June 2017) <https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Fina l_Report.pdf>.

[117] The idea of a First Nations parliamentary advisory body was first proposed by Aboriginal lawyer and activist Noel Pearson in 2014: Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2014) 55 *Quarterly Essay* 1.

[118] National Aboriginal Conference, Sub-Committee on the Makarrata, *Makarrata Report* (July 1980) 6 <http://aiatsis.gov.au/collections/collections-online/digitised-collections/treaty/national-aboriginal-conference>.

[119] Noel Pearson cited in Daniel McKay, 'Uluru Statement: a quick guide', *Parliament Library of Australia Research Paper Series, 2016-17* (online, 19 June 2017) <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/5345708/upload_binary/5345708.pdf;fileType=application%2Fpdf#search=%22library/prspub/5345708%22>.

[120] *R v Burgess; Ex parte Henry* (1936) 55 CLR 608.

[121] Referendum Council, above n 116, 31-32.

and self-government.'[122] For most First Nations peoples, Treaty is seen as 'the ultimate form of recognition.'[123]

The Government has responded that the proposals are too 'radical' and infeasible to implement in the Australian context. In particular, the Government argues that the proposals, if implemented, would fracture the Australian polity and undermine the liberal principles that underlie Australia's democracy, particularly the principles of equality and unity. The next three chapters rebut these presumptions, providing normative force to adoption of the Uluru Statement and its vision of a more reconciled nation, and 'a better future for [their] children based on justice and self-determination'.

[122] Referendum Council, above n 116, 31.
[123] Megan Davis, 'Keating Was Right to Intervene Over Recognition and Indigenous Australia's Unfinished Business', *The Guardian* (online, 21 October 2015) <https://www.theguardian.com/commentisfree/2015/oct/21/soft-recognition-alone-will-not-resolve-indigenous-australias-unfinished-business>.

3. International law and the principle of self determination

This chapter examines whether the Voice and Treaty proposals fall within Australia's obligations under international human rights law. More specifically, the research considers the Voice and Treaty proposal as implementations of the right of First Nations peoples to self-determination, as codified in common art 1 of the *International Covenant on Civil and Political Rights* ('ICCPR')[124] and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR')[125] ('Article 1'). Self-determination is widely considered to be 'the normative cornerstone of the modern international Indigenous rights regime.'[126] According to Luis Rodríguez-Piñero and Anaya:[127]

> No discussion of indigenous peoples' rights under international law is complete without a discussion of self-determination, a principle of the highest order within the contemporary international system. Indigenous peoples have repeatedly articulated their demands in terms of self-determination, and, in turn, self-determination precepts have fuelled the international movement in favor of those demands.

This 'principle of the highest order', however, is also one of the most controversial.[128] At the heart of this controversy lie 'deeply entrenched normative and political tensions' arising from the different meanings attributed to self-determination.[129] For example, in the decolonisation context post World War I, self-determination was used as a powerful political principle to justify the break up of empires and redivision of Europe.[130] However since the 1960s, the principle has been adopted by indigenous peoples around the world as the normative basis of their claims for greater political participation and

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[124] Opened for signature 19 December 1966, 99 UNTS 171 (entered into force 23 March 1976).
[125] Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[126] S James Anaya and Luis Rodríguez-Piñero, 'The Making of the UNDRIP' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 38, 38.
[127] Ibid.
[128] See, eg, Marc Weller, 'Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23 and 26(1)' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 115, 116.
[129] Anaya and Rodríguez-Piñero, above n 126, 49; Melissa Castan, 'DRIP feed: the slow reconstruction of self-determination for Indigenous peoples', in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar Publishing, 2010) 492.
[130] See further, Anaya, above n 15, 76.

control over their own affairs.[131] And indeed, the right to self-determination is now deeply embedded at the centre of the 2007 UNDRIP.[132]

Australia has a complicated history with the UNDRIP, being one of four states to initially vote against the declaration in 2007.[133] A critical issue for the Australian Government was the UNDRIP's explicit acknowledgement that indigenous peoples can claim the right to self-determination, and the impact this would have on state sovereignty.[134] However in 2009 the Government changed its position and has since accepted that the right to self-determination can be claimed by First Nations peoples of Australia.[135] At the time, the Australian Government said it was taking 'another important step towards re-setting relations between Indigenous and non-Indigenous Australians'.[136] More recently, Australia has reconfirmed its commitment to the UNDRIP in a submission to the UN Expert Mechanism on the Rights of Indigenous Peoples ('EMRIP'), stating unequivocally that: 'Australia reaffirms its support for the Declaration as the most comprehensive commitment by the international community to the realisation of the human rights of indigenous peoples.'[137] Further, the Government acknowledged that the principles set in the UNDRIP 'reflect, or provide further context for, Australia's obligations under the seven core United Nations human treaties. Australia is legally bound by the obligations in these treaties.'[138]

Accordingly this thesis takes the provisions of the UNDRIP as the high point of elaborating what Australia's obligations are pursuant the right of First Nations peoples to

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[131] See further ibid; Castan, 'DRIP feed', above n 129.
[132] See further Melissa Castan, 'Constitutional Recognition, Self-Determination and an Indigenous Representative Body' (2015) 8(19) *Indigenous Law Bulletin* 15, 15.
[133] See further Harry Hobbs, 'Treaty making and the UN Declaration on the Rights of Indigenous Peoples: lessons from emerging negotiations in Australia', (2019) 23(1-2) *The International Journal of Human Rights* 174.
[134] See UN GAOR, 61st sess, 107th plen mtg, UN Doc A/61/PV.107 (13 September 2007) 19.
[135] Jenny Macklin, 'Statement on the United Nations Declaration of Indigenous Peoples' (Media Release, 3 April 2009) <http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf>.
[136] Ibid 6.
[137] Australian Government, 'United Nations Expert mechanism on the Rights of Indigenous Peoples (EMRIP) – study on free, prior and informed consent', (2018) <https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/FPIC/Australia.pdf>, 1.
[138] Ibid.

self-determination. As this chapter will show, the UNDRIP proposes a 'relational' framework for indigenous self-determination that is characterised by participation, consent, consultation and non-domination.[139] Critical to understanding this framework is understanding the development of indigenous rights at international law, and the divisive past of self-determination. Section 3.1 will canvas this history to the UNDRIP, before setting out the principles in Section 3.2 that now make up the post-UNDRIP understanding of the right to self-determination. Section 3.3 will then apply this framework to the Australian case to argue why Australia has a legal obligation to adopt the Voice and Treaty proposals.

3.1 Background to the UNDRIP

3.1.1 Self-determination in the decolonisation context

As stated above, the right to self-determination is codified in common Article 1 of the ICCPR and the ICESCR. This article sets out Australia's obligation[140] to promote the realization of the right to self-determination of '[a]ll peoples', and to respect this right 'in conformity with the provisions of the Charter of the United Nations'. The article also provides that this includes the right of all peoples to 'freely determine their political status', 'freely pursue their economic, social and cultural development', and to 'freely dispose of their natural wealth and resources'.

At the time it was codified, Article 1 was widely considered to entail an 'extremely potent' and 'dangerous' right, having significant consequences for the territorial integrity of states and stability of the wider international system.[141] At its extreme, the right to self-determination was understood to confer upon part of the population of an existing state the right to unilaterally secede and create a separate and independent state (described as a

[139] See further Iris Marion Young 'Two Concepts of Self Determination' in Austin Sarat and Thomas R Kearns (eds), *Human Rights, Concepts, Contests and Contingencies* (University of Michigan Press, 2001) 25; Melissa Castan and Kate O'Bryan, *Submission No 126 to the Join Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018* (8 June 2018).
[140] Australia has signed and ratified both treaties: both were signed 18/12/1972, the ICESCR was ratified 10/12/1975, and the ICCPR was ratified 13/08/1980.
[141] Weller, above n 128, 117-119.

right of 'remedial secession').[142] Accordingly from the 1970s onwards, the International Court of Justice ('ICJ'), who had significant impact on the elaboration of the content of the right to self-determination, sought to 'tame' this dangerous right.[143] In the *Namibia*[144] and *Western Sahara*[145] cases, for example, the ICJ limited the application of the right to non-self-governing territories. Further, the ICJ in the *Frontier Dispute* case confirmed that the right was subject to the doctrine of *uti possidetis,* which required the maintenance of borders between former colonies, and as such would appertain not to populations but to territories.[146]

It is understandable then, that when indigenous advocates appropriated the language of self-determination as the foundational basis for advancing their rights, states were fearful of the implications this would have for state sovereignty. As Professor Marc Weller observed of that time, most governments with indigenous populations saw the emergence of an indigenous right to self-determination as 'highly ominous'.[147] Self-determination to them was seen as 'code for a license to question and challenge their dominance over the State, and even for dissolving it through secession or dissolution.'[148] And as such they resisted acknowledging that indigenous peoples could classify as 'peoples' within the meaning of Article 1, instead insisting on using the term 'populations'.

However this did not stop the momentum that was gaining behind the indigenous movement, and as will be shown in the following section, a different understanding of the right to self-determination was beginning to take hold and challenge the limitation of the right to the colonial context.[149]

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[142] See eg, comments of the International Court of Justice in their advisory opinion: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* [2010] ICJ Rep 403, 82.
[143] Weller, above n 128, 119.
[144] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 16, 31.
[145] *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 33.
[146] *Frontier Dispute (Burkina Faso v Mali)* [1986] ICJ Rep 564, 25.
[147] Weller, above n 128 119.
[148] Ibid, 117.
[149] Ibid, 119.

3.1.2 Self-determination in the indigenous context

In 1971 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities commissioned Special Rapporteur José R Martinez Cobo to conduct a comprehensive study on the 'Problem of Discrimination against Indigenous Populations.'[150] The study took two decades to complete and became the 'standard reference for discussion of the subject of indigenous peoples within the United Nations.'[151] The study was ground breaking for being the first of its kind to gather such extensive data on the situation of indigenous peoples worldwide. The final report asserted that the right to self-determination was a 'basic pre-condition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future.'[152] Importantly, Cobo described the right to self-determination as having both internal and external dimensions. The internal he defined as the right of 'a people or group possessing a definite territory' to 'be autonomous in the sense of possessing a separate and distinct administrative structure and judicial system, determined by and intrinsic to that people or group'. The external, on the other hand, he described as 'the right to constitute a state and includes the right to choose various forms of association with other political communities'.[153]

Central to the recommendations of the final report was the establishment a special working group on indigenous peoples' rights, which the Human Rights Commission and the Economic and Social Council then subsequently established in 1982.[154] The original mandate of this Working Group on Indigenous Populations ('WGIP') was to review 'developments pertaining to the promotion and protection of the human rights and fundamental freedoms of Indigenous populations' and 'to give special attention to the evolution of standards concerning the rights of such populations.'[155] Note that the use of the term 'populations' rather than 'peoples' here was deliberate, due to state fears that

[150] Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations, vol 5, Conclusions, Proposals and Recommendations,* UN Doc E/CN.4/Sub2/1986/7 and Add 1-4 (1986) ('Cobo Study').
[151] Anaya, above n 15, 51.
[152] Cobo Study, above n 150, [580].
[153] Ibid, [272]-[273].
[154] Human Rights Commission, Res 1982/19 (10 March 1982); Economic and Social Council, ESC Res 1982/34, UN Doc E/1982/82 (7 May 1982).
[155] Ibid.

acknowledging indigenous peoples as 'peoples' would give rise to certain legal obligations.[156]

Pursuant to their standard setting mandate, the WGIP began work in 1985 drafting a declaration elaborating the rights of indigenous peoples. Importantly, the process of the WGIP was ground-breaking at the time for allowing indigenous peoples and organisations to provide submissions and directly participate in the drafting process. By the late 1980s, as Anaya and Rodríguez-Piñero describe, the WGIP 'had become a major platform for Indigenous peoples from across the globe to forge and express common positions, and a major factor in establishing crucial momentum for the international Indigenous rights movement.'[157]

Though consensus was slow to develop, and in the end it took over two decades of drafting and negotiations before a final text was agreed on. The main cause of the deadlock was the insistence by indigenous representatives on the inclusion of self-determination within the text of the declaration, and their refusal to consent to any language that would limit or curtail this right.[158] Many states however were concerned about the impact that the recognition of the right to self-determination would have for the territorial integrity of states. The Organization of African Unity, for example, adopted a decision highlighting these concerns for the potential political, economic and constitutional implications for states on the African continent.[159] The delegations of Australia, Canada, Colombia, Guyana, New Zealand, the Russian Federation and Suriname also expressed concern that:[160]

> The current text could be misconstrued so as to threaten the political unity, territorial integrity and stability of States, and confer a right of secession upon indigenous peoples.

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[156] Sarah Pritchard, 'Working Group on Indigenous Populations: Mandate, Standard-Setting Activities and Future Perspectives' in Sarah Prtichard (ed), *Indigenous Peoples, United Nations and Human Rights* (The Federation Press, 1998) 42.
[157] Anaya and Rodríguez-Piñero, above n 126, 43.
[158] Pritchard, above n 156, 46.
[159] African Commission on Human and Peoples' Rights, *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (adopted by the 41st ord sess, 16-30 May 2007).
[160] Permanent Representative of the Republic of the Philippines to the United Nations, *Supplement to the Report of the Facilitator On the Draft Declaration on the Rights of Indigenous Peoples* (20 July 2007), Annex I, 'United Nations Declaration on the Rights of Indigenous Peoples: Summary of Kay Areas of Concern'.

> Provisions dealing with the need to achieve harmony with other levels of government are insufficiently developed.

To counter these fears, indigenous peoples conceded to various amendments to the text. First was the inclusion of art 46(1), taken from the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* ('Friendly Relations Declaration'),[161] which states that:

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the *Charter of the United Nations* or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

Article 4 was also inserted, which focuses on the autonomy aspect of self-determination:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

And lastly a preambular paragraph was added recognizing that the 'situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.'

3.2 Self-determination post UNDRIP

Despite these concessions, it is clear that the right to self-determination remains the 'cornerstone' of the UNDRIP,[162] and is set out in art 3 in almost identical terms to Article 1 of the ICCPR and ICESCR. Though many scholars consider the UNDRIP to be, in its entirety, an expression of what the right to self-determination means in practice for indigenous peoples.[163] An important principle underlying the UNDRIP's conception of self-determination is the principle of free, prior and informed consent, which is mentioned in arts 10, 11(1), 19, 28(1), 29(2) and 32. Article 19, for example, states that:

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[161] GA Res 2625(XXV), Annex, UN GAOR, 25th sess, Supp (No 28) at 121, UN Doc A/8028 (1970).

[162] Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law* 439, 458.

[163] See eg, Megan Davis, *Aboriginal Women and the Right to Self-Determination: A Capabilities Approach to Constitutional Reform* (PhD Thesis, Australian National University, 2010) 42.

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The principle of free, prior and informed consent is an evolving standard at international law,[164] and the EMRIP has addressed in detail the meaning of this principle in the context of the post-UNDRIP framework for self-determination. In 2011 they released a final report on the right to participate in decision-making, where they defined the principle as follows:[165]

> The element of 'free' implies no coercion, intimidation or manipulation; 'prior' implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes; 'informed' implies that indigenous peoples have been provided all information relating to the activity and that information is objective, accurate and presented in a manner and form understandable to indigenous peoples; 'consent' implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.

Further, they elaborated on the requirement of consultation and participation of indigenous peoples:[166]

> The duty of the State to obtain indigenous peoples' free, prior and informed consent entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes. Consent is a significant element of the decision-making process obtained through genuine consultation and participation. Hence, the duty to obtain the free, prior and informed consent of indigenous peoples is not only a procedural process but a substantive mechanism to ensure the respect of indigenous peoples' rights

Some scholars have suggested that the reference to 'internal affairs' in art 4 restricts the content of self-determination claimable by indigenous peoples to its internal

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[164] The HRC, for example, has also applied this principle with respect to art 27 of the ICCPR: see, eg, *Poma Poma v Peru,* HRC Communication No.1457/2006, CCPR/95/D/1457/2006 of 27 March 2009.

[165] Expert Mechanism on the Rights of Indigenous Peoples, Human Rights Council, *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, 18th sess, Agenda Item 5, A/HRC/18/42 (17 August 2011) 27.

[166] Ibid.

connotations only.[167] However this interpretation has mostly been rejected,[168] and indeed art 1 affirms that: 'Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights… as recognized in the Charter of the United Nations… and international human rights law.' Further, the preamble makes clear that nothing in the UNDRIP 'may be used to deny any peoples their right to self-determination, exercised in conformity with international law.'

Anaya has instead suggested an alternative frame to understanding self-determination that is more useful than the out of date internal-external dichotomy. Anaya proposes a distinction between substantive and remedial self-determination, with the substantive component consisting of both a constitutive and ongoing aspect.[169] The constitutive aspect focuses on the time at which the governing institutions of the state were first created, and requires that the processes which created these institutions be 'guided by the will of the people, or peoples, who are governed'. This requires participation and consent of the governed peoples, so that the political order properly reflects 'the collective will of the peoples concerned'. The ongoing aspect, on the other hand, requires that the governing institutional order, 'independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis.' The important part of this dimension is the establishment and maintenance of institutions 'under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis.' Remedial self-determination then refers to the measures that must be implemented in order to rectify any violations of the substantive (ongoing or constitutive) elements of self-determination.[170]

In regards to treaties, the EMRIP also released a report in 2019 on the recognition, reparation and reconciliation initiatives undertaken by states to achieve the ends of the

[167] See, eg, Jacquelyn A Jampolsky and Kristen A Carpenter, 'Indigenous Rights' (2015) 11(2) *International Encyclopaedia of the Social & Behavioural Sciences* 795, 800; Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 *European Journal of International Law* 141, 147.
[168] See, eg, Mauro Barelli, 'Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?' (2011) 13 *International Community Law Review* 413,426; Megan Davis, 'To Bind or not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17, 33.
[169] Anaya, above n 15, 81.
[170] Ibid 81-82.

UNDRIP.[171] In the report, the EMRIP states that legal recognition of indigenous peoples is fundamental to their rights and the 'achievements of the ends of the [UNDRIP]'. The EMRIP however acknowledged that recognition exists in many forms:[172]

> At one end of the spectrum are weak forms of recognition that can involve symbolic recognition of indigenous peoples' rights and indeed historical harms, such as a formal apology or a few words of recognition of facts relating to preoocupation, dispossession and survival. On the other hand, there are strong forms of recognition that can take the shape of treaties, constitutional recognition of treaty rights or aboriginal rights, indigenous parliaments or designated parliamentary seats, or autonomous regions.

Among the examples of strong recognition, the EMRIP highlighted the Constitution of the Plurinational State of Bolivia, which recognises the 'precolonial existence' of indigenous peoples and guarantees their self-determination within the framework of the unity of the State.[173] The EMRIP also referred to the Treaty of Waitangi in New Zealand, and encouraged the steps currently being taken to improve access to information and increase education about the Treaty amongst citizens.[174]

Relevant here also is art 37 of the UNDRIP, which some scholars have argued is expressing a right to conclude treaties.[175] The article provides that:

> Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

Article 46 however makes all the provisions of the UNDRIP subject to the norms of existing international and domestic law. This means essentially that all rights contained in the UNDRIP are relative and must be balanced against the rights of others.[176]

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[171] Human Rights Council, 'Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation', Report of the Expert Mechanism on the Rights of Indigenous People (Twelfth session, 2019), UN Doc A/HRC/EMRIP/2019/3/Rev.1 ('EMRIP, Recognition Report').
[172] Ibid [15].
[173] Ibid [18].
[174] See further Constitutional Advisory Panel, 'New Zealand's Constitution: A Report on a Conversation' (November 2013) <https://www.justice.govt.nz/assets/Documents/Publications/Constitutional-Advisory-Panel-Full-Report-2013.pdf>.
[175] Davis, 'To Bind or not to Bind', above n 168, 26.
[176] Davis, 'To Bind or Not to Bind', above n 168, 30-33.

3.3 Application of principles to the Australian case

3.3.1 Do the proposals fall within the post-UNDRIP framework of self-determination?

Turning now to the Voice and Treaty proposals, we can see that these proposals meet the elements identified above that make up the post-UNDRIP framework of self-determination. First, these proposals fit within Anaya's constitutive-ongoing conception of self-determination, as they seek to remedy both the past exclusion of First Nations peoples from the constitutive self-determination acts of Australia, as well as the current failure to accord ongoing self-determination to First Nations peoples. Second, these proposals will facilitate greater participation of, and consultation with, First Nations peoples in decision-making matters that affect their rights, and will therefore satisfy the standard set by the principle of free, prior and informed consent. Third, applying the EMRIP's spectrum conception of recognition, we can see that the Voice and Treaty proposals would be considered forms of 'strong recognition'. The Government's Apology in 2007, however, would be likely understood as 'weak recognition'.

The main argument behind the Voice proposal is that it will enable greater political participation of and consultation with First Nations peoples on decision-making matters that directly affect them. Specifically it would allow monitoring of the operation of the sections 51(xxvi) and 122 of the *Constitution*, which are the powers that the Commonwealth Parliament uses to enact laws specific to First Nations peoples.[177] As we saw from Chapter Two, these lawmaking powers have been consistently used without sufficient (if any) prior consultation with First Nations communities. The Voice therefore is aimed to address this history of poor consultation and entrench a greater participatory role for First Nations peoples in Australia's constitutional framework. Its enshrinement in the *Constitution* will then help to ensure stability and consistency in the ongoing self-determination and political participation of First Nations peoples. As Professor Melissa Castan and Dr Katie O'Bryan argue, the Voice will help shift the relationship between First Nations peoples and the Commonwealth Parliament from 'a monologue to a dialogue, from unilateral to multilateral, and from a majoritarian agenda

[177] Referendum Council, above n 116, 14, 104.

to a consultative, participatory one.'[178] A critical shift in the implementation of First Nations peoples' right to self-determination.

It could be argued that because the Government sees the Voice and Treaty proposals as undermining the 'principle of unity', the proposals therefore engage the limitation in art 46 and fall outside the scope of their right to self-determination. However, the historical development of the UNDRIP shows this article to be referring specifically to the 'dangerous' form of the right to self-determination, being the right to secession that the ICJ has granted to colonial territories. Whilst there still remains uncertainty as to whether indigenous peoples can also claim a right to secession,[179] the Uluru Statement at least makes clear that this is not what First Nations peoples are seeking. Rather, they are claiming the right to self-determination in its inclusive form – to facilitate a 'coming together' and the renegotiation of a 'fair and truthful relationship with the people of Australia'; to 'empower' First Nations peoples to take 'a rightful place' in the country, in furtherance of 'a fuller expression of Australia's nationhood'.[180] Accordingly it is clear that the Voice and Treaty proposals, when understood as forms of remedial self-determination, fall within the scope of Australia's obligations under international human rights law.

3.3.2 What is the normative force of this argument?

How much weight does this argument have in the consideration of the proposals in the Uluru Statement? Or blatantly put: why should the Australian Government care that the Voice and Treaty proposals fall within the UNDRIP framework of self-determination? Whilst this thesis acknowledges that the UNDRIP is a non-binding declaration and therefore technically 'soft law',[181] it argues, firstly, that the UNDRIP is still an important legal document with substantial normative weight. Importantly, the UNDRIP reflects widespread consensus of not only states but also indigenous peoples. As Anaya argues, the UNDRIP has 'a high degree of legitimacy' precisely because 'it is the product of years of advocacy and struggle by Indigenous people themselves.'[182]

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[178] Castan and O'Bryan, above n 139, 7.
[179] Davis, 'To Bind or Not to Bind', above n 168, 26.
[180] Uluru Statement, above n 8.
[181] See further Davis, 'To Bind or Not to Bind', above n 168, 36-40.
[182] See, eg, *Report of the UN Special Rapporteur on the rights of indigenous peoples*, *James Anaya,* UN Doc A/68/317 (2013) [63]-[67]. See also Claire Charters, 'The UN Declaration on

Secondly, it is generally accepted that the UNDRIP does not set out new norms but rather articulates pre-existing norms as they apply to the situation of indigenous peoples.[183] And as stated above, the Australian Government has acknowledged that the principles of the UNDRIP 'reflect or provide further context for' Australia's legally binding obligations under international human rights law, in particular Article 1.[184] Accordingly this thesis argues that Australia is bound to follow the principles of the UNDRIP by the fundamental principle of *pacta sunt servanda* as codified in art 26 of the VCLT: 'Every treaty in force is binding upon the parties and must be performed by them in good faith.'

And lastly, the UNDRIP holds legitimacy for being accepted by First Nations peoples of Australia. Not only were Australian First Nations peoples involved in the drafting process of the UNDRIP, they have also subsequently used its provisions as the normative basis of their claims. Davis, for example, has argued that the UNDRIP establishes a 'framework that states can adopt to underpin their relationship with Indigenous peoples and… guide them in the development of domestic law and policy.'[185] And as mentioned above in Chapter One, the UNDRIP was highly influential in the drafting of the Uluru Statement.

Accordingly it is clear the Voice and Treaty proposals fall within the content of First Nations' peoples right to self-determination, and Australia is therefore bound to implement these proposals pursuant to their obligations under international human rights law. This provides significant normative force to the demands of First Nations peoples. However it leaves some arguments unanswered – namely, how these forms of recognition can be reconciled within liberal democratic understandings of legitimate state rule. The next chapter therefore proposes to address this issue by using the theoretical framework of multinational federalism.

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the Rights of Indigenous Peoples in New Zealand Courts: A Case for Cautious Optimism' in Brenda L. Gunn and Oonagh E. Fitzgerald (eds), *UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS* (Centre for International Governance Innovation, 2020) 43, 49.

[183] Davis, 'To Bind or not to Bind', above n 168, 26; Anaya and Rodríguez-Piñero, above n 126, 43.

[184] Australian Government, above n 137.

[185] Davis, 'Indigenous Struggles in Standard-Setting', above n 162, 465.

4. Multinational Federalism

The argument that strong forms of recognition, like the Voice and Treaty proposals, will undermine the liberal principles of unity and equality has been raised throughout the two decades of debate on constitutional recognition in Australia. For example, when the Government rejected the proposals outlined in the Uluru Statement in 2017, they argued that the claims 'undermine the universal principles of unity and equality.'[186] This position echoes that of former Liberal Prime Minister John Howard, who in 2000 dismissed claims for treaty arguing that 'an undivided united nation does not make a treaty with itself.'[187] For him, treaties and representative structures struck 'at the heart of the unity of the Australian people' and violated the fundamental principle of equal treatment before the law.[188]

But do strong forms of recognition, like the Treaty and Voice proposal, necessarily undermine the liberal principles of equality and unity? Is there a way that the Voice and Treaty proposals can be reconciled with these legitimating conditions of liberal democracies? To answer this question this chapter turns to one solution that is quickly gaining traction in the Australian debate on indigenous recognition, namely: multinational federalism.[189]

As mentioned above in Chapter One, the scholarship considering question of constitutional recognition so far lacks theoretical grounding. But theory is important – it has significant but often under acknowledged influences on the way we think and understand the world around us. And indeed, doctrines of political theory have 'deep and

[186] Response Statement, above n 9.
[187] Cited in *Interview with John Laws, 2UE Radio* (29 May 2000) PM Transcripts <https://pmtranscripts.dpmc.gov.au/release/transcript-22788>.
[188] Commonwealth, *Parliamentary Debates,* House of Representatives, 11 April 1989, 1328.
[189] See, eg, Lino, *Constitutional Recognition,* above n 22; Hobbs, above n 24; Breen, above n 24; Robbins, above n 24; Mansell, above n 24; Dylan Lino, 'Towards Indigenous-Settler Federalism' (2017) 28(2) *Public Law Review* 118; Mark McMillan, 'Is Federalism Being Undermined in the Current Surge to "Recognise Indigenous Australian in (and into) the Commonwealth Constitution?' (2016) 8(25) *Indigenous Law Bulletin* 15; Jonathan Crowe, 'The Race Power, Federalism and the Value of Subsidiarity for Indigenous Peoples' in Simon Young, Jennifer Nielsen and Jeremy Patrick (eds), *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (The Federation Press, 2016) 129; Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28 *Sydney Law Review* 403; Cheryl Saunders, 'The Implications of Federalism for Indigenous Australians', in Yash Ghai (ed), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge University Press, 2000) 266.

broad influence in our political life.'[190] As philosopher Martha Nussbaum explains: 'Images of who we are and why we get together shape our thinking about what political principles we should favour and who should be involved in their framing.'[191]

This point is particularly relevant for the Australian debate around indigenous recognition. As we can see from above, terms like 'unity', 'sovereignty' and 'equality' are consistently used to deny the rights of First Nations peoples and refute their status as political equals. It is a situation therefore that requires us 'to go to the root of the problem', which political theory allows. For when we get to this root, as Nussbaum insists, 'we can see much more clearly why we got into such a difficulty and what we must change if we wish to advance.'[192]

This chapter therefore presents multinational federalism as a valuable theoretical framework to conceptualise how the Voice and Treaty proposals can be reconciled with the liberal principles of unity and equality. The chapter proceeds as follows. Section 4.1 will advance a definition of multinational federalism for the purposes of this chapter. Section 4.2 will then explore Kymlicka's defence of multinational federalism within the liberal frame, and enunciate two conditions of application. Section 4.3 will apply the framework of multinational federalism to the Australian case, and argue why it holds relevance in this context.

4.1 Conceptualising multinational federalism

Firstly, what do I mean by the term multinational federalism? Federalism, in a broad sense, is a constitutional model that combines self-rule with shared rule.[193] Federalism is most commonly associated with federations such as the United States and Switzerland, which divide power between constituent units and a central government.[194] Australia, whose constitution divides power between the Commonwealth government and six

[190] Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006) 4.
[191] Ibid.
[192] Ibid.
[193] Lino, *Constitutional Recognition,* above n 22, 217, 226; Daniel Elazar, *Exploring Federalism* (University of Alabama Press, 1987).
[194] For a general definition of a federation, see Ronald Watts, 'Federalism, Federal Political Systems, and Federations' (1998) 1 *Annual Review of Political Science* 117, 121. See also Sujit Choudhry and Nathan Hume, 'Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism' in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law* (Edward Elgar, 2011) 356.

States and two Territories, fits within this traditional form of federalism.[195] However the concept of federalism is much broader than these examples, and indeed it can take many different forms, including unions, confederations and associated states.[196] Inherent to all these forms of federalism is the notion of split sovereignty,[197] or rather, the idea that 'sovereignty need not be monolithic but can be shared'.[198]

When applied to the context of sub-state national pluralism, this model of self-rule combined with shared rule provides a mechanism to 'capture the balance between dependence and independence of peoples within a single territory'.[199] The main difference between this type of federalism and the traditional model of federalism discussed above, is that here the subunits are defined by their ethnonational group identity, rather than their dominance in a particular territory. Some theorists term this non-territorial or corporate federalism, as the self-rule component is based on the exercise of a cultural group's personal jurisdiction, rather than territorial jurisdiction.[200]

Manifestations of multinational federalism can be either quasi-federal or federal.[201] A quasi-federal form of multinational federalism is essentially a mechanism that employs elements of shared rule, but not self-rule.[202] An example of this kind of multinational federalism would be the Sami Parliament of Norway established in 1989.[203] Whilst the Sami Parliament has the power make submissions to the Norwegian Parliament on matters that affect their interests, the Norwegian Parliament is not bound to follow their advice and the Sami Parliament cannot enact legislation themselves. Therefore the Sami Parliament possesses powers of shared rule only, and not self-rule. A federal form, on the other hand, includes elements of both.[204] The Treaty of Waitangi mentioned above in Chapter Three is an example of this kind of multinational federalism, as are the treaty

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[195] Saunders, above n 189; Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009).
[196] See further Elazar, above n 193, 6-7.
[197] *US Term Limits, Inc v Thornton,* 514 US 778, 838 (1995) (Kennedy J).
[198] Lino, *Constitutional Recognition,* above n 22, 226.
[199] Reilly, above n 189, 413.
[200] See further Lino, *Constitutional Recognition,* above n 22, 227; Breen, above n 24.
[201] Will Kymlicka, 'Multi-nation federalism', in Baogang He, Brian Galligan and Takashi Inoguchi (eds), *Federalism in Asia* (Edward Elgar Publishing, 2007) 33, 37.
[202] Lino, *Constitutional Recognition,* above n 22, 236.
[203] *Procedures for Consultations between State Authorities and the Sami Parliament 2005* (Norway); *The Sami Act 1987* (Norway).
[204] Lino, *Constitutional Recognition,* above n 22, 240.

systems in North America, which enable self-rule through the significant distribution of public power and recognition of sovereignty.[205] Applying this distinction to the Uluru Statement proposals, we can see that the Treaty proposal would be a federal form, whilst the Voice proposal would be quasi-federal.

4.2 Justifying multinational federalism

Now we understand what multinational federalism is, we can address the question of its justification within the liberal frame. The work of Kymlicka is useful here in demonstrating how multinational federalism can be reconciled with the liberal principles of equality and unity.[206] His defence of multinational federalism in this context falls within his wider liberal theory of group-differentiated minority rights, which also encompasses the claims of other sub-state national and ethnic groups.[207] According to Kymlicka, the claims of these groups present 'the most direct threat to the legitimating ideology of the modern nation-state, and to the state's claim to rule over all its citizens and territory.'[208] As such, Kymlicka attempts to set out a theory of legitimate state rule which accommodates diversity 'in a stable and morally defensible way.' With respect to indigenous peoples, classified as 'national minorities', Kymlicka argues that their rights to self-government through federal forms can be justified on the basis of the liberal principles of equality and unity.[209]

4.2.1 Reconciling multinational federalism with equality

To establish this argument, Kymlicka begins with the proposition that cultural membership is instrumentally valuable to individuals because it provides the context that makes choices meaningful, and as such, the deprivation of one's culture leads to the deprivation of autonomy and choice. Kymlicka accordingly argues that indigenous peoples, as minority cultural groups that have been historically dispossessed and forced to assimilate into the majority state, are disadvantaged in terms of access to their culture

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[205] James Tully calls this 'treaty federalism': *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995). See further, Lino, *Constitutional Recognition,* above n 22, 225-232.

[206] Kymlicka, 'Multi-nation federalism', above n 201; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995); Will Kymlicka, *Multicultural Odysseys* (Oxford University Press, 2007).

[207] Though note that Kymlicka often refers to multinational federalism as 'multi-nation federalism': see, eg, Kymlicka, 'Multi-nation federalism', above n 201, 34.

[208] Ibid 34.

[209] Kymlicka, *Multicultural Citizenship,* above n 206, 26-29.

compared to non-indigenous populations. To remedy this injustice, Kymlicka therefore argues that indigenous peoples are entitled to quasi-federal and federal forms of self-government. Without such rights, Kymlicka argues indigenous peoples are at risk of losing access to their culture, and therefore, their autonomy.[210]

Kymlicka here is employing a kind of egalitarian argumentation that has been called 'luck egalitarianism', where emphasis is placed on the rectification of 'unchosen inequalities'. [211] 'Luck egalitarianism' adopts the position that individuals should not be held responsible for any inequalities that stem from circumstances which they have not chosen, rather only those that result from chosen circumstances. Where the inequality results from unchosen circumstances, it is society that has the collective responsibility to address the inequality. In this sense, Kymlicka argues that society as a whole has the responsibility to address any inequalities that flow from cultural membership, since 'their effects are "profound and pervasive and present from birth".'[212]

It is relevant here to ask: if indigenous peoples are facing inequalities, can this not simply be addressed through non-discrimination legislation? Why is it necessary in this case to make positive structural accommodations in the law? Important to Kymlicka's theory is the assumption that the state cannot be neutral to culture. In this sense, he adopts the fundamental charge of theorists working within the realm of identity politics that laws will affect people differently based on their cultural identity.[213] This proposition presents a direct challenge to colour-blind constitutionalism (or 'the principle of "benign neglect" as Kymlicka calls it[214]), which is the idea that constitutional norms, and laws more broadly, must be blind to racial diversity.[215] True equality, according to colourblind constitutionalism, requires equal rights for all citizens regardless of their race or ethnicity. However Kymlicka argues:[216]

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[210] Kymlicka, *Multicultural Citizenship,* above n 206, 26-29, 89.
[211] Samuel Scheffler, 'What is Egalitarianism' (2003) 31(1)*Philosophy and Public Affairs* 5.
[212] Kymlicka, *Multicultural Citizenship,* above n 206, 109, citing Rawls, *A Theory of Justice* (Belknap Press, 1971) 96.
[213] Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism and 'the Politics of Recognition'* (Princeton University Press, 1992) 25; Tully, above n 205, ch 1.
[214] Kymlicka, *Multicultural Citizenship,* above n 206, 109, 52, 108-115.
[215] Randall Kennedy, 'Colorblind Constitutionalism' (2013) 82 *Fordham Law Review* 1, 3.
[216] Kymlicka, *Multicultural Citizenship,* above n 206, 115.

> But there is no way to have a complete 'separation of state and ethnicity'. In various ways, the ideal of 'benign neglect' is a myth. Government decisions on languages, internal boundaries, public holidays, and state symbols unavoidably involve recognizing, accommodating, and supporting the needs and identities of particular ethnic and national groups.

In this sense, where there exists cultural diversity in society, the state cannot adopt colourblind constitutionalism without forcing minorities to assimilate to the majority culture. Therefore Kymlicka argues that when it comes to the situation of indigenous peoples and other cultural minorities, equality means differential treatment in order to ensure equal access to cultural membership. This point is particularly relevant for the Australian case, as the argument that Australia's constitutional framework must be colourblind is consistently raised in opposition to the demands of First Nations peoples. These arguments will be further addressed below in Chapter Five.

4.2.2 Reconciling multinational federalism with unity

Kymlicka acknowledges that the 'need for unity' is one of the main challenges to accepting multinational federalism within the liberal frame. He defines unity as a 'sense of shared civic identity that holds a liberal society together', creating amongst citizens a 'willingness to make the mutual sacrifices and accommodations necessary for a functioning democracy.'[217] Professor Charles Taylor likewise has stated that unity is necessary 'to sustain what can be recognized as a common deliberation', and in this sense, 'a people has to have a minimal common focus, a set of agreed goals, or principles, or concerns, about which they can debate, argue and struggle.' Without this common bond or 'political identity', the ability of states to 'deliver the goods' is significantly diminished.[218] Accordingly Kymlicka accepts that the task of justifying multinational federalism as a response to the demands of indigenous peoples is not complete without first establishing how these forms of diverse government 'can sustain a level of mutual concern, accommodation and sacrifice that democracies require.'[219]

When considering this need for unity, It is not difficult to see why many liberals believe that the only way to develop this common bond and political identity is through

[217] Kymlicka, *Multicultural Citizenship* above n 206, 174.
[218] Charles Taylor, 'Foreword' in Alain-G Gagnon and James Tully (eds.), *Multinational Democracies* (Cambridge University Press, 2001) xiii.
[219] Kymlicka, *Multicultural Citizenship,* above n 206, 173-174.

homogeneity, or rather 'a common (undifferentiated) citizenship status'.[220] This is in effect the same line of thinking behind the colourblind constitutionalism argument raised above. Indeed as Professor James Tully notes, in many classical texts in liberal theory, 'the connections between uniformity and unity on one hand and diversity and disunity on the other are so firmly forged… that it seems unreasonable to raise doubts.'[221] One example here being Thomas Hobbes' seminal liberal text *Leviathan*, where he associates diverse society with a 'craise house… hardly lasting out their own time, must assuredly fall upon the heads of their posterity.'[222]

However, as Taylor, Kymlicka and Tully all point out, along with many other theorists writing in the realm of identity politics, we no longer (and indeed Australia never did) live in homogenous societies. And when we understand that colourblind constitutionalism in diverse societies will not satisfy the criterion of equality, we can understand that it will not foster unity either. Whilst it may be challenging to accommodate diversity, ignoring it will only lead to greater divisions and dissatisfaction in society. Kymlicka further argues this point:[223]

> What is clear, I think, is that if there is a viable way to promote a sense of solidarity and common purpose in a multination state, it will involve accommodating, rather than subordinating, national identities. People from different national groups will only share an allegiance to the larger polity if they see it as the context within which their national identity is nurtured, rather than subordinated.

Indeed we can see from Australia's history of indigenous-state relations in Chapter Two that a sense of a common bond and political identity was not built from subordination and assimilation. Tully in fact argues that the situation of indigenous peoples globally is exemplary of the point that the 'imposition of uniformity does not lead to unity but to resistance, further repression and disunity':[224]

> Every imaginable means of destruction of their cultures and assimilation into uniform European ways has been tried. Yet, after five hundred years of repression and attempted genocide, they are still here and as multiform as ever… for cultural recognition is a deep

[220] Ibid 173.
[221] Tully, *Strange Multiplicity,* above n 205, 196.
[222] Thomas Hobbes, *Leviathan* (Clarendon Press, 1909) 221; Tully, *Strange Multiplicity,* above n 205, 196.
[223] Kymlicka, *Multicultural Citizenship,* above n 206, 189.
[224] Tully, *Strange Multiplicity,* above n 205, 197.

> and abiding human need. The suppression of cultural difference in the name of uniformity and unity is one of the leading causes of civil strife, disunity and dissolution today.

Kymlicka accordingly argues that whilst multinational federalism may be challenging for states to adopt, rather than being a threat to unity these forms of self-government are 'rightly seen as promoting civic participation and political legitimacy'.[225]

4.2.3 Limitations of Kymlicka's approach

Kymlicka's 'multicultural liberalism' is widely celebrated as an 'innovative'[226] and 'impressive'[227] attempt at reconciling the principles of liberalism with respect for cultural identity. However there are two important limitations that are relevant to the applicability of his theory to justify the Voice and Treaty proposals in the Australian case. Firstly, his equality-based argument 'will only endorse special rights if there actually is a disadvantage with respect to cultural membership, and if the rights actually serve to rectify the disadvantage.'[228] The legitimacy of multinational federalism will accordingly vary with the different circumstances of the case. What will be necessary to establish in the Australian case is that First Nations peoples are disadvantaged as a result of their culture, and that multinational federalism will be effective at addressing this disadvantage.

The second then relates to the potential conflict between individual and collective rights: 'liberals can only endorse minority rights insofar as they are consistent with respect for the freedom and autonomy of individuals.'[229] Kymlicka here is essentially saying that individual rights take priority over collective rights, and that his justification of quasi-federal and federal forms of indigenous self-governance depends on these structures respecting the liberal rights of individual members. Accordingly as David Ivison, Paul Patton and Will Sanders observe, Kymlicka's conception of justice 'involves compensating for arbitrary and unfair social disadvantages, as well as promoting and securing the capacities of individuals to pursue and revise their own conception of the

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[225] Kymlicka, *Multicultural Citizenship,* above n 206, 176.
[226] Richard Spaulding, 'Peoples as National Minorities: A Review of Will Kymlicka's Arguments for Aboriginal Rights from a Self-determination Perspective' (1997) 47(1) *The University of Toronto Law Journal* 35, 40.
[227] Tully, *Strange Multiplicity,* above n 205, 53.
[228] Kymlicka, *Multicultural Citizenship,* above n 206, 109-110.
[229] Ibid 75.

good.'[230] Therefore, in order for the Voice and Treaty proposals to be justified according to Kymlicka's liberal theory, they must be consistent with the individual rights of First Nations peoples.

4.3 Application of principles to the Australian case

4.3.1 Do the proposals fall within the multinational federalism framework?

Kymlicka's justification of multinational federalism discussed above provides us with the understanding of how the Voice and Treaty proposals can be consistent with the liberal principles of equality (Section 4.2.1) and unity (Section 4.2.2). However to fit within Kymlicka's liberal frame, the proposals must meet the two conditions discussed above in Section 4.2.3.

First, it is clear from Chapter Two that First Nations peoples are disadvantaged with respect to accessing their culture. Making up only 3.3% of the population in a representative democracy, First Nations voices are not heard through the majoritarian processes, and they are not consulted in decision-making that affects their communities. Further, the Closing the Gap strategy has failed consistently over the last twelve years to effectively address the socio-economic disadvantage that First Nations peoples face. The Closing the Gap Steering Committee and professional psychologists have directly attributed this failure to the inability of First Nations peoples to access to their own culture, and the failure of the Australian Government to formally accommodate them within its political structure. The Voice and Treaty proposals have designed to directly address this disadvantage and facilitate greater self-determination and access to culture. Accordingly it is clear this first condition is met.

The second condition, however, raises more challenging issues to address. Will the Voice and Treaty proposals negatively impact the rights of First Nations peoples? In Australia the argument is commonly raised that, the Treaty proposal could lead to the establishment of 'illiberal enclaves'.[231] Of main concern here are certain traditional punishments, such as spearing and 'payback', as well as evidence of arranged child

[230] David Ivison, Paul Patton and Will Sanders, 'Introduction', in David Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 1, 7.

[231] Kirsty Gover, 'Legal Pluralism and State-Indigenous Relations in Western Settler Societies' (Working Paper, International Council on Human Rights Policy, 1999) 18 <http://www.ichrp.org/files/papers/168/135_gover.pdf>.

marriages and the use of custom to excuse family violence and sexual abuse.[232] Opponents argue therefore that the recognition of First Nations customary law through Treaty will lead to human rights violations of First Nations people, particularly the rights of women and children.[233]

The clash between individual and collective rights inherent in the indigenous rights agenda is indeed a challenging one to navigate. Especially so in the Australian case, being the only liberal democracy in the world to not have a bill of rights at the national level. However I would argue that the lack of a bill of rights actually shows there is a greater need for Treaty as a means of protecting the individual rights of First Nations peoples. Again, the small population size of First Nations peoples is important here, and it is clear from the current gap in socio-economic indicators that the majoritarian system is not sufficiently protecting the individual rights of First Nations peoples.

Indeed, rather than being seen as a means to avoid human rights obligations, it is quite clear that most First Nations peoples see Treaty as the key to better respecting them.[234] This is consistent with various cross-country comparative studies which indicate that the social and economic wellbeing of indigenous peoples is significantly higher in countries that have stronger forms of recognition, including treaties.[235] The Barunga Statement mentioned above in Chapter Two explicitly called for a treaty '*affirming our human rights and freedoms*.[236]

Further, many First Nations advocates have argued that that their customary laws are not fixed, but constantly evolving and developing, and as such can be brought into

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[232] Jeremy Patrick, 'A Survey of the Arguments against the Constitutional Recognition of Indigenous Peoples' in Simon Young, Jennifer Nielsen and Jeremy Patrick (eds), *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (Federation Press, 2016) 143, 148; Law Reform Commission of Western Australia, 'Aboriginal Customary Laws' (Discussion Paper, Project 94, December 2005) 74 <https://www.lrc.justice.wa.gov.au/_files/P94_DP.pdf>.
[233] Davis, 'Recognition of Aboriginal Law', above n 18, 27.
[234] See, eg, Referendum Council, above n 116, 31-32; Expert Panel, above n 34, 96-98.
[235] See, eg, Paul Kauffman, 'Learning from the United States? The Relevance of Self-Determination and Diversity for the Economic well-being of Indigenous Peoples' (2006) 4(1) *International Journal of Diversity in Organisations, Communities and Nations,* 403; Manuela Tomei, *Indigenous and Tribal Peoples: An Ethnic Audit of Selected Poverty Reduction Strategy Papers* (International Labour Organization, 2005).
[236] Barunga Statement, above n 112 (emphasis added).

conformity with international human rights norms.[237] They argue therefore that these norms of international human rights can be used as the basis for treaty negotiations, informing the dialogue between First Nations peoples and the Australian Government about what should and shouldn't be included in these agreements.[238]

It is clear therefore that both the Treaty and Voice proposals meet the conditions of applying Kymlicka's liberal justification, and as such can be seen as manifestations of multinational federalism that are consistent with the principles of equality and unity.

4.3.2 What is the normative force of this argument?

Relevant for the consideration of the normative force of these arguments is the fact that Kymlicka's theory on multinational federalism was built with a North American context in mind. Accordingly an important question to ask is how applicable is this model to the Australian context? As I mentioned above in the introduction, multinational federalism is slowly gaining traction in the Australian debate, and for good reason. Australia is one of the oldest federations in the world, who's written *Constitution* divides power between the Commonwealth and six States and two Territories.[239] As such, the constitutional language of federalism is familiar to the Australian domain, and indeed it can increase the conservative appeal for strong forms of recognition.[240] Understood through the framework of multinational federalism then, the Voice and Treaty proposals become compatible with Australia's constitutional heritage and system of government.

A further reason why multinational federalism holds normative force for the Australian debate is its consistency with the constitutional structure of many First Nations societies. Aboriginal scholar Christine Black, for example, has described the political organisation of First Nations peoples prior to colonisation as federal in nature:[241]

> Before 1788, over 200 sovereign Indigenous nations co-existed on this continent, by means of an organic and trans-communicative federal model based on mutual respect,

[237] See, eg, Davis, 'Recognition of Aboriginal Law', above n 18, 27.
[238] Ibid.
[239] *Constitution* s 51.
[240] Lino, *Constitutional Recognition,* above n 22, 244-245.
[241] Christine Morris, 'Constitutional Dreaming' in Charles Sampford and Tom Round (eds), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism* (Federation Press, 2001) 290, 294.

> without needing organised state machinery. This system situated sovereignty within a multilateral system of communication, politics and trade.

More recently, Wiradjuri man Mark McMillian has argued that modern First Nations societies, including his own Wiradjuri nation, still retain this federal character. Accordingly he argues that Australia must 'use the consciousness of federalism to examine its role and place in the current suggestions that the Australian Constitution be amended to "recognise" Aboriginal and Torres Strait Islander peoples.'[242] Therefore, not only do these arguments hold legitimacy in the traditions of Australia's Western legal and political heritage, they also are consistent in the traditions of Australia's indigenous legal and political heritage.

However it must be acknowledged, as Lino does, that the application of multinational federalism would require a 'creative adaptation' of Australia's constitutional traditions.[243] There are two lines of argument against this adaptation relating to the exceptionalism of Australia's constitutional context. Chapter Five accordingly rebuts these arguments and argue why the Voice and Treaty proposal, as manifestations of multinational federalism, fit within Australia's constitutional framework.

[242] McMillan, above n 189, 15-16.
[243] Lino, *Constitutional Recognition,* above n 22, 246.

5. Australian constitutional context

Chapters Three and Four have advanced normative arguments in favour of the Voice and Treaty proposals, demonstrating these proposals are consistent with Australia's obligations under international law (Chapter Three) and compatible with liberal understandings of legitimate state rule (Chapter Four). This chapter critically engages with two contentions against the Voice and Treaty proposals, which rely upon the exceptionalism of Australia's constitutional framework. First, is the argument these proposals are incongruent with Australia's majoritarian approach to rights protection and will undermine parliamentary sovereignty. Second, is the argument that there is no place for identity politics in the Australian constitutionalism: rather, it must be 'normatively thin' and colourblind. Chapter Five asserts each line of argument fundamentally misunderstands the principles of Australian constitutionalism, and accordingly provide no compelling reasons to reject the Voice and Treaty proposal. Prior to doing so, I clarify the relevant meaning of constitutionalism and the relevant constitutional dimension in the Australian context for the purposes of this chapter.

5.1 Defining constitutionalism and the constitutional dimension

Acknowledging debate as the term's (over)use and scope of meaning,[244] I employ 'constitutionalism' as defined by Australian constitutional law scholar Jeremy Webber, that is, 'the general framework of presumptions and concerns that inform our understanding of public action and that are used to explain and justify the exercise of governmental power within any society.' Webber clarifies these presumptions:[245]

> operate at a high level of generality and are closely connected to conceptions of nationhood, but their effects are not confirmed to a realm of ideological abstraction. They have a marked conditioning effect on legal interpretation, governmental practice and institutional reform.

So, Australian constitutionalism refers to the unique 'framework of presumptions' that comprise Australia's constitutional culture. Examining this framework of presumptions

[244] Dieter Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World', in Peter Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010) 3; Cheryl Saunders, 'Constitutionalism in Australia' (Melbourne Legal Studies Research Paper Series No. 880, 6 May 2020).
[245] Jeremy Webber, 'Beyond Regret: Mabo's Implications For Australian Constitutionalism' in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 60, 60.

provides normative insight into the conditions of legitimate regulation of public power in Australia. In other words, constitutionalism provides us with specific ideas about what the Australian constitution, in its conferral and limitation of government power, must look like – which norms will be legitimate and which will be illegitimate.[246] For example, traditional federalism and liberalism are presumed to be legitimate constitutional norms within Australian constitutional culture.[247]

It is also necessary to clarify the relevant constitutional dimension in Australia. Following Lino's example, I adopt a wide understanding of Australia's constitutional framework as encompassing both the big-C written Constitution and small-c constitutional norms.[248] Constitutional theorists use the term 'small-c' constitution to describe the constitutional field that encompasses the 'institutions, practices and norms falling outside a codified constitutional text that nonetheless concern the fundamental distribution of public power within the political community.'[249] Accordingly, whilst the Treaty proposal may not require amendment to the written Constitution, it would still constitute significant change to Australia's 'small-c' constitution because it would involve an acknowledgement of First Nations' sovereignty in exercise of Commonwealth executive power under s 61 of the *Constitution;* and an attendant transfer of political power to First Nations people through the agreement-making process. In this sense, as we saw above in Chapter Five, treaties are an important feature of the small-c constitutional domain in many states with indigenous populations, including New Zealand, Canada and the US. Australia is in fact the only Commonwealth country to not have concluded a treaty with its indigenous population.[250]

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[246] See also Martin Loughlin, 'What is Constitutionalisation?' (2010) in Peter Dobner and Martin Loughlin eds *The Twilight of Constitutionalism?* (Oxford University Press, 2010) 47, 55, arguing that modern constitutions 'increasingly seem to acquire legitimacy only to the extent that they measure up to the norms of constitutionalism.'

[247] Saunders, 'Constitutionalism'*,* above n 244, 5; French, above n 11, 4.

[248] Lino, *Constitutional Recognition,* above n 22, 6-7, 98-101.

[249] See further Lino, *Constitutional Recognition,* above n 22, 6; David S Law, 'Constitutions' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 376, 377.

[250] Note that Harry Hobbs and George Williams have advanced an interesting argument that South West Native Title Settlement negotiated between the Noongar people and the Western Australian Government is 'Australia's first treaty': 'The Noongar Settlement: Australia's First Treaty' (2018) 40 *Sydney Law Review* 1.

5.2 Assessing the arguments against the proposals

5.2.1 Counter-majoritarian

The first argument against the Treaty and Voice proposals is that they are counter to Australia's unique 'rights reluctant' culture.[251] As Chapter Four discussed, Australia lacks any constitutionally entrenched bill of rights and instead favours a majoritarian approach to human rights protection. As Sir Owen Dixon explained in 1942, this was a deliberate choice of the framers of the *Constitution* in 1901:[252]

> In [the US] men have come to regard formal guarantees of life, liberty and property against invasion by government, as indispensable to a free constitution. Bred in this doctrine you may think it strange that in Australia, a democracy if ever there was one, the cherished American practice of placing in the fundamental law guarantees of personal liberty should prove unacceptable to our constitution makers. But so it was. The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power.

The framers of the *Constitution* were influenced by British constitutional jurist AV Dicey's conception of parliamentary sovereignty, which places 'faith in the rule of law and the moderate and wise way legislators behave'.[253] Dicey argued that rights could be sufficiently and incrementally protected by the British common law, and hence there was no need for a US style bill of rights.[254] Importantly, this Diceyan approach conceives of the parliament as the 'supreme legislative power' whose laws cannot be struck down by courts or any other body.[255] Parliamentary sovereignty, then, is constructed as absolute and monolithic.[256]

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[251] Hilary Charlesworth, *Writing in Rights: Australian and the Protection of Human Rights* (University of New South Wales Press, 2002); Megan Davis, 'Australia's reconciliation process in its international context: Recognition and the health & wellbeing of Australia's Aboriginal and Torres Strait Islander Peoples' (2014/2015)18(2) *Australian Indigenous Law Reporter* 56, 57-58.

[252] Cited in Susan Crennan and William Gummow (eds), *Jesting Pilate And Other Papers and Addresses by the Rt Hon Sir Owen Dixon* (3rd edn, Federation Press, 2019) 221.

[253] See further Davis, 'Australia's reconciliation process', above n 251, 58.

[254] See further Murray Gleeson, 'Recognition in keeping with the Constitution: A worthwhile project' (Discussion paper, Uphold & Recognise, 2019)

[255] *New South Wales v Commonwealth* (1975) 135 CLR 337, 376 (McTiernan J); Sean Brennan, Brenda Gunn and George Williams, '"Sovereignty" and its Relevance to

Critics of the Voice and Treaty proposals contend their implementation would be 'incongruous' with this aspect of Australian constitutionalism and would illegitimately 'diminish the law-making power of Parliament.'[257] Further they argue that the Voice and Treaty proposals would be inconsistent with the absolute and monolithic nature of sovereignty in Australia.[258]

There are two important points to make in reply to this argument. The first is that the Voice proposal would not actually impede the Commonwealth Parliament's legal authority to act.[259] It's powers would be merely advisory, and as emphasised by former High Court Justice Murray Gleeson, it is clear that this proposal would not amount to a third chamber of Parliament, as it would function as 'a voice *to* Parliament, not a voice *in* Parliament.'[260] Further, the Voice would not have the power to enact legislation itself, nor amend or reject legislation, and as such would lack the key features that constitute a house of Parliament.[261] By all accounts the Voice is a rather modest proposal,[262] and as we saw above in Chapter Four, it would be a quasi-federal structure, containing the element of shared rule but not self-rule.

While the Treaty proposal has deeper implications for the nature of sovereignty in Australia, and the powers of the Commonwealth Parliament, it is ultimately consistent with both. Key to the Treaty proposal, is its ability to address the 'unfinished business' left by *Mabo* and recognise the sovereignty of First Nations peoples.[263] This then leads us to the second point: the Commonwealth Parliament is not sovereign, and its power is not

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Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26 *Sydney Law Review* 307, 312.
[256] Ibid 311.
[257] Gleeson, above n 254, 9.
[258] William Jonas, 'Native Title and the Treaty Dialogue' in Greg Marks (ed), *Indigenous Peoples: International and Australian Law* (International Law Association, 2006) 8, 12. Brennan, Gunn and Williams, above n 254, 317-318.
[259] Cheryl Saunders, *Submission No 194 to the Join Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018* (25 May 2018) 2; Castan and O'Bryan, above n 139, 6.
[260] Gleeson, above n 254, 12.
[261] Saunders, *Submission,* above n 259, 3; Anne Twomey, *Submission No 57 to the Join Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018* (25 May 2018) 2.
[262] Twomey, above n 261, 2.
[263] Referendum Council, above n 116, 21.

absolute.[264] Indeed Dicey was not the only influence on the drafters of the Australian Constitution, and as Sean Brennan explains, Australia in fact has a 'hybrid constitutional democracy': [265]

> The Diceyan tradition sits alongside one of legal constitutionalism, which draws inspiration from the United States in terms of a written, entrenched constitution and judicial review by the courts. Under our hybrid Constitution there have always been some legal safeguards for the community, enforceable by courts against governments, such as the just terms guarantee for the acquisition of property and the freedom from discrimination on the basis of residence in a particular State.

Australia's constitutional framework is often described as a 'Washminster' system, reflecting the influence of both the UK 'Westminster' and the US 'Washington' models.[266] The US model was an essential reference point for design of the federal structure of the Australian polity, which divides power between the Commonwealth and State and Territory governments. We can see therefore that the Australian *Constitution* has always placed limits on the power of the Commonwealth Parliament, and these limits have been enforceable by the courts.[267] In this sense then, sovereignty within the Australian constitutional context is not absolute but rather qualified and shared.[268] Further, as Dr William Jonas points out, the nature of Australian sovereignty has changed over time, and is 'constantly being realigned and redistributed among a myriad of levels and players.' Jonas argues therefore that the 'distribution of sovereign power is not fixed and unable to change.'[269]

As such this line of argument clearly misconstrues the principles of Australian constitutionalism. Australia is not a pure majoritarian system, and its sovereignty is not monolithic and absolute. Rather it is a hybrid system, and therefore compatible with the Voice and Treaty proposals.

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[264] Gleeson, above n 254, 12; Brennan, Gunn and Williams, above n 255, 317-318.
[265] Sean Brennan, 'Constitutional Amendment and the Issue of Trust', in Simon Young, Jennifer Nielsen and Jeremy Patrick (eds), *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (The Federation Press, 2016) 89,102.
[266] See further Elaine Thomson, 'The "Washminster" Mutation' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (Drummond Publishing. 1980).
[267] See, eg, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262-263 (Fullagar J).
[268] Brennan, Gunn and Williams, above n 255, 319-321; Brennan, above n 265,102.
[269] Jonas, above n 258, 12.

5.2.2 'Race Has No Place'

The second argument relies on the purported 'normative thinness' and 'colourblindness' of Australian constitutionalism. As mentioned above in Chapter Four, colour-blind constitutionalism asserts that a state's constitutional norms must be neutral and not differentiate on the basis of race. In Australia, this argument is often substantiated by reference to the normative thinness of Australia's written *Constitution* – that it is 'essentially a structural plan for a federal system of government', which does not address substantive issues.[270] Professor Gregory Melleuish, for example, argues that 'the Australian Constitution has nothing to do with identity politics. It does not deal with substantive issues… Its focus is procedural.'[271] Another critic is conservative lawyer Keith Wolahan, who advances a similar argument to Melleuish stating that these proposals would 'insert race into the heart of our most important democratic document'[272] and would 'change the nature of the Constitution away from a procedural document by introducing identity into it.'[273] These sentiments are echoed by the Institute of Public Affairs ('IPA'), an influential conservative think tank who launched the online campaign 'Race Has No Place' in 2019.[274] Like Meullish and Wolahan, the IPA argues that the Voice and Treaty proposals 'are the manifestation of radical identity politics' and should be rejected because they would 'divide Australians according to race.'[275]

There are two points to make in reply to the argument. First, as we saw from Chapter Four, as a matter of theory, laws cannot be colourblind. Those who assume this position completely fail to recognise that while Australian constitutionalism may purport to be

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[270] Gleeson, above n 254, 8.
[271] Gregory Melleuish, *Australia's Constitution Works Because It Doesn't Define National Identity* (6 July 2015), <https://theconversation.com/australias-constitution-works-because-it-doesnt-define-national-identity-43253>.
[272] Keith Wolahan, 'A Colour-blind Constitution', Samuel Griffith Conference (26 August 2017) 322.
[273] Keith Wolahan, 'Australia's Constitution works because it doesn't define national identity', *The Conversation* (online, 7 July 2015) <https://theconversation.com/australias-constitution-works-because-it-doesnt-define-national-identity-43253>.
[274] *Race Has No Place* (Web Page) <http://racehasnoplace.org.au/>.
[275] John Roskam, 'Indigenous Treaty Would Divide Australia into Two Nations According to Race', *Race Has No Place* (online, 31 May 2017) <http://racehasnoplace.org.au/2017/05/31/indigenous-treaty-would-divide-australia-into-two-nations-according-to-race/>.

neutral, in reality 'it is anything but'.[276] The most glaringly obvious section that establishes this fact is the *race* power in section 51(xxvi), which explicitly gives the Commonwealth Government the power to legislate *on the basis of race,* and is not restricted to only beneficial interpretation. As such the argument that these proposals would 'insert race into the Constitution' is false and misleading.[277] Further, even the very fact of the Australia's written *Constitution* being 'purely procedural' evidences that it is, 'in fact, *steeped* in identity politics'.[278] Professors Jennifer Hendry and Melissa Tatum succinctly explain this point:[279]

> That it achieves its substantive goals (creating a government structure, specifying the form, powers, and duties of the government, and establishing the federation's territorial dominion) largely by instituting procedures to regulate those government functions simply reinforces its identity as a document rooted in Western political philosophy and Anglo-American common law.

This argument echoes that of Elisa Arcioni and Adrienne Stone, who argue that 'even a "procedural" constitution can, and perhaps *must,* define the deepest political commitments of the polity it governs. When constitutions establish the processes, they make substantive commitments.'[280] As such they argue that Australian constitutionalism is not as 'normatively thin' as so many believe. Perhaps, however, it is the very reluctance of these critics to engage with identity politics which has kept them blind to the particular colour that is entrenched in the *Constitution*. As we saw above in Chapter Two, there is no doubt that the *Constitution* was created to enable a particular identity for the Australian people, and expressly excluded First Nations peoples from its terms. And whilst the 1967 referendum has gone someway to alleviate this 'negative recognition', it by no means has erased race from the *Constitution*.

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[276] Jennifer Hendry and Melissa L Tatum, 'Constitution as Dialogue: Legal Pluralism and the American Experience', in in Simon Young, Jennifer Nielsen and Jeremy Patrick (eds), *Constitutional Recognition of First Peoples in Australia* (The Federation Press, 2016) 160, 162.
[277] Brennan, above n 265, 100-102.
[278] Hendry and Tatum, above n 276, 162.
[279] Ibid.
[280] Elisa Arcioni and Adrienne Stone, 'The small brown bird: Values and aspirations in the Australian Constitution' (2016) 14 *International Journal of Constitutional Law* 60, 66-67.

6. Conclusion

This thesis has advocated for the Voice and Treaty proposals in the Uluru Statement as a means of implementing the collective rights of First Nations peoples in Australia. Informed by Australia's legal and political history, as well as the pervasive socio-economic disadvantage that First Nations peoples continue to face, this thesis draws on international law and liberal ideas of legitimate state rule to prophesise a more hopeful future for Australian constitutionalism. It contends the Voice and Treaty are the best means of realising that future: they are consistent with Australia's obligations under international law, they are compatible with the principles of liberalism that underlie Australian democracy, and they fit within Australia's constitutional framework and culture.

This argument was advanced over the proceeding chapters as follows. Chapter Two contextualised the relevant issues and familiarised the reader with the nuances of the Australian case. It was shown that the dimensions of the current crisis facing First Nations peoples are a direct result of the Australian Government's failure to legally recognise them, to protect their culture and to allow them to participate in decision-making on matters that affect them. Chapter Three located the Voice and Treaty proposals within the framework of self-determination and demonstrated that these proposals are consistent with Australia's obligations under international human rights law. Chapter Four translated the Voice and Treaty proposals into the framework of multinational federalism, to show how these proposals are consistent with the liberal principles of unity and equality. Chapter Five applied Australian constitutional law and theory to counter the arguments, prevalent within Australian political and popular discourse, that the Voice and Treaty proposals are inconsistent with features of Australian constitutionalism.

Most importantly, the Uluru Statement is a clear and unambiguous statement of the meaningful form of constitutional recognition for First Nations peoples. They seek a 'living' form of recognition – 'one that is not confined to words on the page of a rarely-read document, but rather provides ongoing and substantive recognition by way of a means of having their voices heard in relation to governmental decisions that directly

affect their lives.'[281] Accordingly this thesis presents a useful tool to communicate to the polity and political leadership as to why Australia has the legal and moral obligation to adopt the Voice and Treaty proposals.

[281] Twomey, above n 261, 2.

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