IMAGINING A MAKARRATA COMMISSION

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The Uluru Statement from the Heart advocates for a First Nations constitutional voice and a legislated Makarrata Commission to supervise agreement-making and truth-telling. A First Nations voice is the immediate priority and the necessary focus of scholarly and practical discussion. However, while advocates envisage a Makarrata Commission being established following a First Nations voice, there is negligible research imagining how a Makarrata Commission might operate. This article addresses that gap. Drawing on agreement-making and truth-telling processes in Australia, Aotearoa New Zealand and Canada, it imagines how a national institution to supervise agreement-making and truth-telling could function.

I INTRODUCTION

The Uluru Statement from the Heart ('Uluru Statement') advocates for a First Nations constitutional voice to facilitate Indigenous input into laws and policies with respect to Indigenous affairs, and a legislated Makarrata Commission to supervise agreement-making and truth-telling.[1] The two ideas fit logically together: empowering Indigenous peoples with a voice in political decisions made about them, while promoting spheres of autonomy in matters relating to their internal affairs through agreement-making with the state, are reforms both necessary for justice and reconciliation.[2]

Since the Uluru Statement in 2017, considerable discussion and design work has developed the concept of a First Nations voice. Several states and territories have embarked upon treaty-making in various forms, and Victoria has commenced a formal process of truth-telling. However, little has been done to explore how a national Makarrata Commission could operate in Australia. This article aims to support the Uluru Statement by helping to address that gap. In broad contours it

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1 Referendum Council, 'Uluru Statement from the Heart' (Statement, National Constitutional Convention, 2017) <https://ulurustatement.org/the-statement> ('Uluru Statement').

2 These two ideas are both also protected in the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) arts 3–5 ('*UNDRIP*').

explores the role a national institution to supervise agreement-making and truth-telling might play. In offering these thoughts, we draw on historical and ongoing agreement-making and truth-telling mechanisms between Indigenous peoples and the Australian state, as well as salient international examples from Aotearoa New Zealand and Canada. Our intent is to present preliminary suggestions to stimulate discussion and support Indigenous Australians and policymakers considering these questions.

On the first question, the Referendum Council noted that a Makarrata Commission is a matter 'of great importance to Aboriginal and Torres Strait Islander peoples'.[3] Makarrata is a Yolngu word meaning a 'coming together after a struggle'; since 1980, it has been used to refer to a political accord between Indigenous peoples and the Australian government.[4] As a concept, 'makarrata' captures the idea of peacemaking after conflict. It is concerned with 'healing the divisions of the past. … acknowledging that something has been done wrong, and … [seeking] to make things right',[5] by 'establishing an honest relationship with government'.[6] But what might this mean in practice, and who is entitled to help answer the question?

Consistent with principles of self-determination and free, prior and informed consent,[7] Indigenous peoples must lead the discussion about and design of a Makarrata Commission. Indigenous Australians initiated this conversation, and for generations have called for structural reform to deal with the 'unfinished business' of the nation. However, as Indigenous Australians have explained, '[i]n order for meaningful change to happen, Australian society generally needs to "work on itself"'.[8] To this end, in the Uluru Statement, Indigenous advocates invited all Australians to 'walk with' Indigenous peoples to achieve the specified reforms. As non-Indigenous scholars, we accept this invitation and offer our research and ideas in the spirit of collaboration and dialogue.

We participate for three reasons. First, so our research might be of assistance to Indigenous people in their advocacy and design thinking. Second, because this is not merely a theoretical debate: we are alive to the political and practical reality that any constitutional and (in the case of a Makarrata Commission) legislative institution will require widespread community and political support to be implemented by the Australian Parliament and government, and to ultimately succeed in its aims. Achieving a Makarrata Commission thus requires broad political consensus among Indigenous and non-Indigenous Australians, underscoring the need for inclusive dialogue. Third, according to the Uluru

3 *Final Report of the Referendum Council* (Report, 30 June 2017) 2 ('*Referendum Council Final Report*').

4 Noel Pearson, 'Indigenous Voice Deserves to Be Heard', *The Weekend Australian* (Canberra, 27 May 2017) 19.

5 Ibid.

6 *Referendum Council Final Report* (n 3) 21.

7 See *UNDRIP* (n 2) arts 3, 19.

8 *Referendum Council Final Report* (n 3) 17 (emphasis omitted).

Statement and the Referendum Council Final Report, a Makarrata Commission would supervise agreement-making and truth-telling between Indigenous peoples and Australian governments, which represent all Australians. The concept of a Makarrata Commission speaks to the idea of healing divisions; of communities 'coming together'. It is therefore the responsibility of both Indigenous and non-Indigenous Australians to achieve Makarrata and resolve our shared unfinished business. In the spirit of Dr Nugget Coombs' 1979 Aboriginal Treaty Committee, we urge non-Indigenous Australians to accept Indigenous Australia's invitation to come to the table and be part of this conversation.

On the second question, we agree that a First Nations constitutional voice is the immediate priority, for reasons explained in more detail in Part II. However, two factors suggest that the time is ripe for scholarly work to also consider how a Makarrata Commission might operate. First, the new Australian government led by Prime Minister Anthony Albanese has committed to holding a First Nations voice referendum in its first term, but also to implementing the Uluru Statement in full.[9] This includes establishing a Makarrata Commission.

Second, several states and territories have formally commenced treaty and truth-telling processes. Victoria, Queensland, the Northern Territory and South Australia have committed to discussing treaties.[10] In 2021, Victoria established the Yoo-rrook Justice Commission to undertake Australia's first comprehensive process of truth-telling.[11] These state and territory processes represent the first time any Australian government has opened treaty talks and a comprehensive process of truth-telling with Indigenous peoples. The push demonstrates political interest in structural reform in these jurisdictions. However, while important, these processes remain limited and disconnected. Questions remain as to how and whether substantive justice will be achieved.[12] It is vital that scholars begin to consider how a nationwide Makarrata Commission might complement and expand on these important state and territory initiatives.

Our article proceeds in six parts. In Part II, we provide the historical and political background that informs current discussion of a Makarrata Commission. We explain why this reform is logically connected to, and should be implemented after, a First Nations constitutional voice. In Part III we examine current and former processes of agreement-making and truth-telling in Australia. While these processes are significant, they remain inadequate in important respects. Nonetheless, as we suggest, they could form the basis from which to construct

9 Lorena Allam, 'Voice, Treaty, Truth: What Does Labor's Commitment to Uluru Statement from the Heart Mean?', *The Guardian* (online, 22 May 2022) <https://www.theguardian.com/australia-news/2022/may/22/voice-treaty-truth-what-does-labors-commitment-to-uluru-statement-from-the-heart-mean>.

10 See generally George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020) 240.

11 Victoria, *Victoria Government Gazette*, No S 217, 14 May 2021 ('*Victoria Gazette*').

12 Megan Davis, 'The Truth about Truth-Telling', *The Monthly* (online, 1 December 2021) <https://www.themonthly.com.au/issue/2021/december/1638277200/megan-davis/truth-about-truth-telling> ('Truth-Telling').

broader comprehensive agreement-making and truth-telling processes facilitated by a nationwide Makarrata Commission.

In Part IV, we turn to international examples for inspiration. We examine ongoing treaty-settlement processes in Aotearoa New Zealand and modern treaty-making in Canada. While both states operate under distinct constitutional and legal frameworks, they offer insight for Australia. In Part V, we draw on the sophisticated and nuanced conversations held by the First Nations Regional Dialogues and the First Nations National Constitutional Convention at Uluru to explore how a Makarrata Commission could work in Australia. In doing so, we also build on the agreement-making and truth-telling mechanisms investigated in Parts III and IV where appropriate. In a brief Part VI, we conclude.

II THE ULURU STATEMENT FROM THE HEART

Australia was colonised without consent. No official treaty was signed at first contact or in the early years of settlement with the hundreds of Indigenous communities who had possessed the continent for over 60,000 years.[13] Those communities actively resisted colonial intrusion, but settler diseases, frontier wars and massacres stripped Indigenous peoples of much of their community and country. In the name of and under the colour of law, Indigenous peoples 'were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation'.[14]

Indigenous peoples have long campaigned for reform to recognise this history and provide appropriate redress. Most recently, the 2017 Uluru Statement from the Heart builds on decades of Indigenous-led advocacy to call for structural and constitutional reform to end Indigenous peoples' 'torment of … powerlessness'.[15] It calls for a constitutionally guaranteed First Nations voice to empower Indigenous peoples with a fairer say in laws and policies made about them, and a legislated Makarrata Commission to supervise agreement-making and truth-

13 Peter Veth and Sue O'Connor, 'The Past 50,000 Years: An Archaeological View' in Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia* (Cambridge University Press, 2013) vol 1, 17, 19.

14 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 69 (Brennan J).

15 'Uluru Statement' (n 1) (emphasis omitted).

telling.[16] The proposed reforms have been characterised by some advocates as 'Voice. Treaty. Truth'.[17]

A Voice

A First Nations constitutional voice must be developed and implemented first. This is the sequencing Indigenous advocates say they want, and it makes the most sense.[18] As Megan Davis explains, a First Nations voice — an Indigenous representative and consultative body — would play a leading role in advocating for the establishment and collaborating with government and Parliament on the design of a Makarrata Commission.[19] Once established, that Commission would then facilitate agreement-making and truth-telling.[20] For Davis, the nascent treaty process in Victoria demonstrates the logic of this sequencing:

> To negotiate a treaty, it had to do what the Uluru statement contemplates and create a political Voice first: this pioneering Voice is known as the First Peoples' Assembly of Victoria. The assembly advanced its treaty negotiation framework and, on the advice of communities, has now established the Yoo-rrook Justice Commission.[21]

As Davis clarifies, '[t]he reform is Voice: Makarrata'.[22]

Historical and practical considerations support this strategy. In Australia, the absence of a constitutionally guaranteed voice has meant governments have been able to easily disregard and dismiss Indigenous advocacy, including advocacy for

16 On the Uluru Statement: see Megan Davis and George Williams, *Everything You Need to Know about the Uluru Statement from the Heart* (NewSouth Publishing, 2021). On a First Nations voice: see Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart Publishing, 2020) ('*A First Nations Voice*'); Shireen Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples when Making Laws for Indigenous Affairs' (2015) 26(3) *Public Law Review* 166; 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) *University of New South Wales Law Journal* 629. On questions of the design of a First Nations voice: see Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart Publishing, 2021) ('*Indigenous Aspirations and Structural Reform*').

17 Pat Anderson, 'Our Hope for the Future: Voice. Treaty. Truth' (Vincent Lingiari Memorial Lecture, Darwin, 16 August 2017).

18 Megan Davis, 'A First Nations Voice to Parliament: Our Plea to Be Heard', *Religion and Ethics, ABC* (online, 27 May 2022) <https://www.abc.net.au/religion/megan-davis-voice-to-parliament-our-plea-to-be-heard/11300474> ('Voice to Parliament').

19 Ibid.

20 Megan Davis, 'The Long Road to Uluru: Walking Together' [2018] (60) *Griffith Review* 13, 42–4.

21 Davis, 'Truth-Telling' (n 12).

22 Ibid.

treaties.[23] For instance, despite Prime Minister Bob Hawke's endorsement of the Barunga Statement (which called for both a treaty and a national Indigenous representative body), no treaty was negotiated — indeed, no treaty process was even set up. Similarly, notwithstanding the persistent advocacy of the Aboriginal and Torres Strait Islander Commission ('ATSIC'), the John Howard government refused to countenance a negotiated settlement with Indigenous peoples.[24] Instead, ATSIC's agitation for treaty led the Howard government to marginalise the Commission.[25] Crucially, lack of constitutional protection left ATSIC vulnerable to the 'wavering sympathies of the Australian community' and the fickle priorities of politicians.[26] ATSIC was ultimately abolished in 2005 with bipartisan support.[27] Its abolition effectively sidelined Indigenous voices and derailed their campaign for treaty.

Practical factors also support establishing an Indigenous representative body prior to agreement-making and truth-telling. Colonisation often removed Indigenous peoples from their country and communities, inhibiting their capacity to exercise self-governance according to their laws, customs and traditions. It also weakened their political power within the Australian state. An Indigenous representative body could help unify Indigenous communities where appropriate, to consolidate their negotiating power and support them to engage with each other and the state. As Victorian Treaty Advancement Commissioner Jill Gallagher has explained:

> Before colonisation, we had traditional ways of doing business. There was no need for a statewide Representative Body. Colonisation has changed this. We now need a way to talk Treaty with the state. … Our unique situation needs a unique response. We have to make a Body that fits our unique culture, history and traditions. But it must also represent us in the modern world.[28]

An Indigenous representative body that facilitates Indigenous input into the design of an agreement-making and truth-telling framework is therefore vital to increase the likelihood of meaningful settlements. Appreciating these factors, the Uluru Statement calls for a constitutionally guaranteed First Nations voice as a necessary first step towards a Makarrata Commission. A constitutional voice would provide a permanent platform for Indigenous advocacy and engagement with the state.

23 Megan Davis, 'Constitutional Recognition for Indigenous Australians Must Involve Structural Change, Not Mere Symbolism', *The Conversation* (online, 18 February 2020) <https://theconversation.com/constitutional-recognition-for-indigenous-australians-must-involve-structural-change-not-mere-symbolism-131751>.

24 Williams and Hobbs, *Treaty* (n 10) 45.

25 Ibid 45–6.

26 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 8.

27 *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth). The previous Labor government had also marginalised ATSIC at times. On ATSIC: see Hobbs, *Indigenous Aspirations and Structural Reform* (n 16) ch 5.

28 Victorian Treaty Advancement Commission, *Treaty Statewide Gathering* (Booklet, 25 September 2018) 3.

Depending on the model adopted, a First Nations voice may even participate as a party to processes of agreement-making and truth-telling in certain circumstances.

However, while a First Nations constitutional voice is necessary, it is on its own an insufficient precondition to achieving a Makarrata Commission. Agreement-making and truth-telling in the Indigenous–state relationship cannot happen unilaterally; it requires Australian governments to come to the table. A second precondition is therefore political will, and preferably bipartisan commitment, for a national Makarrata Commission.[29] It may take time to build the necessary widespread political support, but Indigenous people (through a First Nations voice) and representatives of the Australian state will ultimately need to work together to make agreement-making and truth-telling a reality.

B Makarrata

The Uluru Statement and the Referendum Council report explain that a Makarrata Commission should supervise agreement-making and truth-telling.[30] This would be 'a legislative initiative for Aboriginal and Torres Strait Islander peoples to pursue with government',[31] enabling the resolution of 'Unfinished Business' and providing a way to address historic and ongoing 'differences … through agreement-making'.[32] As the Indigenous delegates to the final constitutional Convention at Uluru explained:

> Through negotiated settlement, First Nations can build their cultural strength, reclaim control and make practical changes over the things that matter in their daily life. By making agreements at the highest level, the negotiation process with the Australian government allows First Nations to express our sovereignty — the sovereignty that we know comes from The Law.[33]

Voice and Makarrata complement each other by empowering Indigenous peoples in different ways: while a First Nations voice would empower Indigenous communities to provide advice on laws and policies made about them, a Makarrata Commission would enable agreement-making and truth-telling in the Indigenous–

29 Notably, Victoria's treaty process now has bipartisan commitment: see Adeshola Ore, 'Victoria's Opposition Backflips on Opposing State-Based Treaty Negotiations with Traditional Owners', *The Guardian* (online, 5 May 2022) <https://www.theguardian.com/australia-news/2022/may/05/victorias-opposition-backflips-on-opposing-state-based-treaty-negotiations-with-traditional-owners>.

30 'Uluru Statement' (n 1).

31 *Referendum Council Final Report* (n 3) 2.

32 Ibid 21.

33 Ibid.

state relationship. Together these reforms would enable First Nations' 'ancient sovereignty [to] shine through as a fuller expression of Australia's nationhood'.[34]

Historian Henry Reynolds imagines a Makarrata Commission to be a kind of truth commission. He envisages 'the first official and adequately funded body to examine the fraught history of relations between the First Nations and the European invaders'.[35] Reynolds suggests that a Makarrata Commission

> would have to tackle questions that have been deeply controversial and much contested during the last two generations, ones that have been central to the culture wars still being fought out in parliaments, the media and the nation's school rooms. On the other hand, it would bring Australia into line with the many countries that, while dealing with troubled histories, have over the last thirty years or so established truth commissions. … They provided venues for victims to be heard, and for atrocities to be documented in such a way that they will never be forgotten.[36]

Truth is crucial, but a Makarrata Commission must be more than just a truth commission. Indigenous Australians have long warned against detaching truth from justice. In a recent article, Davis argued that Indigenous Australians should be wary of attempts by the state to 'co-opt' 'Indigenous peoples' trauma and healing' in order to detach them 'from broader Indigenous political goals for self-determination'.[37] The concern appears to be that Australians should not be rewarded with the catharsis that can come from truth-telling without also committing to the obligations and restitution required to address the wrongs of the past. A Makarrata Commission calls for much more than just truth-telling and documenting of past atrocities: it calls for past atrocities to be dealt with through just settlements.

Drawing on the First Nations Regional Dialogues as recorded in the Referendum Council report, we see a Makarrata Commission as an independent tribunal empowered to facilitate agreement-making and truth-telling between Indigenous peoples and the Australian state, with truth and just outcomes being tethered together as much as possible.[38] What might just outcomes look like? The Referendum Council report explains that 'Makarrata is another word for Treaty or agreement-making'.[39] This is an important point. While there are many types of agreements between Indigenous peoples and governments in Australia and

34 'Uluru Statement' (n 1). On the recognition of Indigenous sovereignty in Australian law through treaty-making: see RS French, 'Native Title: A Constitutional Shift?' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 126, 144–5.

35 Henry Reynolds, *Truth-Telling: History, Sovereignty and the Uluru Statement* (NewSouth Publishing, 2021) 3.

36 Ibid.

37 Davis, 'Truth-Telling' (n 12), discussing Dian Million, *Therapeutic Nations: Healing in an Age of Indigenous Human Rights* (University of Arizona Press, 2013) 6.

38 See below Part V.

39 *Referendum Council Final Report* (n 3) 21.

internationally, simply calling an agreement a treaty does not make it so. A treaty is a particular type of agreement that must satisfy three conditions.[40]

First, while treaties can be vehicles of reconciliation and inclusion of Indigenous peoples within the Australian state, they also acknowledge Indigenous peoples as distinct political communities, on the basis of their status as prior self-governing peoples who owned and occupied the land. Such acknowledgement varies in its terms and expression depending on what the parties negotiate. For instance, in the 2018 *Barunga Agreement*, which commits the Northern Territory government and the four Aboriginal Land Councils to explore treaty, the parties agree that:

a) Aboriginal people, the First Nations, were the prior owners and occupiers of the land, seas and waters that are now called the Northern Territory of Australia.

b) The First Nations of the Northern Territory were self-governing in accordance with their traditional laws and customs; and that

c) First Nations peoples of the Northern Territory never ceded sovereignty of their lands, seas and waters.[41]

The *Barunga Agreement* is only an initial step towards a treaty, but it demonstrates that recognising Indigenous peoples as distinct political communities is the first stage in any treaty relationship.

Second, a treaty is a political agreement that must be reached by a fair negotiation process conducted in good faith and in a manner respectful of each participant's standing as a distinct political community. Negotiation is an appropriate process for resolving disputes between Indigenous peoples and the state. It allows for flexibility, builds trust, and can produce agreements supported by all parties. Fair negotiation also enables the discovery of a shared middle ground. However, securing a fair negotiation process will be challenging given deeply unequal power relationships. This is why institutional mechanisms to support good faith negotiations are imperative.[42] In Aotearoa New Zealand for example, courts promote principles of 'good faith, reasonableness, trust, openness and consultation' in political negotiations between Māori and the Crown,[43] and urge that the parties conduct themselves 'with the utmost good faith which is the characteristic

40 For more detail on these conditions and where they are drawn from: see Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1, 7–14 ('The Noongar Settlement'); Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016) 99–114.

41 This is outlined in principle six: *The Barunga Agreement*, signed 8 June 2018, 6.

42 The *UNDRIP* (n 2) articulates a standard predicated on respecting the status of Indigenous peoples as a political community.

43 *New Zealand Maori Council v A-G (NZ)* [2008] 1 NZLR 318, 337 [81] (O'Regan J for the Court) (Court of Appeal of New Zealand).

obligation of partnership'.[44] The Waitangi Tribunal also holds the parties to account to these principles. We imagine a Makarrata Commission could play a similar role in ensuring negotiations are fair.

Third, and perhaps most importantly, treaties involve both sides committing to responsibilities, promises and principles that bind the parties in an ongoing relationship of mutual obligation and shared responsibility. Crucially, while the content of any negotiated settlement will differ in accordance with the aspirations and capacity of each Indigenous community as well as the priorities of the state, treaties must empower Indigenous communities with authority, agency, and a degree of self-government. The extent of self-government recognised will differ depending on what is agreed. However, treaties should at least empower Indigenous peoples to take responsibility and exercise authority and leadership in their 'internal and local affairs'.[45] In Aotearoa New Zealand, the Waitangi Tribunal has adopted a similar understanding, explaining that the *Treaty of Waitangi* protects 'the ability of tribal communities to govern themselves as they had for centuries, to determine their own internal political, economic, and social rights and objectives, and to act collectively in accordance with those determinants'.[46]

In addition to setting out mutual promises, principles and power-sharing arrangements, settlements between Indigenous peoples and the state should provide redress for past injustice. This could include agreed financial compensation, return of land, formal recognition of historic wrongs (truth-telling) and symbolic gestures of reconciliation, such as state apologies. However, as Davis has emphasised, truth-telling unaccompanied by substantive justice and structural reform should be rejected.[47] Similarly, symbolic apologies on their own are insufficient. As Noel Pearson has explained, with 'sorry' should come a substantive promise that the past wrongs will not be repeated.[48] The moral and political gravitas of such mutual promises make a treaty much more than an ordinary contract. As the Canadian Supreme Court has described, a treaty is 'an exchange of solemn promises … [and] an agreement whose nature is sacred'.[49]

44 *New Zealand Maori Council v A-G (NZ)* [1987] 1 NZLR 641, 664 (Cooke P) (Court of Appeal of New Zealand).

45 *UNDRIP* (n 2) art 4.

46 Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) vol 1, 113.

47 Davis, 'Truth-Telling' (n 12).

48 Noel Pearson, 'Next Step Is for Australia to Leave Race Behind', *The Australian* (online, 25 May 2013) <https://amp.theaustralian.com.au/national-affairs/in-depth/journey-to-recognition/next-step-is-for-australia-to-leave-race-behind/news-story/f9acee8f859d79f8f3fac2b374d1300a>.

49 *R v Badger* [1996] 1 SCR 771, 793 [41] (Cory J).

III AGREEMENT MAKING AND TRUTH TELLING IN AUSTRALIA

In supervising agreement-making and truth-telling, a national Makarrata Commission would not build on an empty slate. Australian governments have periodically engaged in limited forms of agreement-making and truth-telling. From these beginnings could grow a more comprehensive and systematic agreement-making and truth-telling process, as imagined by the Uluru Statement. In this Part, we explore several key past and present agreement-making and truth-telling processes. While these processes are valuable, they are also often piecemeal, narrow and/or disconnected, and (in most cases) have not resulted in just settlements built on acknowledgement of past injustices. By contrast, a national Makarrata Commission imagines an embedded process of comprehensive agreement-making and truth-telling, leading to just resolutions of grievances and stronger ongoing partnerships between Indigenous peoples and the state.

A Existing Processes of Agreement Making

There are many forms of agreements between Indigenous peoples and Australian governments.[50] Agreements arise in a range of contexts including in relation to land rights, joint management of national parks, resource benefit-sharing, and service-delivery. Some of these agreement-making mechanisms could pave the way for more comprehensive agreement-making under a Makarrata Commission.

Consider agreements made under the *Native Title Act 1993* (Cth). Noel Pearson has suggested that negotiations around native title may form 'very good foundations … for First Nations to make agreements with government on the full range of issues that affect their people and their future'.[51] The Noongar Settlement demonstrates this potential. Taking the legal form of six Indigenous Land Use Agreements, the Noongar Settlement between the Noongar people and the Western Australian government is the largest and most comprehensive agreement to settle Aboriginal interests in land in Australian history.[52] The $1.3 billion settlement, negotiated with the Liberal State government, includes agreement on rights, obligations and opportunities relating to land, resources, governance, finance, and cultural heritage.[53] As part of the Settlement, the Noongar people agreed to surrender any native title rights and interests that exist in the area and consented to the validation of all potentially historically invalid acts. A smaller but similarly

50 Marcia Langton, Maureen Tehan and Lisa Palmer, 'Introduction' in Marcia Langton et al (eds), *Honour among Nations: Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 1, 21.

51 Michael McKenna, 'Noel Pearson's Regional Treaty Push', *The Australian* (online, 19 June 2015) <https://amp.theaustralian.com.au/nation/noel-pearsons-regional-treaty-push/news-story/35ac7239cf81efe0882626a7333d974a>.

52 Gian De Poloni, 'WA Premier Signs $1.3 Billion Noongar Native Title Settlement', *ABC News* (online, 8 June 2015) <https://www.abc.net.au/news/2015-06-08/premier-signs-noongar-native-title-settlement/6530434>.

53 Ibid.

broad agreement was struck between the Yamatji Nation and the Western Australian government in 2020. The Yamatji settlement comprises both a determination of native title and an Indigenous Land Use Agreement, meaning that the settlement contains both recognition of land rights as well as a substantial economic package of over $450 million.[54]

These examples demonstrate that native title can be the starting point or trigger for broader agreements. The Noongar Settlement has even been described as comparable to a treaty.[55] Participants in the negotiation certainly recognised its significance. Upon notification that the Noongar people had voted to accept the settlement, Premier Colin Barnett issued a press release, noting that the 'break-through agreement' was 'a historic achievement in reconciliation' and an 'extraordinary act of self-determination by Aboriginal people … provid[ing] them with a real opportunity for independence'.[56] Roger Cook, the Deputy Opposition Leader agreed, characterising the Settlement as 'the single greatest act of sovereignty by the Noongar nation since settlement'.[57] Glen Kelly, the CEO of the South West Aboriginal Lands and Sea Council, looked forward to what the settlement might mean in practice for the Noongar people: 'we think there's great empowerment in there for the Noongar people and great prosperity to be had'.[58]

Formal processes of truth-telling do not ordinarily accompany native title settlements, but apologies occur in various forms. Consider the 2001 *Western Cape Communities Co-Existence Agreement*, negotiated between the Indigenous peoples of Cape York (represented by 11 traditional owner groups and four Aboriginal community councils), Comalco and the Queensland government.[59] Legally an Indigenous Land Use Agreement, the Settlement recognised traditional ownership and included a range of economic and cultural components.[60] At the signing of the Agreement, the Acting Chief Executive of Comalco apologised that it had taken more than 40 years to 'face up to that unfinished business'.[61] The State government

54 See discussion in Laura Meachim, 'Yamatji Nation Claim Resolved Granting Native Title and Funding Deal in Australian First', *ABC News* (online, 7 February 2020) <https://www.abc.net.au/news/2020-02-07/landmark-yamatji-nation-native-title-declaration-in-wa/11942946>.

55 Hobbs and Williams, 'The Noongar Settlement' (n 40) 34–7.

56 Department of the Premier and Cabinet (WA), 'Noongars Vote to Accept Historic Offer' (Media Statement, 30 March 2015) <https://www.mediastatements.wa.gov.au/Pages/Barnett/2015/03/Noongars-vote-to-accept-historic-offer.aspx>.

57 Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 8688 (Roger Cook).

58 Kathryn Diss, 'Claimants Ink $1.3 Billion Western Australia Noongar Native Title Deal', *ABC News* (online, 30 March 2015) <https://www.abc.net.au/news/2015-03-30/south-west-noongar-native-title-deal-inked/6357746>.

59 'Western Cape Communities Co-Existence Agreement', *Western Cape Communities Trust* (Web Page) <https://www.westerncape.com.au/welcome/our-agreement/>.

60 See Mark McMillan et al, 'Obligations of Conduct: Public Law' (2020) 44(2) *Melbourne University Law Review* 602, 619, quoting ibid

61 McMillan et al (n 60) 620, quoting Rio Tinto, *Why Agreements Matter* (Resource Guide, March 2016) 68.

also apologised. Queensland Premier Peter Beattie delivered a formal written apology to the people of Mapoon, expressing 'sincere regret' for government 'actions taken between 1950 and 1963 under the laws of the time'.[62] More recently, in confirming the registration of the Yamatji Nation's native title, Mortimer J noted that:

> The recognition given by a determination of native title, for those who have long been denied any recognition by Australian law of their deep and abiding connection to their Country, is a step in the struggle of Aboriginal and Torres Strait Islander peoples to regain what was taken away from them …[63]

Apologies like these are important, but they do not engage in truth-telling in any depth. They are not comprehensive legal processes capable of, or aimed at, shifting power relations. Rather they memorialise historic injustice.[64]

The Noongar Settlement also included some symbolic cultural and historic recognition, which could be characterised as a 'light touch' form of truth-telling. The preamble to the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA) ('*Noongar Act*') acknowledges that '[s]ince time immemorial, the Noongar people have inhabited lands in the south-west of the State; these lands the Noongar people call Noongar boodja (Noongar earth)', and that they still enjoy a 'living cultural, spiritual, familial and social relationship with Noongar boodja'.[65] Schedule 1 includes a declaration in the Noongar language, the translation of which acknowledges that the Noongar people 'are the traditional owners of South West Western Australia, and have been since before time immemorial'.[66] It further recognises that the Noongar people 'continue to practise the laws and customs of our culture' as part of 'one of the oldest surviving living cultures on this earth'.[67] In debate on the Bill, members of the Western Australian Parliament spoke of their own experiences learning about the history of colonisation in Australia, and 'why it is really important to teach people about the injustices of the past'.[68]

Many Noongar people appreciated the legislative recognition of truth. On the day that the Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition

62 Anti-Discrimination Commission Queensland, *Aboriginal People in Queensland: A Brief Human Rights History* (Resource, 2017) 16, cited in McMillan et al (n 60) 620.

63 *Taylor on Behalf of the Yamatji Nation Claim v Western Australia* [2020] FCA 42, [80].

64 Davis, 'Truth-Telling' (n 12), quoting Lea David, *The Past Can't Heal Us: The Dangers of Mandating Memory in the Name of Human Rights* (Cambridge University Press, 2020) 1–2.

65 *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA) s 5.

66 Ibid sch 1.

67 Ibid.

68 Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 2016, 1410 (Dave Kelly).

Bill was introduced into the Parliament, Noongar elder Elizabeth Hayden, told reporters:

> My heart is weeping with joy … We live with hope because we've been knocked from pillar to post for generations. We've always lived in hope that we would get to a point of being acknowledged as the first people of this nation. … The past is past, but we need to move forward to a better future …[69]

Native title agreements are clearly significant for the parties involved, but they do not involve the sort of truth-telling called for in the Regional Dialogues or the Uluru Statement. This is because they usually lack a fulsome recognition about historic wrongs, do not involve any published record or report of historic injustice (apart from what appears in court and tribunal judgments), and do not convey the lived Indigenous experience of dispossession and past discrimination. Similarly, while there is some cultural recognition (like the use of Indigenous language in the *Noongar Act*), native title settlements do not generally involve programs for revitalisation of Indigenous culture and heritage.

Additional limitations inhibit the capacity of native title to comprehensively resolve 'unfinished business'.[70] Native title employs an unjust burden of proof, which affects who can participate. Claimants must prove largely continuous and uninterrupted survival of pre-colonisation traditional laws and customs for their title to be recognised.[71] Given the realities of colonisation, native title is unavailable for many First Nations. Native title also allocates an inferior form of title that is often limited in its economic utility.[72] Broader negotiated settlements may enable return of land in a way that empowers Indigenous owners to obtain maximum economic, cultural and spiritual benefit from their country, according to their community preferences. Most significantly, native title does not generally recognise a right to nor facilitate a degree of Indigenous self-government: settlements do not necessarily include reforms or measures that enable Indigenous empowerment and authority in their affairs.[73] In this, the Noongar Settlement is unique. Given the noted limitations of the lack of fulsome truth-telling, native title processes therefore fall short of the comprehensive settlements that we understand to be the goal of a Makarrata Commission.

69 Australian Associated Press, 'WA Introduces Bill Recognising Noongar People as Traditional Land Owners', *The Guardian* (online, 14 October 2015) <https://www.theguardian.com/australia-news/2015/oct/14/wa-introduces-bill-recognising-noongar-people-as-traditional-land-owners>.

70 Patrick Dodson, 'Beyond the Mourning Gate: Dealing with Unfinished Business' in Robert Tonkinson (ed), *The Wentworth Lectures: Honouring Fifty Years of Australian Indigenous Studies* (Aboriginal Studies Press, 2015) 192, 200; *Referendum Council Final Report* (n 3) 21.

71 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 456–7 [87]–[89] (Gleeson CJ, Gummow and Hayne JJ).

72 Shireen Morris, 'Re-Evaluating *Mabo*: The Case for Native Title Reform to Remove Discrimination and Promote Economic Opportunity' (2012) 5(3) *Land, Rights, Laws* 1, 1.

73 Hobbs and Williams, 'The Noongar Settlement' (n 40) 26–7.

These limitations have encouraged the development of alternative agreement-making processes. In Victoria, the *Traditional Owner Settlement Act 2010* (Vic) enables traditional owners to pursue negotiated '[r]ecognition and settlement agreements' outside the native title regime.[74] The Act allows Aboriginal communities who may not be capable of proving native title to attain a modicum of land justice, but it too has limitations. In particular, self-government is not recognised, and the scope of authority offered 'is limited merely to joint management of national parks and reserves'.[75] Other more ambitious proposals have been made. Warren Mundine, for example, has argued that drawn-out native title cases should be settled by a broader 'formal agreement' that is negotiated 'between Australia and each Aboriginal and Torres Strait Islander tribal group, nation to nation'.[76] Mundine called for 'a system of governance that recognises the Indigenous nations and gives [them] the ability to govern matters concerning their traditional lands, assets, culture, language and heritage'.[77] Other proposals have been developed.

Several Australian governments have begun to engage in the sort of talks envisaged by Mundine. Victoria is furthest advanced. In 2018, the State government established the Victorian Treaty Advancement Commission.[78] Consulting extensively with Aboriginal Victorians,[79] the Commission supported the design of an Aboriginal Representative Body. As the elected voice for Aboriginal Victorians, the First Peoples' Assembly will administer a self-determination fund to support First Nations in treaty negotiations and work with the State government to establish a treaty negotiation framework 'so clans or mobs or nations here in Victoria can eventually negotiate their own treaties'.[80] Following elections for the First Peoples' Assembly in 2019, preliminary discussion on a treaty negotiation framework has commenced.

Other State and Territory governments have followed Victoria. The Northern Territory, Queensland, and South Australia have formally committed to entering treaty processes with the First Nations communities whose traditional lands fall

74 *Traditional Owner Settlement Act 2010* (Vic) pt 2.

75 Hobbs and Williams, 'The Noongar Settlement' (n 40) 29.

76 Patricia Karvelas, 'Warren Mundine: Treaty Needed with Each First Nation', *The Australian* (online, 10 December 2014) <https://www.theaustralian.com.au/national-affairs/indigenous/warren-mundine-treaty-needed-with-each-first-nation/news-story/4ae32087476d1b259f3d415d70a71564>.

77 Warren Mundine, 'Shooting an Elephant: Four Giant Steps' (Speech, Garma Festival Corporate Dinner, 10 August 2013) 5.

78 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).

79 Jill Gallagher, 'The Work of the Victorian Treaty Advancement Commission to Bring Us Closer to Treaties in Victoria' in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Treaty-Making: Two Hundred and Fifty Years Later* (Federation Press, 2021) 220, 227.

80 Lorena Allam, 'Victoria a Step Closer to Indigenous Treaty with Creation of First Peoples' Assembly', *The Guardian* (online, 11 April 2019) <https://www.theguardian.com/australia-news/2019/apr/11/victoria-a-step-closer-to-indigenous-treaty-with-creation-of-first-peoples-assembly>.

within their borders.[81] While South Australia abandoned its treaty process in 2018 under the Liberal government, the new Labor government recommitted to 'voice, treaty and truth' at the State level after its election in 2022.[82] Treaties are also being discussed in several other jurisdictions. In February 2021, the ACT government announced funding 'to facilitate a conversation with the [Ngunnawal people] about what treaty means in the ACT and what a treaty process will look like'.[83] Several months later, the Tasmanian government also pledged to consult with Aboriginal Tasmanians and work on a pathway to treaty. At the time of writing, the Tasmanian government has committed to progressing this issue.[84]

It is too early to know whether these emerging treaty processes will result in meaningful settlements. While the processes suggest that the state and territory governments are open to recognising the status and rights of Indigenous peoples, the constitutional allocation of power in Australia poses challenges and risks. First, the constitutional distribution of legislative power renders state and territory treaties vulnerable to abrogation by the federal Parliament.[85] The Commonwealth Parliament's concurrent power to legislate with respect to Indigenous affairs means it could override state or territory settlements.[86] The operation of s 109 of the *Constitution* entails that Commonwealth law prevails to the extent of any inconsistency with state or territory laws. Accordingly, the federal Parliament could overrule a state treaty using s 51(xxvi), or a Northern Territory agreement under s 122 of the *Constitution*. There may therefore be some areas that state and territory governments lack the power to negotiate because of superseding federal law. It is thus important that the Commonwealth play a role in state and territory negotiation processes to ensure alignment and buy-in.

Second, state and territory governments have fewer financial resources than the Commonwealth, potentially limiting financial settlements. Third, without an overarching national body monitoring and facilitating agreement-making, the fairness and effectiveness of treaties may differ across jurisdictions, rendering some First Nations without any recourse to justice. Similarly, some state and territory governments may choose not to negotiate, leaving First Nations in those jurisdictions in a weaker position. While this could of course occur even with a

81 See Williams and Hobbs, *Treaty* (n 10) 240.

82 Sumeyya Ilanbey, 'Labor Secures Stunning Election Win in South Australia, Marshall Concedes', *The Age* (online, 19 March 2022) <https://www.theage.com.au/politics/victoria/very-tough-very-close-very-long-night-sa-s-labor-opposition-cautiously-optimistic-20220319-p5a64m.html>.

83 Jasper Lindell, 'Funding for First Indigenous Treaty Process in ACT Budget', *The Canberra Times* (online, 7 February 2021) <https://www.canberratimes.com.au/story/7115029/funding-for-first-indigenous-treaty-process-in-act-budget/>.

84 Peter Gutwein, 'Next Steps on Pathway to Truth-Telling and Treaty' (Media Release, 1 March 2022) <https://www.premier.tas.gov.au/site_resources_2015/additional_releases/next_steps_on_pathway_to_truth-telling_and_treaty>.

85 Harry Hobbs and George Williams, 'Treaty-Making in the Australian Federation' (2019) 43(1) *Melbourne University Law Review* 178, 217–21 ('Treaty-Making in the Australian Federation').

86 *Australian Constitution* s 51(xxvi).

Makarrata Commission, a national institution facilitating processes across the Federation will likely encourage consistency and the development of some minimum standards in agreement-making. Fourth, for states and territories that do achieve treaties before any federal process, this too may have longer term political consequences: would a future Commonwealth government assert that no agreements are needed with those First Nations, because the state/territory treaties have already settled the matter? Finally, the political attitudes of opposition parties in jurisdictions pursuing treaties must also be considered. Where a state or territory government negotiates a treaty without the support of the opposition, it is unclear what may happen after a change in government. Might a legislated settlement enacted by the previous government be revoked, or would it carry sufficient moral and political weight that its repeal would be politically difficult?[87]

These questions underscore the need for a nationwide Makarrata commission. While Indigenous–state treaties could be negotiated at either level of government, or in parallel if the parties prefer, such issues highlight the benefits in settlements being negotiated with both levels of government at the same table.[88] A national Makarrata Commission could be crucial in ensuring Australian agreement-making and truth-telling facilitates justice and reconciliation across the Federation.

B Truth-Telling Processes and Inquiries

The Uluru Statement also highlights the importance of truth-telling in debates about Indigenous recognition and reconciliation. As Gabrielle Appleby and Megan Davis note, while '[t]ruth-telling has not been absent in the relationship between Indigenous and non-Indigenous Australia',[89] past inquiries have been limited, 'ad hoc and piecemeal'.[90] Intended to respond to specific incidences of injustice, inquiries like the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') and the *Bringing Them Home Report* exposed non-Indigenous Australians to uncomfortable aspects of our national history. At the same time, larger-scale national processes such as that led by the Council for Aboriginal Reconciliation ('CAR') in the 1990s sought to educate and promote fairer relations. However, these processes were narrowly focussed and did not lead to structural reform or compensation.

87 For discussion, see: Cheryl Saunders, 'Treaty-Making in Australia: The Non-Indigenous Party' in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Treaty-Making: Two Hundred and Fifty Years Later* (Federation Press, 2021) 43, 51. Note that the NSW government and Queensland opposition parties oppose state-based treaty processes on the basis that treaty is best dealt with at the Commonwealth level.

88 For discussion on how Commonwealth-only or state-only treaties may be structured, and the reasons why it is preferable that both Commonwealth and state governments are at the same table, see: Hobbs and Williams, 'Treaty-Making in the Australian Federation' (85) 227–30; Williams and Hobbs, *Treaty* (n 10) ch 9.

89 Gabrielle Appleby and Megan Davis, 'The Uluru Statement and the Promises of Truth' (2018) 49(4) *Australian Historical Studies* 501, 501.

90 Ibid 502.

The RCIADIC was established in 1987 in response to persistent national outrage over the alarming number of Aboriginal people dying in custody.[91] The Royal Commission investigated 99 deaths that had occurred in gaols, police stations and juvenile detention centres between 1 January 1980 and 31 May 1989.[92] In a wide-ranging report across every jurisdiction in Australia, the Commission found 'that the deaths were [not] the product of deliberate violence or brutality by police or prison officers'.[93] It concluded further that Aboriginal people did not die at a greater rate than non-Aboriginal people in custody, but that the large number of deaths was a result of the fact that Aboriginal people were grossly over-represented in the prison system.[94] That over-representation was the consequence of 'systemic disadvantage and institutional racism'.[95]

Initially hailed as the means to 'transform race politics for Indigenous people',[96] the RCIADIC revealed systemic patterns of racial discrimination across the country. It saw self-determination, reconciliation, and Indigenous empowerment as the key to rectifying and redressing incarceration rates.[97] However, 30 years after the release of the RCIADIC's report, many of the Commission's 339 recommendations remain un-implemented.[98] As NSW State Coroner, Teresa O'Sullivan, recently explained, '[s]elf-determination for First Nations people is still lacking in this country. This unfinished business cannot be separated from anything else that is done to try to prevent the deaths of First Nations people in custody'.[99]

One RCIADIC recommendation, regarding the initiation of a process of reconciliation between Aboriginal and non-Aboriginal Australians, was adopted almost immediately. In September 1991, the Parliament unanimously enacted the *Council for Aboriginal Reconciliation Act 1991* (Cth) ('*CAR Act*'). The Act established a national CAR composed of 25 Indigenous and non-Indigenous Australians tasked with fostering reconciliation initiatives.[100] The CAR was

91 Elliot Johnston, *Royal Commission into Aboriginal Deaths in Custody* (National Report, 15 April 1991) vol 1, 3 [1.1.2].

92 Ibid [1.1.1].

93 Ibid [1.2.2].

94 Ibid [1.3.1]–[1.3.2].

95 Patrick Dodson, '25 Years On from Royal Commission into Aboriginal Deaths in Custody Recommendations' (2016) 8(23) *Indigenous Law Bulletin* 24, 24.

96 Elena Marchetti, 'The Deep Colonizing Practices of the Australian Royal Commission into Aboriginal Deaths in Custody' (2006) 33(3) *Journal of Law and Society* 451, 453.

97 Ibid 457.

98 T Anthony et al, '30 Years On: Royal Commission into Aboriginal Deaths in Custody Recommendations Remain Unimplemented' (Working Paper No 140, Centre for Aboriginal Economic Policy Research, Australian National University, 2021) 17.

99 Teresa O'Sullivan, 'Read the State Coroner's Full Statement on Indigenous Deaths in Custody', *The Sydney Morning Herald*, (online, 12 April 2021) <https://www.smh.com.au/national/nsw/read-the-state-coroner-s-full-statement-on-indigenous-deaths-in-custody-20210411-p57i6h>.

100 *Council for Aboriginal Reconciliation Act 1991* (Cth) ss 5, 14(1)(h) ('*CAR Act*').

required 'to promote … a deeper understanding by all Australians of the history, cultures, past dispossession and continuing disadvantage of Aborigines and Torres Strait Islanders' and 'to provide a forum for discussion by all Australians of issues relating to reconciliation'.[101] The Council supported a range of important national and local initiatives in truth-telling. However, the federal government rejected its recommendations for constitutional reform and treaty.[102]

During the Council's formal ten-year mandate, a third major national truth-telling process was initiated. In 1995 the government tasked the Human Rights and Equal Opportunity Commission with inquiring into the separation of Aboriginal and Torres Strait Islander children from their families. As the Inquiry noted in its final report, this was in response to the concerns expressed by Indigenous communities that 'the general public's ignorance of the history of forcible removal was hindering the recognition of the needs of its victims and their families and the provision of services'.[103] The Inquiry conducted hearings in every capital city across the continent and many smaller regional centres. It heard public and private testimony from Indigenous organisations, governments, Commonwealth and state government representatives, church groups, foster parents, and individuals, including 535 Indigenous peoples who were forcibly taken from their families and communities.[104] Its conclusions were confronting:

> [B]etween one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970. In certain regions and in certain periods the figure was undoubtedly much greater than one in ten. In that time not one Indigenous family has escaped the effects of forcible removal …[105]

The Inquiry penetrated public consciousness. The report was 'widely read, with sixty thousand copies purchased in the first year of its release alone',[106] and community knowledge and understanding of the Stolen Generations has improved substantially since the 1990s.

Nonetheless, reflecting the same problem experienced by the RCIADIC and the CAR, truth-telling did not lead to structural reform. The Howard government

101 Ibid ss 6(1)(b), (d).

102 Sara Tomevska, 'Australia Had a Chance to Recognise First Nations Peoples in the Constitution 20 Years Ago. Why Didn't We?', *SBS News* (online, 1 January 2023) <https://www.sbs.com.au/news/article/australia-had-a-chance-to-recognise-first-nations-peoples-in-the-constitution-20-years-ago-why-didnt-we/l27d3r0ew>; Williams and Hobbs, *Treaty* (n 10) 44–5.

103 Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 1997) 18.

104 Ibid 21.

105 Ibid 37.

106 Anne Orford, 'Commissioning the Truth' (2006) 15(3) *Columbia Journal of Gender and Law* 851, 867, citing John Bond, 'Time to Say Sorry to "Stolen Generations"' (1998) 11(1) *For a Change* <https://forachange.co.uk/browse/1560.html>.

dismissed the report's call for an official apology and compensation.[107] Although the Rudd government finally apologised in 2008, no national compensation scheme was established.[108]

The importance of connecting truth to reform and restitution is visible in the new Victorian Yoo-rrook Justice Commission. Designed in partnership with Aboriginal Victorians and the state government, the body has been invested with the powers of a Royal Commission.[109] It is empowered to 'establish an official public record' and 'develop a shared understanding' of 'First Peoples' experiences of [s]ystemic [i]njustice', and 'help build the foundations for a new relationship' between Aboriginal and non-Aboriginal Victorians.[110] In doing so, the Commission will support and complement the First Peoples' Assembly and emerging treaty process.[111]

The Commission is embedded in that process. It is required to inquire into how historical systemic injustice continues to affect Aboriginal Victorians today.[112] In this sense, the Yoo-rrook Justice Commission understands that the process of truth-telling is 'a bridge', intended to 'draw history into the present'.[113] Recognising that truth-telling should identify and articulate connections between denial of Indigenous sovereignty, people-hood, and agency at first contact, during the frontier massacres, and in the discriminatory and protectionist policies of the colonial period, *with* contemporary legislation, policies and attitudes that operate to perpetuate their disempowerment is key to building political action for substantive legal and institutional reform. This is especially important as the Commission does not itself have the power to order reparations or implement

107 Lindy Kerin, 'Long Journey to National Apology', *ABC News* (online, 13 February 2008) <https://www.abc.net.au/news/2008-02-13/long-journey-to-national-apology/1041564>.

108 Some states and territories have set up compensation schemes though they have been criticised as inadequate: see Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 25 of 2021–2, 19 October 2021) 6. The federal government has recently announced it will set up a 'redress scheme for living Stolen Generations members who were removed as children from their families in the Northern Territory and the Australian Capital Territory prior to their respective self-government and the Jervis Bay Territory': Scott Morrison and Ken Wyatt, 'Stolen Generations Redress Scheme' (Joint Media Release, 5 August 2021) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/8105071/upload_binary/8105071.PDF;fileType=application%2Fpdf#search=%22media/pressrel/8105071%22>.

109 *Victoria Gazette* (n 11) 1.

110 Ibid 2.

111 Ibid.

112 Ibid 3.

113 Courtney Jung, 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Nontransitional Society' in Paige Arthur (ed), *Identities in Transition: Challenges for Transitional Justice in Divided Societies* (Cambridge University Press, 2011) 217, 231.

reforms.[114] The Commission can only succeed if it helps to tell a broader story that can inform and support the treaty process. The Yoo-rrook Justice Commission may provide a valuable guide to the establishment of a national Makarrata Commission. Even so, that national body remains critical, as Yoo-rrook cannot directly assist Indigenous peoples outside Victoria.

Truth-telling measures have helped to develop 'new national insight' into Australia's colonial history.[115] However, such processes have generally been unable to transform that insight into structural reform and genuine compensation. Rather, they can sometimes be exploited to deflect from the 'settler problem',[116] including the 'large-scale resistance to examining' how institutions and bureaucracies contribute to colonial injustice.[117] As Davis explains:

> The idea that truth automatically will lead to justice is fraught. It is illusory. It is an ahistorical belief that is simply not borne out by the evidence. It defies the demands we have made as Aboriginal people for rigorous evidence-based thinking and public policy in Indigenous affairs. Beware the ally spruiking truth.[118]

A Makarrata Commission that directly marries a truthful and balanced examination of history with just settlements is crucial. Such an institution could help ground and propel political action for structural reform. If the above truth-telling processes could be more systematically undertaken and structurally conjoined with agreement-making that settles matters of land, governance, financial restitution, cultural redress, and recognition, as well as providing for official state apologies, we would be well on the way to imagining a Makarrata Commission.

IV INTERNATIONAL EXAMPLES: NEW ZEALAND AND CANADA

International examples of modern agreement-making and truth-telling processes may also help us envision how a Makarrata Commission might function in Australia. Aotearoa New Zealand and Canada both operate under distinct constitutional and legal frameworks. However, these two countries share key similarities with each other and Australia; they are common law, liberal democratic

114 Harry Hobbs, 'Unfinished Business? The Victorian Yoo-rrook Justice Commission and Truth-Telling in Australia', *Australia and New Zealand School of Government* (Web Page, 3 March 2022) <https://anzsog.edu.au/research-insights-and-resources/research/unfinished-business-the-victorian-yoo-rrook-justice-commission-and-truth-telling-in-australia/>; Dani Larkin et al, 'Aboriginal and Torres Strait Islander Peoples, Law Reform and the Return of the States' (2022) 41(1) *University of Queensland Law Journal* 35, 56.

115 Christabel Chamarette, 'Terra Nullius Then and Now: Mabo, Native Title, and Reconciliation in 2000' (2000) 35(2) *Australian Psychologist* 167, 170.

116 Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (UBC Press, 2010) 34.

117 Jennifer Matsunaga, 'The Red Tape of Reparations: Settler Governmentalities of Truth Telling and Compensation for Indian Residential Schools' (2021) 11(1) *Settler Colonial Studies* 21, 22.

118 Davis, 'Truth-Telling' (n 12).

settler states currently engaging in related treaty processes with historically dispossessed Indigenous peoples. In Canada, modern treaties are still being negotiated between Indigenous peoples and the state in an effort to recognise and 'reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty'.[119] Likewise, in Aotearoa New Zealand, Māori peoples and the Crown continue to engage in negotiations to settle claims arising from breaches of the *Treaty of Waitangi*. In this Part, we examine how these processes operate to identify lessons for Australia.

A The Waitangi Tribunal

In 2013, then Opposition Leader Tony Abbott invoked the *Treaty of Waitangi* as a model to inspire Australia. 'We only have to look across the Tasman to see how it [all] could have been done so much better,' Abbott said.[120] 'Thanks to the Treaty of Waitangi in New Zealand two peoples became one nation.'[121] Confusingly, Abbott later rejected the idea of an Indigenous–state treaty in Australia on the basis that a 'treaty is something two nations make with each other'.[122] This oversimplification (or perhaps politically-driven obfuscation) is refuted by Abbott's own observation of the *Treaty of Waitangi*, not to mention examples of modern treaty-making in Canada, which demonstrate the reality that treaties can be unifying acts of nation building. Others have also been intrigued by New Zealand's parallel colonial history, yet more successful and ambitious (albeit imperfect) efforts at reconciliation.[123]

The relationship between Māori and Pākehā in Aotearoa New Zealand is regulated by *Te Tiriti o Waitangi* — the *Treaty of Waitangi*. Signed in 1840, the Treaty is an agreement between representatives of the British Crown and around 540 Māori chiefs from the North Island of Aotearoa New Zealand. The Treaty consists of an English-language and a *Te Reo Māori* version. Although comprising only three short articles, inconsistencies between the two different texts have caused significant complications. In the English language version of the Treaty, the Māori cede 'all [their] rights and powers of [s]overeignty' to the British Crown, while retaining their right to the 'full exclusive and undisturbed possession of their Lands and Estates'.[124] Under the Te Reo Māori version, by contrast, the signatories agreed

119 *Haida Nation v Minister of Forests (BC)* [2004] 3 SCR 511, 524 [20] (McLachlin CJ for the Court).

120 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2013, 1123 (Tony Abbott).

121 Ibid.

122 Anna Henderson and Eliza Borrello, 'John Howard, Tony Abbott Lock In against Treaty with Indigenous Australians', *ABC News* (online, 8 September 2016) <https://www.abc.net.au/news/2016-09-08/conservatives-lock-in-against-treaty-with-indigenous-australians/7825298>.

123 See, eg, Laura Tingle, 'The High Road: What Australia Can Learn from New Zealand' (2020) 80 *Quarterly Essay* 1, 25–41; Shireen Morris, 'Lessons from New Zealand: Towards a Better Working Relationship between Indigenous Peoples and the State' (2015) 18(2) *Australian Indigenous Law Review* 67; Morris, *A First Nations Voice* (n 16) 154–74.

124 *Treaty of Waitangi Act 1975* (NZ) sch 1 ('*Treaty of Waitangi Act*').

to cede *kawanatanga* (governorship), while being promised that their *tino rangatiratanga* (full authority) over their land, people and treasure would remain undisturbed.[125] Contemporary scholarship now recognises that the Māori signatories did not cede sovereignty.[126] Nonetheless, whether and how Māori sovereignty can be expressed today remains the subject of debate.

The Treaty remains a foundational political agreement between Māori and the Crown. However, like most historic treaties negotiated in situations of deep power imbalance, its promises were not always upheld.[127] In the 1877 case of *Wi Parata v Bishop of Wellington*, Prendergast CJ held that Māori were 'primitive barbarians' and found that they 'were incapable of performing the duties, and therefore of assuming the rights, of a civilised community'.[128] Asserting further that '[n]o body politic existed capable of making [a] cession of sovereignty', the Chief Justice considered the instrument 'a simple nullity' and unilaterally annulled the Treaty.[129] In 1941, the Privy Council confirmed that the Treaty did not confer any legal rights itself.[130] As such, the Treaty today has legal force only to the extent that it is incorporated by Parliament into legislation.

From the 1950s, Māori activism focused on changing the dismissive state attitude towards the Treaty. Māori and their supporters called on the government to 'Honour the Treaty', by making good on past promises and rectifying past wrongs.[131] In 1975, the *Treaty of Waitangi Act 1975* (NZ) established the Waitangi Tribunal as a permanent commission of inquiry. The Tribunal is empowered 'to inquire into and make recommendations' in relation to Māori claims that they have been prejudicially affected by legislation or Crown action inconsistent with Treaty principles.[132] Initially, the Tribunal was empowered to investigate alleged breaches by the government or any state-controlled body occurring after 1975. Within 10 years, however, the Tribunal was provided with retrospective jurisdiction dating from 1840.[133]

125 'Read the Treaty: Page 3', *New Zealand History* (Web Page, 5 October 2021) <https://nzhistory.govt.nz/politics/treaty/read-the-Treaty/differences-between-the-texts>.

126 Waitangi Tribunal, *He Whakaputanga me te Tiriti* [The Declaration and the Treaty]*: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) 436.

127 See generally Harry Hobbs and Stephen Young, 'Modern Treaty Making and the Limits of the Law' (2021) 71(2) *University of Toronto Law Journal* 234, 252 ('Modern Treaty Making').

128 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur NS 72, 77, 78 (Supreme Court of New Zealand).

129 Ibid 78.

130 *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590, 596–7 (Viscount Simon LC for the Court).

131 'Section 5: What the Treaty Means Today', *Waitangi Tribunal* (Web Page, 19 September 2016) <https://waitangitribunal.govt.nz/publications-and-resources/school-resources/treaty-past-and-present/section-5/>.

132 *Treaty of Waitangi Act* (n 124).

133 *Treaty of Waitangi Amendment Act 1985* (NZ) s 3(1), amending ibid s 6(1).

Intended to be a neutral arbiter, the Tribunal is composed of both Māori and Pākehā members 'appointed by the Governor-General on the recommendation of the Minister of Maori Affairs made after consultation with the Minister of Justice'.[134] The Tribunal's recommendations are generally non-binding but carry political and moral force.[135] Its recommendations inform and help propel direct negotiations between Māori and the Crown aimed at addressing and rectifying breaches of the Treaty. On the Crown side, those negotiations are facilitated by the Office for Māori Crown Relations — *Te Arawhiti* (which means 'the bridge' to symbolise 'the bridge between Māori and the Crown, the past and the future, and the journey from grievance to partnership').[136] The Tribunal is also empowered to examine proposed legislation referred to it, and to advise on whether it is contrary to Treaty principles.[137]

The Waitangi Tribunal inquiries and treaty-settlement process provide active forums for Māori recognition, truth-telling about history and agreement-making. Through Tribunal hearings and negotiations, grievances can be aired, stories told, and histories documented. An integral part of the process is the catharsis that comes with being heard, having wrongs acknowledged by the Crown, and having the 'truth' established on the public record through Tribunal reports.

Tribunal reports are published and publicly available but subsequent negotiations between Māori and the Crown do not involve the general public.[138] This contained conversation, in addition to use of 'the Crown' as a distancing device,[139] may have usefully 'relieved the public of "guilt by association"', such that 'New Zealanders today are not held accountable for the sins of their colonial past'.[140] Rather, the Crown takes responsibility for past wrongs. As Hayward describes, the settlement process creates an enduring 'political conversation sustained over several decades between the treaty partners'.[141] The process is non-justiciable, but this does not

134 *Treaty of Waitangi Act* (n 124) s 4(2).

135 Waitangi Tribunal, *Practice Note: Guide to the Practice and Procedure of the Waitangi Tribunal*, August 2018, 10. However, in 1988, the Waitangi Tribunal was conferred power to make binding recommendations in specific limited circumstances: see, eg, Richard P Boast, 'The Waitangi Tribunal: "Conscience of the Nation", or Just Another Court?' (1993) 16(1) *University of New South Wales Law Journal* 223, 227–8.

136 'Tēnā Koutou Katoa: Welcome to the Office for Māori Crown Relations', *Te Arawhiti: The Office for Maori Crown Relations* (Web Page) <https://www.tearawhiti.govt.nz/>. See 'The Office for Māori Crown Relations: Te Arawhiti', *Te Kāwanatanga o Aotearoa New Zealand Government* (Web Page, 14 April 2021) <https://www.govt.nz/organisations/the-office-for-maori-crown-relations-te-arawhiti/>.

137 *Treaty of Waitangi Act* (n 124) s 8.

138 Janine Hayward, 'Treaty of Waitangi Settlements: Successful Symbolic Reparation' in Joannah Luetjens, Michael Mintrom and Paul `t Hart (eds), *Successful Public Policy: Lessons from Australia and New Zealand* (ANU Press, 2019) 399, 400.

139 Janet McLean, 'Crown, Empire and Redressing the Historical Wrongs of Colonisation in New Zealand' [2015] (2) *New Zealand Law Review* 187, 206.

140 Hayward (n 138) 400.

141 Ibid 401.

limit its impact. As McHugh explains, 'non-justiciability does not mean an absence of public law consequence. Rather, it means the courts will not be the sole or primary agent of that consequence in the claims–settlement arena'.[142] Negotiations are politically driven, propelled by a sense of partnership that is notably absent in the Australian Indigenous–state dynamic.[143]

Treaty settlements carry symbolic weight as well as practical power. They also demonstrate the way in which this process can address financial as well as cultural losses. Settlements commonly result in an apology, 'financial redress' in the form of property and cash (financial settlements vary, and the Crown acknowledges that monetary compensation can never be commensurate to real historic losses),[144] as well as 'cultural redress' including access to land, involvement in decision-making about land and place name changes.[145] The 1995 Waikato-Tainui settlement, for example, addressed decades of historical warfare and failed attempts at fair negotiation.[146] The settlement deed included a compensation package of land, cash, and an apology, personally delivered by Queen Elizabeth II.[147] The apology is particularly powerful. Drafted in both *Te Reo Māori* and English, it expresses the Crown's 'profound regret and apologises unreservedly for the loss of lives because of the hostilities arising from its invasion, and at the devastation of property and social life which resulted', including the 'crippling impact on the welfare, economy and development of Waikato'.[148]

The Tribunal also undertakes broader inquiries. In 1985, Māori claimants to the Waitangi Tribunal asserted that *Te Reo Māori* was a *taonga* or 'treasure', protected under the Treaty.[149] In 1986, the Tribunal agreed and made several recommendations for appropriate redress, which included recognising *Te Reo Māori* as an official language of Aotearoa New Zealand.[150] The government accepted the recommendation, adopting *Te Reo Māori* as an official language and establishing the Māori Language Commission to promote Aotearoa New Zealand as a bicultural nation.[151] The cultural component of the Waitangi Tribunal

142 PG McHugh, '"Treaty Principles": Constitutional Relations inside a Conservative Jurisprudence' (2008) 39(1) *Victoria University of Wellington Law Review* 39, 67.

143 Ibid 57.

144 Damien Freeman and Nolan Hunter, 'When Two Rivers Become One' in Shireen Morris (ed), *A Rightful Place: A Road Map to Recognition* (Black, 2017) 173, 182–3.

145 Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Guide, June 2018) 90–4.

146 *Deed of Settlement*, New Zealand–Waikato-Tanui, signed 22 May 1995.

147 Ibid cls 3–6; Mark Derby, 'Royal Apology to Tainui: 1995', *Te Ara* [The Pathway] (Web Page, 20 June 2012) <https://teara.govt.nz/en/video/32507/royal-apology-to-tainui-1995>.

148 *Waikato Raupatu Claims Settlement Act 1995* (NZ) s 6.

149 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim* (Wai 11, 1986) 3, 20 [4.2.3]–[4.2.4].

150 Ibid 51.

151 See *Māori Language Act 1987* (NZ) ss 3, 6–7.

settlements has also helped to propel practical recognition of Māori culture and heritage. For instance, the New Zealand Geographic Board undertakes dual-language place naming, with Māori place names sometimes flowing from Treaty settlements, then included in the relevant settlement legislation.[152] Dual naming 'recognise[s] the equal and specific significance of both names',[153] and New Zealand itself now carries its Māori name: Aotearoa. Māori culture is increasingly seen as the nation's culture.

The settlement process has helped create a sense of respect for Māori culture and worldviews. Consider the landmark 2017 *Te Awa Tupua (Whanganui River Claims Settlement) Act*.[154] The settlement recognises that 'Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements'[155] and also recognises the river as a legal person.[156] The Settlement provides for joint management and collaborative development of a policy plan for managing the river and includes financial and cultural redress as well as a Crown apology for past wrongs.[157] In the apology, 'the Crown seeks to atone for its past wrongs, and begin the process of healing', hoping to create 'a renewed and enduring relationship' based on 'cooperation, good faith, and respect for the *Treaty of Waitangi* and its principles'.[158]

The settlement process has been slow and government policy restraining the scope of potential settlement outcomes has attracted strong criticism.[159] Nevertheless, the Waitangi Tribunal facilitates ongoing political dialogue between Māori and the Crown. As with any political negotiation, compromise is inevitable. But the settlement process enables agreement-making to become a living process for Māori recognition. This has proved valuable.

Several key insights can be drawn from the structure and functions of the Tribunal that might inform a Makarrata Commission in Australia.[160] First, although its

152 'Treaty of Waitangi Claims Settlement Names', *Toitū Te Whenua: Land Information New Zealand* (Web Page, 9 March 2018) <http://www.linz.govt.nz/regulatory/place-names/propose-place-name/treaty-waitangi-claims-settlement-names>.

153 New Zealand Geographic Board, 'Standard for New Zealand Place Names' (Standard No NZGBS60002, 5 November 2020) 8 <https://www.linz.govt.nz/sites/default/files/2022-05/03c%20Standard%20for%20New%20Zealand%20place%20names%20-%20NZGBS60002%20FINAL.pdf>.

154 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ).

155 Ibid s 12.

156 Ibid s 14.

157 Ibid ss 69–70.

158 Ibid s 70(f).

159 Margaret Mutu, 'Behind the Smoke and Mirrors of the Treaty of Waitangi Claims Settlement Process in New Zealand: No Prospect for Justice and Reconciliation for Māori without Constitutional Transformation' (2018) 14(2) *Journal of Global Ethics* 208.

160 See also Morris, *A First Nations Voice* (n 16) 171–3.

members are appointed by the government, the Tribunal is independent and impartial, and is comprised of both Māori and Pākehā members to ensure fairness and balance in the adjudication of the Māori–Pākehā relationship. This emphasis on balanced membership could be adopted with respect to a Makarrata Commission in Australia, if Indigenous people and Australian governments think this is workable. Second, the Waitangi settlements comprehensively combine land and financial restitution with Crown apologies for past injustice, as well as practical measures for cultural recognition. In this way, the symbolism of apologies is tied to and not detached from substantive justice. The two go hand in hand.

Third, and perhaps most importantly, the settlement process has been successful because it enjoys bipartisan political support. The Tribunal's reports and recommendations are not legally enforceable but carry political and moral weight as an account of history and inform settlement negotiations between Māori and the Crown. Fundamentally, these political settlements require political will. In Aotearoa New Zealand, the political impetus for the settlement process is propelled by and grounded in the moral and political authority of the historic Treaty. In Australia, the absence of a historical treaty to anchor a future settlement process under a Makarrata Commission means some thought must be given to alternative ways of creating necessary political buy-in.

There are two factors to consider in this respect. First, the absence of any historic treaty or treaties in Australia underscores the need for a constitutionally guaranteed First Nations voice as a first step. A constitutionally embedded promise that Indigenous peoples will be heard in their affairs will help promote a principle of political partnership between Indigenous peoples and the Australian state. As the Referendum Council has made clear, such a promise would be political and moral, rather than justiciable,[161] but it would nonetheless constitutionally commit Indigenous peoples and Australian governments to ongoing political dialogue. Crucially, this constitutional commitment to 'perpetual dialogues' and 'ongoing constitutional conversations' between Indigenous peoples and the state may help create a political culture more conducive to agreement-making and truth-telling.[162] Unlike the historic *Treaty of Waitangi*, this would be a new promise rather than an old promise. Yet, endorsed via a referendum of the Australian people, it will carry significant political power.

Second, the Referendum Council's proposal of a declaration outside the Constitution,[163] if negotiated and agreed with a First Nations voice, could become Australia's version of an enduring reconciliatory agreement with the First

161 *Referendum Council Final Report* (n 3) 38.

162 Morris, *A First Nations Voice* (n 16) 242, citing James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995) 8. See also Gabrielle Appleby and Eddie Synot, 'A First Nations Voice: Institutionalising Political Listening' (2020) 48(4) *Federal Law Review* 529.

163 This is referred to as a 'Declaration of Recognition' in recommendation two: *Referendum Council Final Report* (n 3) 2.

Nations.[164] Again, this agreement would be new rather than old, but over time such a declaration could become imbued with moral and political gravitas. Depending on content, its principles could help guide and propel future settlements under a Makarrata Commission. This idea will be discussed further below.

B The British Columbia Treaty Commission

There is a long history of treaty-making between Indigenous peoples and British, French, and Dutch colonists in North America.[165] Initially, relationships were based on trading arrangements, but over time the colonists sought to formalise these deals into strategic alliances.[166] The nature of these agreements evolved over the years. After the British became the dominant colonial power in 1763, a series of treaties across the country were reached.[167] Characterised as the 'era of unsystematic treaty making',[168] these agreements generally required Indigenous people to surrender their rights to land in return for 'limited reserve land, monetary compensation, hunting and gathering rights across a wider area, tools for farming and hunting, and schooling'.[169] Following Confederation in 1867, the Canadian Crown entered into 11 'Numbered Treaties'. Comprising a similar exchange, these treaties were consciously sought to promote 'settlement, agriculture, and resource development'.[170] Between 1701 and 1921, 70 treaties were negotiated.[171]

In 1921, the Canadian government refused to enter any more treaties. Nonetheless, considerable areas of the country had never been subject to treaty, including 'most of British Columbia, Northern Quebec, Newfoundland and Labrador, and parts of

164 Shireen Morris, 'An Australian Declaration of Recognition: The Case for Semi-Entrenched Symbolism' (2020) 44(1) *Melbourne University Law Review* 267, 289 ('An Australian Declaration of Recognition').

165 See generally JR Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (University of Toronto Press, 2009).

166 Ibid 4–5.

167 Ibid 66.

168 Christina Godlewska and Jeremy Webber, 'The *Calder* Decision, Aboriginal Title, Treaties, and the Nisga'a' in Hamar Foster, Heather Raven and Jeremy Webber (eds), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press, 2007) 1, 12, quoted in Hobbs and Williams, 'The Noongar Settlement' (n 40) 14.

169 The 1996 Royal Commission on Aboriginal Peoples found that 'First Nations [signatories] did not intend to consent to the blanket extinguishment of their rights and title, but merely to share the land, jurisdiction and management over it': Hobbs and Williams, 'The Noongar Settlement' (n 40) 15, citing *Royal Commission on Aboriginal Peoples* (Report, October 1996) vol 2, 986 [2.2.4].

170 Hobbs and Williams, 'The Noongar Settlement' (n 40) 15, citing Arthur J Ray, Jim Miller and Frank J Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (McGill-Queen's University Press, 2000) 59.

171 'Treaties and Agreements', *Government of Canada* (Web Page, 30 July 2020) <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>.

Yukon Territory and Northwest Territories'.[172] The absence of treaty left many people questioning the legitimacy of the Canadian and provincial governments' claim to authority and jurisdiction.[173] It was not until 1973, however, that this question was considered by the Supreme Court of Canada.

In *Calder v Attorney-General (BC)*,[174] the Nisga'a Tribal Council sought a declaration that their Aboriginal title in the Nass River Valley of north-western British Columbia had never been lawfully extinguished. The Court held that the common law could recognise Aboriginal title but were evenly split on the question of whether the Nisga'a title had been extinguished.[175] The ambiguity in the decision prompted Prime Minister Pierre Trudeau to develop a new policy based on 'self-determination, aboriginal and treaty rights, and self-government'.[176] Trudeau announced a comprehensive land claims ('CLC') policy, under which the government would 'negotiate with the representatives of Aboriginal peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit would be provided'.[177] Beginning with the *James Bay and Northern Quebec Agreement* in 1975,[178] a series of modern treaties were negotiated between Indigenous peoples and the Canadian and provincial governments.

For many years, British Columbia resisted the push for modern treaty-making, asserting that Indigenous interests in land had been extinguished when the province joined Canada in 1871.[179] The province only joined the negotiating table after several further judicial decisions raised the possibility that Aboriginal title to large swathes of the province would be recognised.[180] Instead of joining the CLC process set up by the federal government, however, it elected to develop its own

172 Christopher Alcantara, 'Implementing Comprehensive Land Claims Agreements in Canada: Towards an Analytical Framework' (2017) 60(3) *Canadian Public Administration* 327, 329.

173 Hobbs and Williams, 'The Noongar Settlement' (n 40) 5–6.

174 [1973] SCR 313.

175 Ibid 328–9, 344 (Judson J for Martland, Judson and Ritchie JJ), 394, 402, 422 (Hall J for Hall, Spence and Laskin JJ).

176 Augie Fleras and Jean Leonard Elliott, *The 'Nations Within': Aboriginal–State Relations in Canada, the United States, and New Zealand* (Oxford University Press, 1992) 45.

177 Lisa Palmer and Maureen Tehan, 'Shared Citizenship and Self-Government in Canada: A Case Study of James Bay and Nunavik (Northern Quebec)' in Marcia Langton et al (eds), *Settling with Indigenous People: Modern Treaty and Agreement-Making* (Federation Press, 2006) 19, 23, quoting Richard Bartlett, 'Canada: Indigenous Land Claims and Settlements' in Bryan Keon-Cohen (ed), *Native Title in the New Millennium* (Aboriginal Studies Press, 2001) 355, 357; Indian and Northern Affairs, Government of Canada, 'Statement Made by the Honourable Jean Chrétien Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People' (Communiqué, 8 August 1973) 4.

178 *James Bay and Northern Quebec Agreement*, signed 11 November 1975.

179 Christopher McKee, *Treaty Talks in British Columbia: Building a New Relationship* (UBC Press, 3rd ed, 2009) 28.

180 Ibid 29.

framework.[181] In December 1990, the governments of Canada and British Columbia and representatives of British Columbia First Nations agreed to establish the British Columbia Treaty Claims Task Force ('Task Force').[182]

The Task Force was a tripartite body comprised of seven commissioners. Three commissioners were appointed by First Nations, with two each appointed by the Canadian and provincial governments.[183] Following six months of consultations, the Task Force recommended the parties commit to 'a new relationship based on mutual trust, respect, and understanding — through political negotiations'.[184] Recognising that the process of any negotiation is 'a critical factor' in achieving success, the Task Force recommended that negotiations must embody six key elements: commitment, made in British Columbia, fair, impartial, effective, and understandable.[185] Vital to realising these elements was the creation of a treaty commission that would 'ensure that the process is fair and impartial, that all parties have sufficient resources to do the job, and that the parties work effectively to reach agreements'.[186] All three parties accepted these recommendations — the British Columbia Treaty Commission ('BCTC') was established in 1993.[187]

The BCTC is an independent and impartial tripartite statutory body responsible for facilitating treaty negotiations between First Nations and the governments of Canada and British Columbia.[188] It is composed of a Chief Commissioner who serves a three-year term and four part-time commissioners appointed for a two-year term.[189] Two of the four part-time commissioners are appointed by the First Nations Summit — a political organisation of First Nations and Tribal Councils engaged in the treaty process.[190] The two other part-time commissioners are

181 Stephen Young and Harry Hobbs, 'Treaty-Making: Critical Reflections on Critiques from Abroad' in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Treaty-Making: Two Hundred and Fifty Years Later* (Federation Press, 2021) 156, 161 ('Treaty-Making Critical Reflections').

182 As the timing suggests, in 1990 the conservative Social Credit government stepped back from its hardline position against treaty-making to establish the Task Force. In October 1991, the social-democratic New Democratic Party ('NDP') was swept to power in provincial elections. Emphasising the political nature of treaty processes, the election of the NDP was a key factor in advancing the treaty process in British Columbia.

183 British Columbia Claims Task Force, *The Report of the British Columbia Claims Task Force* (Report, 28 June 1991) 9.

184 Ibid 11.

185 Ibid 17–18.

186 Ibid 18.

187 Initially the commissioners were appointed under Orders in Council. In 1996, supporting legislation was enacted by both the Provincial and Dominion governments. The First Nations Summit ratified the legislation.

188 *British Columbia Treaty Commission Act*, SC 1995, c 45, ss 4–5 ('*BCTC Act*').

189 Ibid ss 7(1)–(2).

190 Ibid ss 2 (definition of 'Summit'), 7(1).

appointed by the federal and provincial governments respectively.[191] The Chief Commissioner is appointed by agreement of the three principals.[192] Despite this appointment procedure, the commissioners do not represent the interests of the principals that have appointed them but act independently.[193] To encourage independence, all decisions require the support of at least one appointee of each of the three principals.[194] Funding is shared between the federal (60%) and provincial governments (40%).[195]

The BCTC is not responsible for negotiating treaties. Rather it supports the treaty process by 'monitoring developments and by providing, when necessary, methods of dispute resolution'.[196] It also allocates negotiation support funding to First Nations and educates the public by providing information about the process and the advantages of treaty-making.[197] In 2018, its mandate was expanded. The Commission now also supports negotiating parties in implementing the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*'),[198] the Truth and Reconciliation Commission of Canada's *Calls to Action*,[199] the *Principles: Respecting the Government of Canada's Relationship with Indigenous Peoples*,[200] and the recognition of First Nations title and rights.

Funding for negotiation support is critical to the success of treaty-making. First Nations may be unprepared for the complex and challenging negotiations; they will need time to reach consensus within their community and then to obtain appropriate advice for a process that can stretch decades. In the early years, the BCTC was unable to provide the level of funding required by First Nations.[201] More problematically, most of the funding allocated initially came in form of loans. Only 20% of funding consisted of a non-repayable contribution,[202] with the

191 Ibid s 7(1).

192 Ibid.

193 Ibid s 4(3).

194 Ibid s 12(2).

195 'Financial Issues', *BC Treaty Commission* (Web Page) <https://www.bctreaty.ca/financial-issues>.

196 McKee (n 179) 33.

197 'About Us', *BC Treaty Commission* (Web Page) <https://www.bctreaty.ca/about-us>.

198 *UNDRIP* (n 2).

199 Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation* (McGill-Queen's University Press, 2015) vol 6, 223–41.

200 Department of Justice, Canadian Government, *Principles: Respecting the Government of Canada's Relationship with Indigenous Peoples* (2018) <https://www.justice.gc.ca/eng/csj-sjc/principles.pdf> ('*Principles*').

201 British Columbia Treaty Commission, *Annual Report 1995* (Report, 1995) 15, quoted in Hobbs and Young, 'Modern Treaty Making' (n 127) 252.

202 British Columbia Treaty Commission, *Annual Report 2019* (Report, 2019) 53.

remaining 80% viewed as an 'advance on the cash transfer component'.[203] This was roundly condemned by government-commissioned reports,[204] the Special Rapporteur on the Rights of Indigenous Peoples,[205] and the Inter-American Commission on Human Rights.[206] Inquiries found that the debt burden was an 'unsustainable barrier to progress',[207] which 'made it impossible' for many First Nations to continue in the process.[208] Recent changes to the approach to financing have improved the process. In 2018, the government announced that all negotiation support funding would take the form of non-repayable contributions.[209] The following year it declared that it would forgive all outstanding loans and reimburse First Nations who had already repaid loans.[210]

Treaty negotiations are voluntary. Since 1993, 65 First Nations (just over half of all First Nations in the province) have entered or completed treaties through the process. As of June 2022, 55 First Nations are currently participating, while seven have completed treaties.[211] The treaties are specific to each First Nation, as well as place, history and circumstance, but they share a number of common elements relating to land, resources, governance, finance, and cultural heritage.[212] As part of each settlement, a portion of the First Nation's territory is transferred in fee simple for the exclusive use of the First Nation.[213] This includes rights over sub-surface resources. Under the *Tla'amin Final Agreement*, for example, the Tla'amin Nation secured over 8,300 hectares of land.[214] Exclusive resource rights are guaranteed

203 Douglas R Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (Report, 20 February 2015) 61.

204 Ibid.

205 James Anaya, *Addendum to the Report of the Special Rapporteur on the Rights of Indigenous Peoples: The Situation of Indigenous Peoples in Canada*, UN Doc A/HRC/27/52/Add.2 (4 July 2014) 16 [61], [64].

206 This was in obiter dicta: *Hul'qumi'num Treaty Group v Canada (Admissibility)* (Inter-American Commission on Human Rights, Petition 592-07, 30 October 2009) [38]–[39] ('*Hul'qumi'num v Canada*').

207 James M Lornie, *Final Report with Recommendations Regarding the Possibility of Accelerating Negotiations with Common Table First Nations that Are in the BC Treaty Process, and Any Steps Required* (Report, 30 November 2011) 29.

208 *Hul'qumi'num v Canada* (n 206) [16]. See also at [37].

209 Canadian Government, *Equality + Growth: A Strong Middle Class* (Budget, 27 February 2018) 140.

210 This will cost $1.4 billion: Canadian Government, *Investing in the Middle Class: Budget 2019* (Budget, 19 March 2019) 129.

211 Those First Nations are the: Huu-ay-aht First Nations, the Tsawwassen First Nation, the Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations, the Uchucklesaht Tribe, the Tla'amin Nation, the Yuułuʔiłʔatḥ First Nation and the Toquaht Nation: 'Negotiation Update', *BC Treaty Commission* (Web Page) <https://www.bctreaty.ca/negotiation-update>.

212 Godlewska and Webber (n 168) 17–18.

213 Ibid 17.

214 *Tla'amin Final Agreement*, Tl'a-amin Nation–Canada–British Columbia, signed 11 April 2014, ch 3 art 1.

within the First Nation's territory, with more restrictive resource rights accorded in areas outside their territorial limits.[215] These rights are subject to conservation, as well as public health and safety legislation.[216] In areas outside the First Nation's territory, certain land use decisions are subject to planning, consultation, and joint management.[217]

The question of extinguishment of Aboriginal title through treaty has caused problems. Historic treaties required Aboriginal groups to 'surrender, entirely and for ever',[218] or 'cede, release, surrender and yield up'[219] their rights to land. This approach was followed in the early stages of modern treaty-making from 1975 onwards. However, continuing disquiet over Canada's policy of 'blanket extinguishment' has led to some changes.[220] Since 1995, treaty-making in Canada does not formally require Aboriginal groups to surrender or extinguish Aboriginal title.[221] Rather, a range of techniques are adopted. For instance, the *Tłı̨chǫ Land Claims and Self-Government Agreement among the Tłı̨chǫ and the Government of the Northwest Territories and the Government of Canada* includes a provision providing that the Tłı̨chǫ 'will not exercise or assert any Aboriginal or treaty rights' other than those set out in the agreement.[222] Consistent with the *UNDRIP*, the British Columbia treaty process also does not require Aboriginal groups to extinguish their rights or title.[223] Nevertheless, as only a portion of Aboriginal title is recognised via treaty, many groups remain concerned.[224] Given the challenge to the Noongar Settlement,[225] similar issues may arise in Australia.

215 Godlewska and Webber (n 168) 17.

216 See, eg, *Tsawwassen First Nation Final Agreement*, Tsawwassen First Nation–Canada–British Columbia, signed 6 December 2007, chs 9–11.

217 *Maa-nulth First Nations Final Agreement*, signed 9 April 2009, chs 7–12.

218 See, eg, British Columbia, 'Conveyance of Land to Hudson's Bay Company by Indian Tribes' in *Papers Connected with the Indian Land Question: 1850–1875* (1875) 5, 5 <https://open.library.ubc.ca/collections/bcsessional/items/1.0060734>.

219 See, eg, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (1957) 3, 11 <https://publications.gc.ca/collections/collection_2018/aanc-inac/R32-341-1957-eng.pdf>.

220 Eyford (n 203) 20, 71.

221 Ibid 72–3.

222 *Tłı̨chǫ Land Claims and Self-Government Agreement among the Tłı̨chǫ and the Government of the Northwest Territories and the Government of Canada*, Tłı̨chǫ–Northwest Territories–Canada, signed 25 August 2003, art 2.6.1.

223 This is provided in principle five: *Principles* (n 200) 11.

224 Eyford (n 203) 73–4.

225 See Calla Wahlquist, '"It Is Not about Money": Australia's Largest Native Title Settlement Challenged Again', *The Guardian* (online, 30 November 2018)

The parties to these negotiations understand treaties as providing 'a framework for reconciling Crown title and the inherent titles of Participating Indigenous Nations, and pre-existing Indigenous sovereignty with assumed Crown sovereignty'.[226] To this end, each treaty provides for the co-existence of Crown and Indigenous Nation governments. Article 3.1 of the *Yale First Nation Final Agreement*, for instance, provides that the parties 'acknowledge' the right of self-government and governance of the Yale First Nation.[227] Likewise, the *Maa-nulth First Nations Final Agreement* provides that each Maa-nulth First Nation has 'the right to self-government, and the authority to make laws, as set out in this Agreement'.[228]

As Hobbs and Williams note:

> Jurisdiction recognised under each treaty typically includes the administration of justice, family and social services, healthcare, and language and cultural education, though federal and provincial law applies where an inconsistency or conflict arises.[229]

Unlike the process in Aotearoa New Zealand, apologies and truth-telling are not central parts of the British Columbia treaty process. Agreements cryptically record that 'Canada and British Columbia acknowledge the perspective' of the First Nation signatory and 'express regret if any actions or omissions of the Crown have contributed to that perspective'.[230] Nonetheless, it is through treaty that both parties seek 'to move … beyond the difficult circumstances of the past'.[231]

<https://www.theguardian.com/australia-news/2018/nov/30/it-is-not-about-money-australias-largest-native-title-settlement-challenged-again>; Ben Wyatt, Minister for Aboriginal Affairs (WA), 'High Court Clears the Way for Historic South West Native Title Settlement to Proceed' (Media Statement, Government of Western Australia, 26 November 2020) <https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/11/High-Court-clears-the-way-for-historic-South-West-Native-Title-Settlement-to-proceed.aspx>.

226 *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* (Policy Document, 4 September 2019) [18(d)] <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/recognition_and_reconciliation_of_rights_policy_for_treaty_negotiations_in_bc_aug_28_002.pdf>.

227 *Yale First Nation Final Agreement*, Yale First Nation–Canada–British Columbia, signed 11 April 2013, art 3.1.

228 *Maa-nulth First Nations Final Agreement*, signed 9 April 2009, art 13.1.1.

229 Hobbs and Williams, 'The Noongar Settlement' (n 40) 19, citing ibid art 1.8.1.

230 Ibid preamble para F.

231 Ibid. While not connected directly to treaty-making, Canada has utilised discrete truth-telling processes to attempt to uncover and address historic wrongs. The 1996 *Royal Commission on Aboriginal Peoples* aimed to investigate and propose solutions to the challenges affecting the relationship between Aboriginal peoples (First Nations, Inuit, Métis Nation), the Canadian government and Canadian society. The report made hundreds of recommendations, calling for a 'sincere acknowledgement by non-Aboriginal people of the injustices of the past' to be

Despite some concerns over process and outcomes, modern treaty-making through the BCTC and across Canada has achieved real benefits for First Nations.[232] The Huu-ay-aht First Nations, for example, perceive modern treaty-making as a continuation of the 'pre-colonial practice of negotiated agreements between equal sovereigns'.[233] Huu-ay-aht First Nations were 'aware of the imperfection and often asymmetrical nature of modern treaties', but, nonetheless, engaged in the process to reform their relationship with British Columbia and Canada in ways they considered valuable.[234] The same is true of the Nisga'a. For these communities, modern treaties confirm that

> power and authority resides in the First Nations themselves. As such, they are a medium through which, in the words of Edward Allen, CEO of the Nisga'a Lisims Government, 'we have negotiated our way into Canada, to be full and equal participants of Canadian society'.[235]

They are also a testament to the strength and resilience of First Nations. As Chief Joseph Gosnell remarked at the signing of the *Nisga'a Final Agreement* in August 1998:

> To the Nisga'a people, a Treaty is a sacred instrument. It represents an understanding between distinct cultures and shows respect for each other's way of life. It stands as a symbol of high idealism in a divided, fractious world. That is why we have fought so long, and so hard. …
>
> The Treaty represents a monumental achievement for the Nisga'a people and for Canadian society as a whole. It shows the world that reasonable people can sit down and settle historical wrongs. It proves that a modern society can correct the

accompanied by the 'rebalancing of political and economic power between Aboriginal nations and other Canadian governments', enabling 'the spirit and intent of historical treaties … to be honoured': *Royal Commission on Aboriginal Peoples* (Report, October 1996) vol 5, 1–3. Narrower in focus, the 2015 Truth and Reconciliation Commission of Canada investigated and reported on injustices resulting from the Indian residential schools: 'Truth and Reconciliation Commission of Canada', *Government of Canada* (Web Page, 29 September 2022) <https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525>.

232 Young and Hobbs, 'Treaty-Making Critical Reflections' (n 181) 161.

233 Ibid 165, citing Vanessa Sloan Morgan, Heather Castleden and Huu-ay-aht First Nations, '"Our Journey, Our Choice, Our Future": Huu-ay-aht First Nations' Self-Government Enacted through the Maa-nulth Treaty with British Columbia and Canada' (2019) 51(4) *Antipode* 1340 ('Our Journey, Our Choice, Our Future').

234 Morgan, Castleden and Huu-ay-aht First Nations, 'Our Journey, Our Choice, Our Future' (n 233) 1359, citing Vanessa Sloan Morgan, Heather Castleden and Huu-ay-aht First Nations, '"This Is Going to Affect Our Lives": Exploring Huu-ay-aht First Nations, the Government of Canada and British Columbia's New Relationship through the Implementation of the Maa-nulth Treaty' (2018) 33(3) *Canadian Journal of Law and Society* 309, 330.

235 Hobbs and Williams, 'The Noongar Settlement' (n 40) 21–2, quoting Edward Allen, 'Our Treaty, Our Inherent Right to Self-Government: An Overview of the Nisga'a Final Agreement' (2004) 11(3) *International Journal on Minority and Group Rights* 233, 234.

> mistakes of the past and ensures that minorities are treated fairly. As Canadians, we should all be very proud.[236]

The legal and political framework within which these processes operate is considerably different to our domestic experience, qualifying any simple translation of lessons for Australia. Significantly, treaty negotiations in Canada occur against the backdrop of constitutionally protected Indigenous rights.[237] Treaties cannot be altered by ordinary legislation,[238] providing Aboriginal groups with a more secure basis to trust their negotiating partners and influencing the scope of agreements. Similarly, since 1995, the Canadian government has adopted a policy to recognise the inherent right of Aboriginal self-government.[239] The absence of constitutional protection of Indigenous rights and political recognition of Indigenous self-government, as well as the absence of a history of treaty-making, places Indigenous peoples in Australia in a more difficult position. Again, the Uluru Statement's sophisticated answer to this challenge is to enhance Indigenous political power through a constitutionally entrenched First Nations voice. As noted, this will also help create a political culture of Indigenous dialogue with the state.[240] The design of a Makarrata Commission, including how it can ensure fair negotiation processes, will also be critical.

Several insights may nonetheless be drawn from the BCTC to inform a Makarrata Commission. First, treaty commissioners in Canada are appointed by the parties to the process, with a balance between those appointed by First Nations and those appointed by governments. However, commissioners do not represent the interests of the party that has appointed them. The Commission is independent and impartial, and decisions need to be supported by appointees from all three parties. This mechanism provides a novel process that might inspire ideas for appointments to a Makarrata Commission in Australia. Second, as 'the keeper of the process of treaty-making',[241] the Commission is not a participant but a guide, playing a kind of neutral umpire role. The commissioners manage the negotiations by ensuring participants are ready, monitoring progress and resolving disputes as and when they arise. Third, to realise these functions, the Commission is jointly funded by the provincial and federal government, helping ensure buy-in across jurisdictions. In guiding the treaty process the Commission also allocates funding to First Nations to support their negotiations and plays a public educative role. These

236 'Joseph Gosnell's Speech at the Nisga"a Treaty Initialing Ceremony', *Nisga'a Lisims Government* (Web Page, 4 August 1998), <http://www.kermode.net/nisgaa/no_frames/initial.html>, archived at <https://perma.cc/NZ6R-JM4V?type=image>, quoted in 'Editorial Note' (2004) 11(3) *International Journal on Minority and Group Rights* 229, 230,

237 *Canada Act 1982* (UK) sch B s 35 ('*Constitution Act 1982*').

238 But see *R v Sparrow* [1990] 1 SCR 1075.

239 Department of Indian and Northern Affairs Canada, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Policy Guide, 1995) 3.

240 Davis, 'Voice to Parliament' (n 18).

241 Dame Evelyn Stokes, 'Modern Treaty Making with First Nations in British Columbia' (2000) 8 *Waikato Law Review* 117, 126.

additional roles complement the primary function of the Commission, strengthening its position as an impartial, yet active, facilitator both between the parties and the broader British Columbian community. Such institutional elements may usefully stimulate design thinking with respect to a Makarrata Commission in Australia.

V IDEAS FOR A MAKARRATA COMMISSION IN AUSTRALIA

The Waitangi Tribunal and the BCTC operate in different contexts but may provide valuable insights on how agreement-making and truth-telling occurs in countries that share important similarities with Australia. This does not mean a Makarrata Commission must walk an identical path to either. A Commission consistent with Indigenous peoples' aspirations and Australia's unique political and legal context may draw on Australia's own inchoate processes discussed above, while being appropriately inspired by international experience. In this final Part, we offer ideas intended to stimulate debate on a Makarrata Commission.

Principles of self-determination and free, prior, and informed consent require that Indigenous Australians should lead discussion on the design, composition, and functions of a Makarrata Commission. We envision that Indigenous peoples' views will be heard through a constitutionally guaranteed First Nations voice. Once these views have been ascertained, the voice will likely work with Australian governments to develop a Makarrata Commission. We aim here to support that process by sketching potential options and ideas, which we hope can constructively inform future discussions between a First Nations voice and Australian parliamentarians.

As the Uluru Statement suggests, a national Makarrata Commission could have two primary functions: supervising agreement-making and truth-telling. Drawing on the reports of meetings of the Regional Dialogues recorded in the *Referendum Council Final Report*, we imagine these functions could be complementary and flexibly connected in a two-stage process. Where appropriate, local and regional truth-telling could inform agreement-making between First Nations and the Australian state. The Makarrata Commission could assist ongoing, or facilitate new, historical inquiries into past injustice and recommend measures to create fairer and more equitable relationships. These recommendations could then inform direct agreement-making between Indigenous peoples and Australian governments, leading to negotiated settlements.[242] However, truth-telling need not precede agreement-making unless the parties feel this is necessary. The structure should enable flexibility and choice in this respect. The following sections imagine how a Makarrata Commission might operate.

242 Similar proposals have been made in Victoria and the Northern Territory: see First Peoples' Assembly of Victoria, *'Tyerri Yoo-rrook' (Seed of Truth): Report to the Yoo-rrook Justice Commission from the First Peoples' Assembly of Victoria* (Report, June 2021) 33; Northern Territory Treaty Commission, 'Treaty Discussion Paper' (Discussion Paper, 30 June 2020) 69–70.

A High-Level Makarrata Principles

A preliminary matter is whether the Makarrata Commission might assess historical and contemporary injustices against a set of high-level agreed principles, values or commitments. Unlike Aotearoa New Zealand where the principles of the *Treaty of Waitangi* serve as a benchmark to assess Crown conduct, no official instrument of this kind exists in Australia. However, the British Crown made historical commitments regarding how Indigenous peoples should be treated, which creates some sense of moral standard against which to judge colonial behaviour. For example, Lieutenant James Cook's secret instructions from the British Admiralty authorised him to 'take possession of Convenient Situations in the Country in the Name of the King of Great Britain', but only 'with the Consent of the Natives'.[243] Despite recognising that the continent was inhabited, Cook took possession without negotiation, let alone consent. In 1787, King George III issued further instructions to Arthur Phillip which this time did not mention 'consent'.[244] These instructions charged as follows: 'You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them'.[245]

As Morris notes, '[a]s the process of dispossession [unfolded], these instructions were also not followed'. The violence of colonisation did not foster 'amity and kindness', no '"intercourse" or dialogue was officially opened, and [no] "conciliation" or peaceful negotiation' was formally conducted.[246] Nonetheless, the focus on 'consent', and 'amity and kindness' in these instruments suggest alternative paths that could have been taken. If the royal instructions had been followed, some of the devastating impacts of colonisation may have been mitigated.

The royal instructions on their own are inappropriate to guide the work of the Makarrata Commission. They were unilateral; they were not agreed in dialogue with Indigenous peoples and so cannot form a sole basis to assess conduct within the relationship. The instructions could, however, be referenced in or inform a high-level agreed statement of shared 'Makarrata principles', intended to guide future relationships between Indigenous peoples and the Australian state.

This could align with other recommendations that have recently been made in the Indigenous constitutional recognition debate. For example, alongside its proposal for a First Nations constitutional voice, the Referendum Council recommended

243 Letter from Philip Stephens to James Cook, 30 July 1768 <https://www.foundingdocs.gov.au/item-sdid-67.html>, reproduced in John Thompson, *Documents that Shaped Australia: Records of a Nation's Heritage* (Pier 9, 2010) 8.

244 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Report, January 2012) 205.

245 Letter from King George III to Arthur Phillip, 25 April 1787 <https://www.foundingdocs.gov.au/item-sdid-68.html>, reproduced in John Thompson, *Documents that Shaped Australia: Records of a Nation's Heritage* (Pier 9, 2010) 41.

246 Morris, *A First Nations Voice* (n 16) 15–16.

that all Australian Parliaments enact an extra-constitutional 'Declaration of Recognition'.[247] The Declaration:

> should be developed, containing inspiring and unifying words articulating Australia's shared history, heritage and aspirations. The Declaration should bring together the three parts of our Australian story: our ancient First Peoples' heritage and culture, our British institutions, and our multicultural unity. It should be legislated by all Australian Parliaments, on the same day, either in the lead up to or on the same day as the referendum establishing the First Peoples' Voice to Parliament, as an expression of national unity and reconciliation.[248]

This Declaration should, of course, be led by and developed collaboratively with Indigenous Australians. To this end, Morris suggests it should be enacted with the assent of the First Nations voice, making the Declaration a high-level reconciliatory agreement,[249] or what Stan Grant has described as a 'Makarrata Declaration'.[250]

Depending on how it is conceived, the Declaration could include principles to shape and guide the relationship between Indigenous peoples and the Australian state.[251] Such principles could be informed by the historic royal instructions, foundational statements of Indigenous peoples' aspirations such as the Yirrkala Bark Petition, as well as contemporary agreed aspirations. They could sensibly be drawn from the *UNDRIP* and may build on the 10 guiding principles distilled by the Regional Dialogues in the lead up to the Uluru Statement.[252] These principles provide, for example, that a reform proposal should only proceed if it '[d]oes not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty', '[i]nvolves substantive, structural reform', '[t]ells the truth of history' and '[h]as the support of First Nations', among other standards.[253] Any such principles will need to be redrafted for the purposes of a Makarrata Declaration, but they nonetheless could form the basis of agreed 'Makarrata principles' to guide the relationship between Indigenous peoples and the state, and the work of the Makarrata Commission. Other instruments that could also offer guidance include the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) and the 2018 *Barunga Agreement*. Such principles could be articulated in the *Makarrata Act*, establishing the Makarrata Commission. These Makarrata

247 *Referendum Council Final Report* (n 3) 2.

248 This is outlined in recommendation two: ibid.

249 Morris, 'An Australian Declaration of Recognition' (n 164) 267.

250 Stan Grant, 'A Makarrata Declaration: A Declaration of Our Country' in Shireen Morris (ed), *A Rightful Place: A Road Map to Recognition* (Black, 2017) 117.

251 Morris, 'An Australian Declaration of Recognition' (n 164) 289, 292.

252 *Referendum Council Final Report* (n 3) 22.

253 Ibid. See also Eddie Synot and Roshan de Silva-Wijeyeratne, '*Cooper v Stuart* (1889) 14 App Cas 286' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021) 36, 52.

principles may then inform and guide truth-telling and agreement-making between Indigenous peoples and the Australian state.

B Flexible Two-Stage Process

The legislated Makarrata Commission could supervise and facilitate truth-telling to inform agreement-making where appropriate. Consistent with the evident desire among Indigenous peoples that substantive agreement-making be integrated with truth-telling, this could be a conjoined but flexible two-stage process. Addressing the concern that just outcomes are too often detached from truth-telling, this might entail an expectation, or requirement, that stage two (agreement-making) closely follows stage one (truth-telling). The legislation could make clear that truth-telling is not standalone and not the end of the process: agreement-making to achieve substantive justice would also be expected. However, as noted, truth-telling need not be a compulsory prerequisite to agreement-making. Just as Māori iwi may pursue negotiations with the Crown without any Waitangi Tribunal recommendations to bolster their claims,[254] Australian First Nations might choose to engage in negotiations without a formal truth-telling process. Makarrata Commission processes should provide space for First Nations to pursue their own self-determined strategies, but truth-telling might be a lever First Nations can utilise if they choose.

Appleby and Davis explain that delegates at the Regional Dialogues who produced the Uluru Statement emphasised the importance of truth emerging from and within local communities.[255] As Davis explains:

> Truth-telling must be bottom up, led by First Nations in their communities. The vision of truth determined by the First Nation Regional Dialogues, which led to the Uluru statement, captured this dynamic: localised and featuring understandings of a shared history within communities. Few wanted a framework or institution to regulate this activity. The notion of a commission to animate the process of Makarrata was supported, but communities would still decide whether they want to connect to this, if at all.[256]

Local and regional truth-telling holds several advantages.[257] Slowly but steadily building up a base of understanding and cultural awareness in specific communities could help inoculate all Australians from misinformation, enabling us to build a shared history together. Similarly, as a bottom-up process led by

254 'Treaty of Waitangi Claims', *Te Kāwanatanga o Aotearoa New Zealand Government* (Web Page) <https://www.govt.nz/browse/history-culture-and-heritage/treaty-of-waitangi-claims/>; 'Claims Process', *Waitangi Tribunal* <https://waitangitribunal.govt.nz/claims-process/after-hearing/>.

255 Appleby and Davis (n 89) 508–9.

256 Davis, 'Truth-Telling' (n 12).

257 See generally Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (Report, November 2018) [6.54]–[6.67].

communities, Indigenous peoples may be more eager to engage.[258] Top-down or state-driven efforts at 'reconciliation' in Australia have too often marginalised and disempowered Indigenous communities, who may have perceived them as 'repressive' or as means to 'reinforce colonial hegemonies'.[259] Localised truth-telling would also mean that dispersed processes could occur simultaneously across the country — as is happening already — contributing to a national atmosphere of reconciliation and grounding support for political and structural reform. Those local processes may then inform stage two, the localised and regional agreement-making stage.

How might this work in practice? To help paint a picture, let us sketch out an imagined example of a Makarrata Commission process.[260] In our example, a Queensland First Nation, or a group of First Nations within a region, might make an application to the Makarrata Commission for assistance in investigating and resolving past injustices experienced by that First Nation or region during the colonial era and in contemporary times. If the Makarrata Commission found that there was merit in the claim, it could commence the two-stage process.

First, the truth-telling stage. One or two members of the Makarrata Commission might facilitate and assist in regional and local hearings regarding the historical or contemporary events. This could take several forms. Perhaps the commissioners would facilitate the hearing of oral, anthropological and historical evidence, hear submissions from First Nations people and state and Commonwealth representatives, as well as third parties and experts, and explore matters like land loss, cultural and language loss, discrimination, and historical violence. The Victorian Yoo-rrook Justice Commission provides a cogent example of the matters that may be investigated.[261] Appleby and Davis suggest a hands-off approach, where the Makarrata Commission would play a role encouraging and stimulating local-led truth-telling initiatives by providing additional support and resources where requested and needed.[262]

Local and regional truth-telling processes may support Australian communities to come to an informed view of our own histories. A report recounting this history and providing an account of the 'truth' for the public and historical record —

258 Appleby and Davis (n 89) 508–9, quoting Penelope Edmonds, *Settler Colonialism and (Re)conciliation: Frontier Violence, Affective Performances and Imaginative Refoundings* (Palgrave Macmillan, 2016) 8.

259 Edmonds (n 258) 8. See, eg, the response to the Recognise Campaign: Megan Davis and Marcia Langton, 'Introduction' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 1, 5.

260 It is important to note that some local and regional truth-telling initiatives may not seek the involvement of the Makarrata Commission, preferring instead to engage in their process without the support of a national body. Davis offers the example of the Carrolup Elders Reference Group's Centre for Truth-Telling, suggesting that '[a] Makarrata Commission would step lightly into this space and be guided by First Nations': Davis, 'Truth-Telling' (n 12).

261 See *Victoria Gazette* (n 11) 2–3.

262 Appleby and Davis (n 89) 508–9.

acknowledging different perspectives and contested understandings of that 'truth' — might be published by the local community with the support of the Makarrata Commission or by the Commission itself.[263] The report could include non-binding recommendations to heal the relationship and rectify past injustice in line with agreed Makarrata principles, as set out in the Makarrata Declaration and/or in the *Makarrata Act*. This could include recommendations for reforms facilitating self-determination and community responsibility in their affairs, return of land, monetary compensation, cultural recognition and language revitalisation, and symbolic recognition including state apologies. The Makarrata Commission may then encourage the parties to negotiate the terms of a fairer future relationship.

This could set the scene for stage two: agreement-making. As noted, state participation in subsequent agreement-making could be encouraged by legislation. While legislation requiring the relevant governments to come to the negotiating table is unlikely to be legally enforceable,[264] it could carry political and moral force, especially if the *Makarrata Act* carried the buy-in of all Australian governments. An analogous example of legislation that incorporates an expectation of federal agreement-making is the national Goods and Services Tax ('GST') legislation, which purports to prevent the Commonwealth from altering the GST rate 'unless each State agrees to the change'.[265] Although this special procedural requirement is likely legally ineffective,[266] it carries political force, particularly because it reflects an intergovernmental agreement. A *Makarrata Act* could similarly be the product of an overarching agreement between all Australian Parliaments and the First Nations constitutional voice, setting the scene for an ongoing expectation of agreement-making between the parties.[267] The Act could include provisions that reflect the parties' intent to pursue agreement-making to resolve historic injustices in relation to the First Nations. This could include a requirement that truth-telling should be followed by processes of agreement-making between the relevant First Nations and Australian governments.

Agreements might be negotiated between individual First Nations and the state. However, Indigenous nations may choose to pool their resources and negotiate along linguistic, cultural, or regional lines as occurs in some cases in Canada.[268]

263 Ibid 509.

264 Julie Taylor, 'Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy' (2004) 32(1) *Federal Law Review* 57, 62, citing *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 356 [14]–[15] (Brennan CJ and McHugh J).

265 *A New Tax System (Managing the GST Rate and Base) Act 1999* (Cth) s 11.

266 See Anne Twomey, 'Manner and Form' (Speech, Gilbert + Tobin Constitutional Law Conference, University of New South Wales, 18 February 2005) 2 <http://www.gtcentre.unsw.edu.au/publications/papers/docs/2005/5_AnneTwomey.pdf>, archived at <https://perma.cc/E5D8-U39B>.

267 For more on this kind of federal agreement-making with the First Nations voice, with respect to a Declaration: see Morris, 'An Australian Declaration of Recognition' (n 164) 267.

268 Paul Nadasdy, 'Boundaries among Kin: Sovereignty, the Modern Treaty Process, and the Rise of Ethno-Territorial Nationalism among Yukon First Nations' (2012) 54(3) *Comparative Studies in Society and History* 499, 509–10.

The Indigenous party or parties and representatives of state and Commonwealth governments could then negotiate to resolve their grievances in light of the Makarrata Commission's findings and recommendations. Either one or two members of the Makarrata Commission could mediate and facilitate negotiations, or a distinct or conjoined Makarrata Office could be set up with trained facilitators encouraging resolution and ensuring negotiation processes are fair. Similar to the process in Victoria, a negotiation framework, drawn from the principles articulated in the *UNDRIP*, may be developed by the First Nations voice and the Commonwealth government.

Settlements may include the recognition of community responsibility and self-government in internal and local affairs, financial redress, return of land, cultural recognition and revitalisation measures, and symbolic apologies. As noted above, this suite of elements can help ensure the agreement serves as a 'vehicle to achieve self-determination, autonomy and self-government'.[269] Each Indigenous nation might choose to ascertain community agreement of the settlement terms in a different way. Some might use a community vote, while others may opt for different mechanisms to ensure community support for the agreement. Once agreement is reached and the parties sign off, the Makarrata Commission could formally rubber stamp the settlement in a ceremony on country, as happens in native title processes. The ceremony could involve Indigenous languages, song and dance, as well as Western solemnities to mark the occasion and could incorporate verbal apologies and mutual promises. Once the settlement is finalised, the Commonwealth and state or territory Parliament could enact legislation giving the agreement legal force. Although these agreements would not be constitutionally protected, the staggered process of truth-telling and agreement-making may help build broad and widespread political buy-in for the settlements. Similarly, if both state/territory and Commonwealth parties are at the negotiating table, this may help protect settlements from unilateral amendment or repeal.

The Makarrata Commission could then potentially play a role in monitoring the agreement. It may be that agreement implementation plans and other similar documents would be developed following the negotiation of any settlement.[270] While these plans could be drafted with a degree of flexibility to accommodate unexpected changes, it is important that both parties remain committed to their agreement. This could be assisted by including a provision in the settlement legislation requiring both parties to follow the implementation plan in good faith. If a party thought the other was not sticking to their promises and obligations as set out in those documents or the settlement itself, they might lodge a claim with the Makarrata Commission and seek mediation. Alternatively, the Makarrata Office might be charged with this ongoing monitoring work.

269 *Referendum Council Final Report* (n 3) 31.

270 Poor implementation has hampered modern treaty settlements negotiated in Canada: see Young and Hobbs, 'Treaty-Making Critical Reflections' (n 181) 172–5.

C Integrating Existing Processes and Incorporating the First Nations Voice

A national Makarrata Commission will likely need to relate to and integrate with existing state and territory processes. We do not attempt to provide conclusive answers here but offer some preliminary thoughts that may assist Indigenous peoples and others tasked with designing and developing the Makarrata Commission. For example, a First Nation in Victoria may make an application to the Makarrata Commission. Relying on complementary legislation enacted in Victoria, the Makarrata Commission could refer this application to the existing Yoo-rrook Justice Commission,[271] or the institutions could work together in partnership if desired, to conduct hearings on country, hear evidence and receive submissions from the First Nation, the state (with state and Commonwealth parties at the table) and third parties. On the basis of this evidence, the Yoo-rrook Justice Commission (either independently or jointly with the Makarrata Commission) could draft a report providing an account for the public and historical record. Again, the report may include non-binding recommendations for legal and other reform designed to rectify past injustices and heal the relationship. Following the release of the report, the parties could be encouraged to negotiate and reach agreement to settle claims and establish a fairer future relationship.

The Makarrata Commission might also undertake regional or national inquiries into systemic matters. This could include historical injustices such as stolen wages, or contemporary issues including the depletion of Indigenous languages across the continent, the representation of Indigenous peoples in the media, the education curriculum, or experiences of racism in community and professional sport.[272] The same processes might apply. The Makarrata Commission could hold hearings across the country, assess the evidence and produce a report. That report may recommend legislative and other reforms consistent with the Makarrata principles. In these cases, the First Nations voice may even be a party to the ensuing negotiations regarding legislative and policy reform at the federal level and could enter into national agreements to settle some matters. Any agreed national reforms would then be developed and implemented in consultation with the First Nations voice — consistent with requirements that would by that time be articulated in the *Constitution*. However, broad cross-cutting thematic inquiries may also prompt reflection and action at the local level, further grounding community understanding and support for structural reform, and propelling regional and local agreement-making.

271 Though note that the Yoo-rrook Justice Commission is expected to cease in 2024, after submitting its final report: *Victoria Gazette* (n 11) 6. This example is suggestive only, indicating one approach that a federal Makarrata Commission could integrate within existing (and future) processes at the sub-national level.

272 See Larissa Behrendt and Lindon Coombes, *Do Better: Independent Review into Collingwood Football Club's Responses to Incidents of Racism and Cultural Safety in the Workplace* (Report, 2 February 2021) <https://resources.afl.com.au/afl/document/2021/02/01/0bd7a62e-7508-4a7e-9cb0-37c375507415/Do_Better.pdf>.

In terms of initiating truth-telling and agreement-making processes, we imagine that the First Nations voice could also make applications for thematic or national inquiries, enabling collective, national action by First Nations, if desired. Again, this could lead not only to national truth-telling processes, but also national agreements negotiated between the First Nations voice and the state. Similarly, Indigenous people, non-Indigenous members of the Australian public, and even the government or opposition may ask the Makarrata Commission to inquire into certain issues. However, the Commission should have discretion as to whether it accepts any referral. In determining whether to undertake an inquiry, the Makarrata Commission could consider whether the issue is more appropriately dealt with by a local or regional process. It should also be able to refine the scope of inquiries that are requested, should it see related requests that could be combined, or should it see some other need to do so.

D Possible Composition

Reflecting its role as a vehicle for securing 'a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination',[273] the Makarrata Commission could be composed of prominent Indigenous and non-Indigenous Australians of the highest integrity. Members could serve for a single five-year term, subject to reappointment for a further five-years. Appointments could be staggered to avoid wholesale turnover of the Commission. To ensure balanced, neutral membership reflective of the Makarrata Commission's umpire role, it could be made up of half Indigenous and half non-Indigenous commissioners.[274] To consolidate this balance, the First Nations voice could nominate half of the members (equal Indigenous and non-Indigenous), with the federal government nominating the other half (equal Indigenous and non-Indigenous). Recognising their 'national' role, the federal government may be encouraged to consult with the opposition and the states and territories in making their selection. As required by the imagined *Makarrata Act*, members of the Commission would be independent and impartial, regardless of who appointed them.[275]

The Makarrata Commissioners could be experts in Indigenous affairs, Australian history, anthropology or matters of national reconciliation. They could be historians, legal experts, Indigenous elders, academics or diplomats. Given the need to maintain independence and impartiality, retired diplomats or judges may be particularly well suited. Both political parties could aim to ensure balance with respect to gender and geography in their selections. It may be that the commissioners could be focussed either on the truth-telling or agreement-making

273 'Uluru Statement' (n 1).

274 However, note that the Yoo-rrook Justice Commission (which is exclusively focused on truth-telling) is composed of five commissioners, four of whom are Indigenous, with one non-Indigenous commissioner: Yoorrook Justice Commission, *Yoorrook with Purpose* (Interim Report, June 2022) 3.

275 This proposal is drawn from the membership of the CAR and the British Columbia Treaty Commission: see *CAR Act* (n 100) s 14; *BCTC Act* (n 188) ss 6–7.

functions of the Commission, or that these aspects would be integrated so that all commissioners play a role in both functions. A President of the Commission could be appointed on the support of both the First Nations voice and government.

VI CONCLUSION

In this article, we have imagined how a national Makarrata Commission might operate, in the hope that these ideas can helpfully inform and support future discussions between a First Nations voice and parliamentarians who will be tasked with designing and implementing the institution. We have drawn inspiration from the First Nations Regional Dialogues and the Referendum Council Final Report, as well as existing institutions and processes in Australia, Aotearoa New Zealand and Canada. We imagine a Makarrata Commission as a national body that flexibly supports, supervises and facilitates local and regional truth-telling and agreement-making between Indigenous peoples and the state. A constitutionally guaranteed First Nations voice is the immediate priority. But after a First Nations voice is established, it will be well placed to collaborate with the Australian state on the design of the Makarrata Commission. Our ideas are intended to stimulate and support that discussion, in the spirit of inclusive dialogue and collaboration.

The Makarrata Commission could facilitate regional hearings for the parties to tell their stories and air their grievances, and at which experts can explain the historical evidence for the Commission to assess. The Commission could produce reports providing a record of the historical 'truth' in all its ambiguity and complexity, and could provide non-binding recommendations for the creation of fairer future relationships between Indigenous peoples and the state. These recommendations could inform direct negotiations and agreement-making between Indigenous peoples and the state, with the Makarrata Commission (or a Makarrata Office) facilitating and mediating to ensure negotiations are fair. Once a settlement is reached, it could be approved by the Indigenous party and enacted in legislation by the Commonwealth and relevant state or territory Parliament. The Makarrata Commission could rubber stamp the settlement at ceremonies held on the country of the Indigenous nation. Through this process, the parties could commit to building more equal partnerships based on mutual obligations, respect and responsibilities. The Makarrata Commission (or the Makarrata Office) could play an ongoing role in holding the parties accountable to shared commitments.

It may soon be time for Australians to contemplate what Makarrata means for our country; to imagine how we might become a fairer, more united nation. We offer these ideas to help progress the conversation.