

# LESSONS FROM NEW ZEALAND: TOWARDS A BETTER WORKING RELATIONSHIP BETWEEN INDIGENOUS PEOPLES AND THE STATE

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## I Introduction

This paper examines the ways in which Maori are recognised through New Zealand's legal and political institutions, and draws lessons that are applicable to the complex challenge of Indigenous constitutional recognition in Australia.<sup>1</sup> It argues that Indigenous recognition can occur through constitutional reform, but also through institutional and legislative reform: recognition could be a package of constitutional and other reforms. The New Zealand example demonstrates that Indigenous recognition seeks to address the functional, working relationship between Indigenous peoples and the state, to make it fairer than it has been in the past. It shows that Indigenous recognition can and should be practical and ongoing, rather than purely symbolic and static.

The paper begins by providing a political and theoretical context to the current Australian recognition debate. It discusses the reaction to the Expert Panel's recommendations, contextualises the relevant concepts including 'recognition', 'symbolism', 'practicality' and 'fairness' within the frame of a liberal democracy, and argues that Indigenous advocacy has always been for practical forms of constitutional recognition and constitutional guarantees. Part III draws impetus from former Prime Minister Tony Abbott's comments about the Treaty of Waitangi in New Zealand and compares the constitutional histories of New Zealand and Australia. It explores the changing constitutional relationship between Indigenous peoples and the state in both nations through successful or attempted agreement-making and breached promises, and argues that Indigenous constitutional recognition in the contemporary Australian setting should

arise out of genuine negotiation and agreement between Indigenous peoples and the state, to re-set the terms for a fairer future relationship. Part IV discusses New Zealand's ongoing movement towards practical recognition of Maori through legislative and institutional reforms including the Maori Council, Waitangi Tribunal settlement mechanisms and the cultural recognition that has flowed therefrom, and Maori reserved parliamentary seats.

Part V draws specific lessons relevant to the challenges of Indigenous constitutional recognition in Australia, highlighting four key insights. First, that constitutional rights clauses are not the only way to constitutionally protect Indigenous rights: political and procedural mechanisms to give Indigenous people a participatory voice in their affairs can also be used. Second, that Australia could legislatively enact high-level agreed principles to better manage the future relationship between Indigenous peoples and the state. Third, that Australian governments could pursue agreement-making and settlements with Indigenous peoples in a fuller and richer sense than is currently the case. Fourth, that Australia could enact legislative mechanisms for practical recognition of Indigenous cultures, languages and heritage.

Part VI concludes that New Zealand's functional approach to Maori recognition and reconciliation is useful to the current Australian debate. The New Zealand example encourages both practicality and creativity in ascertaining the right constitutional and other reforms to effect just recognition of Indigenous peoples in Australia, in a way that is compatible with and acceptable within our political and constitutional system and circumstances.

## II Political and Theoretical Context

### A The Current Indigenous Recognition Debate

The difficulty of constitutional reform in Australia imposes arduous constraints on the types of reforms that are politically achievable. The Expert Panel's 2012 recommendations for Indigenous constitutional recognition proposed reforms including removal of references to 'race', insertion of a replacement Indigenous head of power incorporating preambular recognition statements, recognition of Indigenous languages and English as a national language, and the adoption of a racial non-discrimination clause to prohibit governments enacting racially discriminatory laws and policies.<sup>2</sup>

Some of these recommendations proved controversial. The racial non-discrimination clause proposal in particular, despite its public popularity,<sup>3</sup> was derided as a 'one clause bill of rights' that would improperly empower unelected judges to overturn the decisions of elected representatives.<sup>4</sup> Downplaying these criticisms, the Joint Select Committee in 2015 recommended three versions of a racial non-discrimination clause in its final report, including two versions that would protect Indigenous people only.<sup>5</sup> But soon after the report's publication, Committee Chairman, Liberal MP Ken Wyatt, indicated that a racial non-discrimination clause would be unlikely to gain the necessary political support for a successful referendum, because it was already being opposed in his own party.<sup>6</sup> It is thus becoming increasingly apparent that a racial non-discrimination clause, or variations thereof, may be politically unachievable. As bipartisan support is integral to referendum success,<sup>7</sup> modified proposals that might more easily win widespread political consensus are being discussed.<sup>8</sup>

Political and procedural constitutional reform options, designed to increase Indigenous participation in democratic processes as a pre-emptive way of protecting Indigenous rights and interests, have been proposed as alternatives to judicially adjudicated constitutional rights clauses. Noel Pearson argues for a constitutional amendment to guarantee that Indigenous views are heard by Parliament in the making of laws and policies with respect to Indigenous affairs,<sup>9</sup> accompanied by a Declaration outside the Constitution to give effect to symbolic recognition in a way that is free from unintended constitutional consequences.<sup>10</sup> Others have argued for reserved Indigenous parliamentary seats.<sup>11</sup>

Former Labor Prime Minister, Paul Keating, recently called for a treaty, which could then be constitutionally recognised.<sup>12</sup>

Others, like Father Frank Brennan, argue for minimalist, purely symbolic recognition in the Constitution, because that is all he thinks is politically achievable.<sup>13</sup> Brennan suggests a 'modest' constitutional acknowledgement: a new preamble recognising Indigenous prior occupation, the 'continuing relationship with their traditional lands and waters' and the 'continuing cultures, languages and heritage' of Indigenous people, and a replacement Indigenous power framed in similar terms, but no form of constitutional guarantee.<sup>14</sup>

Given the political constraints and legal complexities, and the range of options on the table for discussion, what is a sensible and fair approach to Indigenous constitutional recognition in a liberal democracy like Australia?

### B On Recognition, Symbolism, Fairness and Practicality within a Liberal Democracy

It is first appropriate to provide some theoretical background to the question. Is it 'fair' to be seeking to recognise Indigenous peoples at all? Andrew Bolt and others argue that recognition of one group is unfair and antithetical to equality before the law.<sup>15</sup> Are they wrong?

In the New Zealand context, Maori judge Eddie Durie observes that:

Justice, in the broad sense of fairness, requires respect for all peoples... In many cases, therefore, a plural legal order may be necessary ...

Maori, in this context, are not simply a race or cultural group, but a people with constitutional status arising from prior occupancy ... Maori are a domestic constitutional entity entitled to special recognition.<sup>16</sup>

The argument for Indigenous recognition proceeds from an understanding that Indigenous peoples are a legitimately distinct 'constitutional entity', or constitutional constituency, within a plural legal order that can be seen to derive its authority from more than one source.<sup>17</sup> In the settlement of Australia, the sovereign status of Indigenous peoples was discriminatorily denied by the colonising forces and their status as a legitimate constitutional constituency similarly went unrecognised.

Australia's Constitution was thus a union of the colonies, but it unfairly excluded Indigenous peoples both as equal citizens and as consenting parties to the constitutional compact. Had things been fairer, the Constitution might also have embodied a union with the colonised. Indigenous people might have been treated as equals and allowed to negotiate the terms of their inclusion in the new nation, rather than having those terms oppressively imposed upon them. This essentially 'liberal, consent-based' argument for Indigenous constitutional recognition therefore seeks to remedy the unfair and illiberal treatment of Indigenous peoples prior to and at federation, as well as the injustices that have flowed from that initial discrimination, by setting in place fairer terms for Indigenous inclusion and participation in the future.<sup>18</sup>

Will Kymlicka's understanding of the issue is grounded in his observation that Western democracies are often multinational – they can be home to distinct yet coexisting nations or peoples, while also developing into unified states with a shared sense of patriotism. Kymlicka observes that accommodation and recognition of coexisting domestic nations within states is often accepted as a necessary measure, 'above and beyond the common rights of citizenship', to ensure that these nations can exist in a way that is fair, moral and respectful to their common humanity.<sup>19</sup>

Noel Pearson characterises recognition and accommodation as a middle way between absolute assimilation and total fragmentation of the state as responses to the multinational or 'peoplehood' problem.<sup>20</sup> Indeed, the middle way of recognition and accommodation, as demonstrated in comparable liberal democracies such as Canada, the USA and New Zealand, may be the most humanitarian and peaceful way to reconcile colonised nations with colonising states. Such measures stand as an appropriate recognition of historical difference and a justifiable exception to strict equality before the law, because 'equality, including the just distribution of constitutional power, is enhanced by the construction and support of this difference.'<sup>21</sup> The pursuit of Indigenous constitutional recognition can be understood as the pursuit of reform to support equality in practice, taking into account historical and contemporary practical realities.

Coulthard however, in the Canadian context, problematises 'the increasingly commonplace assumption that the colonial relationship between Indigenous peoples and the ... state

can be reconciled via a liberal "politics of recognition".' He argues that the 'recognition-based approach to reconciling Indigenous peoples' assertions of nationhood with settler-state sovereignty via the accommodation of Indigenous identity-related claims ... is still *colonial* insofar as it remains structurally committed to the dispossession of Indigenous peoples of our lands and self-determining authority.'<sup>22</sup> It is an analysis that aligns with arguments commonly made in the Australian context that Indigenous people should seek 'sovereignty', rather than mere recognition.<sup>23</sup> The argument views constitutional recognition as a subordinate acceptance of, rather than resistance to, colonial rule; it tends to equate recognition with continued oppression, and 'sovereignty' with independence, freedom and self-determination.

As Pearson suggests, however, constitutional recognition may be better understood as attempting to reconcile these extremes. Depending on the model adopted, recognition might mean a carving out of Indigenous authority and a sharing of power. In that sense, it could be a recognition of residual, surviving or co-existing sovereignty or nationhood. Australia's federal arrangements share authority and power between the Commonwealth and the states as a recognition of shared sovereignty.<sup>24</sup> If Indigenous peoples were also meaningfully and fairly represented and recognised within the constitutional union – could that actually amount to a practical recognition of surviving and coexisting Indigenous sovereignty?<sup>25</sup>

Within this nuanced conversation, the difficulty in distinguishing between recognition measures that are fair and those that are unfair is readily apparent. As a starting point, fairness in a symbolic sense should be distinguished from fairness in practice. Sometimes, however, symbolism and practicality can collide and coincide. As Rosenberg points out, for example, constitutional bills of rights (often seen, particularly in the current Australian debate, as offering practical, substantive constitutional protections) can sometimes be pursued for their symbolic value more than for their operational results. Professor Suri Ratnapala notes that 'over 130 countries have a bill of rights in one form or another but only a minority of them can truly claim a reasonable record of respect for human rights.'<sup>26</sup> Observing a potential danger in pursuing litigation alone as a strategy for human rights protection, Rosenberg observes:

Symbolic victories may be mistaken for substantive ones, covering a reality that is distasteful. Rather than working to

change that reality, reformers may be misled (or content?) to celebrate the illusion of change. There is a danger that symbolic gains cover for actual failings.<sup>27</sup>

That is certainly a risk in the pursuit of Indigenous constitutional recognition in Australia. Would the insertion of a racial non-discrimination clause really yield equality of outcomes and equality in practice, or would it be more of a symbolic statement with occasional practical effect? Conversely, might a preamble, intended to have only symbolic effect, eventually yield practical (even if unintended) reform, perhaps through its use in judicial interpretation? Or might symbolic statements engender attitudinal changes which can eventually prompt practical reform? As the New Zealand example demonstrates through the Treaty of Waitangi, sometimes a form of recognition that is of itself lacking in legally enforceable power can nonetheless, over time, prompt significant practical change through the moral and political authority that it comes to wield and the political and cultural change it encourages.<sup>28</sup> It can be given practical substance when its principles are translated into legislative action. The danger, of course, is in settling for symbolism that does not and perhaps never will prompt practical change.

The Apology to Australia's Indigenous Peoples, for example, was not accompanied by any practical measures or financial compensation.<sup>29</sup> Pearson has argued that accepting the Apology without compensation was a strategic mistake. His fear was that 'Black fellas will get the words, the white fellas will keep the money. And by Thursday the stolen generations and their apology will be over as a political issue.'<sup>30</sup> Pearson's anxiety in this regard turned out to be well-founded – compensation was never paid and the Apology turned out to be purely symbolic.<sup>31</sup> The lesson remains salient for current Indigenous struggles to achieve constitutional recognition that is more than mere words and that includes fair reforms to propel positive practical change.<sup>32</sup>

### **C The Constitution is a Rulebook, and Indigenous Advocates Seek Fairer Rules**

This paper argues that Indigenous constitutional recognition should involve practical constitutional and legislative reform rather than symbolism alone. It must involve some kind of constitutional guarantee of fairer future treatment for Indigenous peoples.

Constitutions are fundamentally practical documents. Australia's Constitution in particular is mostly devoid of aspirational statements and symbolic content.<sup>33</sup> There would be little point going to the cost and effort of a national referendum to make a purely symbolic change to Australia's highly practical Constitution. Constitutional recognition should have practical benefit for Indigenous peoples and the nation. Otherwise, why bother?

Further, the type of constitutional reform adopted should be in keeping with the nature of Australia's Constitution. Australia's Constitution contains rules, procedures and principles.<sup>34</sup> Its rules, procedures and principles bring to life the relationships between the Commonwealth and the states, between the courts and the Parliament, and between citizens and governments, under the Constitution. Equally, the lack of fair rules, procedures and principles with respect to Indigenous affairs is the omission that has for so long enlivened calls for Indigenous constitutional recognition.<sup>35</sup> Constitutional recognition seeks to address the relationship between Indigenous peoples and the state, to make it fairer than it has been in the past. This cannot be achieved through symbolism alone: it requires a practical change to some constitutional rules.

The rules, procedures and principles in Australia's Constitution are best characterised as enduring, intergenerational guarantees. The harder a Constitution is to change, the more this is true – Australia's is one of the hardest to change in the world. The history of Indigenous advocacy for constitutional recognition<sup>36</sup> demonstrates that Indigenous advocates have consistently sought meaningful and binding *constitutional guarantees* as a check on the unrestrained might of the parliamentary majority.<sup>37</sup> They have sought 'rules and rights and guarantees that things will happen in a better way.'<sup>38</sup>

In July 2015, at a meeting at Kirribili House, Indigenous leaders emphasised that they seek a form of constitutional recognition that has substance and propels positive practical change. They emphasised the need for an answer to the history of racial discrimination against Indigenous peoples, under the Constitution.<sup>39</sup> Importantly, there is not just one kind of constitutional solution to this problem. The New Zealand example demonstrates that there can be multiple, pragmatic answers embedded into constitutional arrangements to redress past discriminatory treatment of Indigenous peoples and help ensure it is not repeated.

But while there may be multiple forms of constitutional guarantee from which to choose, Indigenous advocacy for practical constitutional change should rule out proposals for merely symbolic recognition. There would be no point proceeding with an Indigenous recognition proposal that Indigenous people themselves do not agree with. And Indigenous people continue to state that they seek practical and substantive constitutional reform.

### III Constitutional Histories Compared

#### A Looking to New Zealand for Inspiration

In 2013, in the context of political ambivalence towards the Expert Panel's recommendations, former Prime Minister Tony Abbott (back then Leader of the Opposition) asked Australians to look to New Zealand as a positive role model for Indigenous recognition and reconciliation. 'We only have to look across the Tasman to see how it all could have been done so much better,' Abbott said. 'Thanks to the Treaty of Waitangi in New Zealand two peoples became one nation.'<sup>40</sup>

In pointing to the Treaty as a beacon of reconciliatory achievement, Abbott rhetorically urged national unity and cohesion over ethnic division. But while Abbott's observation about the unifying purpose of the Treaty in New Zealand was broadly correct,<sup>41</sup> his vision of 'two peoples' peacefully becoming 'one nation' was perhaps romanticised. The relationship between Maori and the Crown in New Zealand was a turbulent one, as most colonial relationships are. It was a relationship that would have highs and lows, promises and betrayals, wars and reconciliations; just like the relationship between Indigenous people and the Crown (and the settlers) in Australia.

Nonetheless, there is much we can learn from New Zealand about moving beyond a discriminatory past and setting in place practical measures for a fairer future relationship between Indigenous peoples and the state. In this fundamental challenge New Zealand, as Abbott correctly observes, is demonstrably way ahead.

#### B Constitutions Compared: New Zealand's Flexible Constitutional Arrangements

Unlike Australia, New Zealand lacks an entrenched Constitution. The *Constitution Act 1986* is New Zealand's main formal statement of constitutional arrangements<sup>42</sup> and can be

amended via ordinary legislative procedures.<sup>43</sup> In contrast to Australia,<sup>44</sup> New Zealand's constitutional arrangements are not especially entrenched through manner and form requirements to make them more difficult to amend.<sup>45</sup> There is no hierarchy under which constitutional laws are given special status, and no 'supreme law' under which ordinary legislation can be struck down by the courts.<sup>46</sup>

This flexible constitutional structure has, in the view of many New Zealanders, enabled positive 'adaption to changing circumstances,' allowing 'the values of government' to 'stay in line with changing social values',<sup>47</sup> through political processes rather than the courts. According to Professor James Allan, this makes New Zealand a particularly democratic nation.<sup>48</sup> Because parliamentary power is not curtailed by an entrenched Constitution, a strong form of parliamentary sovereignty prevails,<sup>49</sup> in contrast to Australia's parliamentary supremacy where Parliament's power is limited by an entrenched Constitution as interpreted by the courts.<sup>50</sup>

The Treaty of Waitangi and the New Zealand *Bill of Rights Act 1990* are also important parts of New Zealand's constitutional framework. They are considered 'foundational documents' which have established important constitutional principles, including the principle 'that the Government must govern according to the law.'<sup>51</sup> Despite this, the unentrenched status of these documents means that the principles within them can never trump parliamentary will.<sup>52</sup> The New Zealand Parliament 'can make laws about anything if a majority of MPs support the proposal.'<sup>53</sup>

New Zealand's comparatively flexible constitutional arrangements must be taken into account when applying Maori recognition insights to Australia's much more difficult to amend Constitution. Nonetheless, it must be remembered that Australia need not implement all its Indigenous recognition measures in the Constitution. Some reforms might properly be implemented through legislation. That would mean that the referendum requirement can be avoided, but it would also mean that the legislation is vulnerable to amendment or repeal.

If Indigenous recognition in Australia can be a package of constitutional and legislative reforms, part of the challenge will be in ascertaining which reforms are best effected in legislation and which reforms need the entrenched status of a constitutional guarantee.

## C The Treaty of Waitangi in New Zealand

The signing of the Treaty of Waitangi, on one view, was a moment of historical accord which laid the groundwork for 'harmonious race relations' between Maori and Pakeha people.<sup>54</sup> The Treaty has been described as 'the promise of two peoples to take the best possible care of each other.'<sup>55</sup> Despite this aspiration, New Zealand's history 'since the signing of the Treaty has been marked by repeated failures to honour these founding promises.'<sup>56</sup>

While the Treaty's promises were often abandoned by the much more powerful Crown, the Treaty nonetheless established a special relationship between Maori and the Crown. This in itself was important. The Treaty's 'text reflects an understanding of the fundamental elements of the relationship and about how *iwi* and *hapū* would work with the Crown in developing the country's future.'<sup>57</sup> It was an acknowledgement of shared founding authority and agreement to work towards a partnered future. This understanding proved key to the development of institutional structures recognising this special relationship.

The Treaty itself, however, can be described as legally mostly ineffective, as laws can be passed which contravene the Treaty.<sup>58</sup> It is only enforceable where expressly incorporated into legislation.<sup>59</sup> Most would agree, however, that the Treaty has become socio-politically and morally effective. Over time as politics and mindsets have changed, the Treaty has helped shift national attitudes towards a greater respect towards Maori rights, and Maori are seen politically as something more akin to equal Treaty partners.<sup>60</sup>

The Treaty's preamble acknowledges the British monarchy, the native prior occupants and immigrants, and is said to establish a bicultural foundation for New Zealand.<sup>61</sup> The preamble establishes the Treaty's purpose as protecting Maori rights and property, recognising British sovereign authority and establishing law and order and conditions for justice, for both the native population and the Crown's subjects.

Article One declares that the native chiefs cede their sovereignty and authority absolutely and without reservation to the British Crown (although this is disputed, as the Maori text of the Treaty employs a concept that differs from the English concept of 'sovereignty').<sup>62</sup> Article Two guarantees the Indigenous tribes 'full exclusive and

undisturbed' possession of their properties as long as they wish to retain those properties; but says that the tribes yield to the Crown the exclusive and pre-emptive right of alienation at agreed prices.<sup>63</sup> Article Three says that 'in consideration therefore' the Crown grants the Maori 'royal protection' and imparts 'all the rights and privileges of British subjects'. It guarantees Maori equal citizenship and equality before the law, but may also establish a duty of protection whereby the Crown is supposed to act in the best interests of Maori people.<sup>64</sup>

The Treaty, however, did not prevent racial discrimination against Maori people.<sup>65</sup> Views that saw the Maori as an inferior race led courts in 1877 to declare the Treaty legally invalid.<sup>66</sup> The racially discriminatory attitudes of the era viewed the Maori as 'savages' and 'uncivilised barbarians', not possessing any sovereignty prior to colonisation. Accordingly, Maori were considered politically incapable of having entered into a valid Treaty with the Crown and were deemed incapable of retaining rights to land and property.<sup>67</sup>

On the foundation of this colony the aborigines [sic] were found without any kind of civil government, or any settled system of law... The Maori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community...

On the cession of territory by one civilised power to another, the rights of private property are invariably respected, and the old law of the country is administered, to such extent as may be necessary, by the courts of the new sovereign. ... But in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice.<sup>68</sup>

The discriminatory logic of *terra nullius* initially prevailed in New Zealand,<sup>69</sup> as it did in Australia, despite the Treaty. The Privy Council overturned the discriminatory reasoning in 1901,<sup>70</sup> but New Zealand courts publically ignored its decision and continued to disregard the Treaty.<sup>71</sup> In 1941 the Privy Council came into line with New Zealand courts and declared that the Treaty was not enforceable unless it was incorporated into legislation.<sup>72</sup>

New Zealand's history, like Australia's, includes violence, warfare and discrimination in the dispossession of Indigenous people,<sup>73</sup> despite the Treaty.

#### D Attempted Agreements in the Colonisation of Australia and the Importance of Negotiation and Agreement for Constitutional Recognition

By contrast, there was no national, bilateral treaty with Indigenous peoples in the colonisation of Australia.<sup>74</sup> John Batman's attempted treaty with the Indigenous peoples near Port Phillip in 1835<sup>75</sup> is seen by some as a sham and an attempt at fraud: a tricky exchange of trinkets and supplies for vast swathes of traditional Kulin land.<sup>76</sup> On another view it was a genuine bargain struck out of political and practical necessity on both sides.<sup>77</sup>

In any case, the treaty was soon declared invalid by the colonial authorities.<sup>78</sup> Henry Reynolds explains the reasoning of the colonial lawyers of the time. Because the colonisers had 'gained ultimate dominion in and sovereignty over the soil,' the Indigenous people only retained a 'right of occupancy' – not ownership. The colonisers asserted that they were sovereign, so allowing Indigenous people rights to sell the land directly to the settlers would have been inconsistent with the rights of the Crown to retain 'sovereignty and dominion' over the land.<sup>79</sup> The concept of the inalienability of native land thus emerged, not from colonial good will, but as 'a restraint on the natives' power of choice and control of their land for the purpose of reserving power and control of land for the new sovereign,'<sup>80</sup> thus allowing the Imperial government to control how land was alienated instead of allowing Indigenous people to strike bargains with the settlers for themselves.<sup>81</sup>

It cannot be said with certainty whether the Batman treaty was a genuine attempt at negotiating a deal or an attempt to dupe the Indigenous people. But it seems evident that the two parties had been trying to negotiate. The logic of *terra nullius* was ingenious in how it played out in this respect. By denying that the Indigenous people possessed any sovereignty or ownership of the land, the Crown denied them their right to negotiate with respect to their own colonisation.

A similar insight is applicable to the constitutional negotiations that preceded Australia's Federation. Indigenous peoples, under the logic of *terra nullius*, were not seen as sovereign entities nor as owners of the land. Thus, they were not included as legitimate negotiating parties to the constitutional compact. Where Maori prior sovereignty was initially recognised through the Treaty of Waitangi

(even if it was later denied) and the key promises of equal citizenship and respect for property were made (even if they were later ignored), the Indigenous peoples of Australia were not dealt with as sovereign entities in the founding of Australia, and the key guarantees with respect to equal treatment and property were not articulated. The pragmatic imperatives of settlement meant that the liberal democratic principles of equality before the law and respect for property rights were ignored in respect of the Indigenous people whom the English sought to colonise.<sup>82</sup>

How different might things have been had this not been the case – if Indigenous people had been allowed to negotiate and settle the terms to govern their future relationship with the newcomers.<sup>83</sup> Abbott is right that things indeed happened more fairly across the Tasman. The key promises of the Treaty of Waitangi were not always kept; but at least they were made. The principles were agreed and established, and this in itself was important. It meant that the Maori were able to hold the Crown accountable to these promises over time.

The exclusion of Indigenous peoples from power sharing and constitutional negotiations was not for lack of Indigenous people trying. Batman's attempted treaty was, if nothing else, an attempt at negotiation. Similarly, the historical accounts relayed in the *Mabo*<sup>84</sup> judgement show that Indigenous people did indeed try to exercise agency and political authority over their lands and to negotiate deals that might ensure their survival and ongoing ownership in the face of creeping dispossession. The *Mabo* judgement quotes Governor King's account of early negotiations with Aboriginal people in 1804:

They very ingenuously answered that they did not like to be driven from the few places that were left on the banks of the river, where alone they could procure food ... that if they could retain some places from the lower part of the river they should be satisfied and would not trouble the white men. The observation and request appear to be so just and equitable that I assured them no more settlements should be made lower down the river.<sup>85</sup>

The account again suggests that an informal deal was struck; a promise was made by the Governor.<sup>86</sup> Like many such Crown promises, however, it was soon abandoned in the face of practical pressures: 'in due course the Governor's assurance ... was dishonoured. While the wrongs involved

in the dispossession of the Aboriginals were acknowledged, the underlying problems were left unaddressed.<sup>87</sup>

The most fundamental of the pre-Federation promises were the unilateral ones in the form of the royal instructions given by the King to Captain Cook and Arthur Phillip when they made their journeys to colonise Australia. Captain James Cook on his exploration voyages carried secret instructions from the British King, authorising Cook to 'take possession of convenient situations in the country in the name of the King of Great Britain', but 'with the consent of the natives'.<sup>88</sup> On 22 August 1770, Cook declared possession of the east coast at Possession Island. He had noted that the land was inhabited, but no documented negotiation occurred and there was no agreement or consent.<sup>89</sup>

Seventeen years later, in 1787, King George III issued further royal Instructions to Arthur Philip as the fleet sailed to Botany Bay:

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.<sup>90</sup>

This good intention too went unfulfilled in the face of the political imperatives of the era.

Indigenous attempts at negotiation of course continued well after Federation. William Cooper's letter to King George V in 1937, asking for Indigenous representation in federal Parliament, was an attempt at negotiation.<sup>91</sup> The Yolngu bark petitions of 1963, the Barunga Statement of 1988, and the 2008 Yolngu petition calling for 'serious constitutional reform'<sup>92</sup> and greater Indigenous control of Indigenous affairs were attempts at negotiation. The attempted power-sharing negotiations have continued to this day, finding their expression in contemporary Indigenous advocacy for constitutional recognition and reform.

Constitutional recognition of Indigenous peoples is a way to belatedly make good those unfulfilled historical promises and complete the unreciprocated and unrealised attempts at constitutional negotiation. In arriving at a fair form of Indigenous recognition, the need for genuine negotiation between Indigenous peoples and the state cannot be ignored. Only genuine negotiation can lead to free agreement and a just settlement between Indigenous peoples and government,

which can then be implemented through constitutional and legislative measures.

#### **IV Movement towards Maori Practical Recognition**

The Treaty established important standing and rights for Maori and was crucial to the development of institutional structures to recognise and give Maori a voice in New Zealand's political system.<sup>93</sup> It came to be seen as the foundation for a positive re-calibration of the relationship between Maori people and the Crown;<sup>94</sup> it is now said to establish biculturalism,<sup>95</sup> a principle of partnership between Maori and the state, and a duty to negotiate reasonably and in good faith.<sup>96</sup> These principles have become ingrained.<sup>97</sup> The fiduciary principle has emerged as a duty to consult which, though not legally actionable, has developed moral and political force. Treaty principles are now incorporated into several pieces of legislation.<sup>98</sup>

Practical measures for Maori recognition have been implemented to ensure the Maori voice is heard through specific national institutional arrangements. These include the Maori Council, the settlement mechanisms of the Waitangi Tribunal which have helped propel practical forms of Maori cultural recognition, and reserved Maori parliamentary seats.

##### **A Maori Council**

The Maori Council structure arose out of Maori political advocacy in the 1800s, and derived its shape from the Kotahitanga (Maori King) movement and the Maori parliaments. The structure was not recognised by the Crown until 1962,<sup>99</sup> when the Maori Council's general functions and purpose were articulated in legislation.<sup>100</sup> The Maori Council's role includes considering and promoting Maori social and economic advancement, harmonious inter-ethnic relations, and collaborating with state departments and other organisations on Maori affairs initiatives such as employment, education, health and cultural revitalisation. The Maori Council is also charged with acting as a consultative and advisory body with local representatives on Maori matters, and is empowered to make representations to government regarding Maori affairs.<sup>101</sup>

The representative structure is spearheaded by nine elected Maori representatives, formed from a collective of Maori committees within each Maori district. Maori council districts,<sup>102</sup> are distinct from the Maori electorates which



operate for the purposes of the Maori roll in the election of Maori reserved parliamentary seats.<sup>103</sup> Committee areas within districts are the declared tribal committee areas under the *Maori Social and Economic Advancement Act 1945*.<sup>104</sup> Thus, the Maori Council provides an elected, representative structure to connect local Maori leaders with national advocacy.

The Maori Council has represented Maori in claims against the Crown<sup>105</sup> and has been an important vehicle for national Maori advocacy. It has helped give Maori a formal and recognised voice in their affairs and assisted in building and consolidating Maori co-operation and consensus between tribes: important elements for effective national advocacy. Some, however, argue that the Maori Council's time is passing and that its political authority has declined. The Minister for Maori Affairs, Dr Pita Sharples, criticised the Act for being outdated because it still contains arguably discriminatory elements, like empowering Maori wardens to evict Maori people from bars.<sup>106</sup>

Nonetheless, while its role and efficacy have changed over time, the Maori Council provided a practical structure for Maori recognition and representation. Given that Maori are better placed than anyone to take a leadership role, advise government and consult with Maori on the challenges related to Maori affairs, it is sensible that New Zealand has formally recognised a national structure to enable Maori people to exercise influence in their affairs. The Maori Council's recent decline also presents valuable lessons. If Australia is to adopt its own Indigenous representative and advocacy body, it would be important to ensure that its structure and functions evolve over time as necessary, while also ensuring that its political authority can be maintained in changing circumstances.

## **B The Waitangi Tribunal and Cultural Recognition**

Since 1975,<sup>107</sup> Maori have been recognised and given voice through the negotiation and settlement mechanisms of the Waitangi Tribunal, which hears and resolves historical breaches of the Treaty of Waitangi.<sup>108</sup> Through these processes, grievances can be aired, stories told and histories documented. Settlements involve financial and cultural redress and recognition, as well as official apology from the Crown for past breaches.<sup>109</sup> The Treaty settlement process establishes a truth and reconciliation process for New Zealand,<sup>110</sup> and provides an active and ongoing process for Maori recognition.

The Waikato-Tainui settlement, legislated in 1995,<sup>111</sup> ended decades of historical warfare and failed attempts at fair negotiation.<sup>112</sup> The settlement deed included compensation of land and cash valued at \$170 million.<sup>113</sup> Queen Elizabeth II signed the *Waikato Raupatu Claims Settlement Act 1995* incorporating it into New Zealand law and personally delivered the apology,<sup>114</sup> acknowledging past injustices and Treaty breaches.<sup>115</sup>

The *Te Reo Māori* claim argued that Maori language was a cultural 'treasure', a right protected under Article 2 of the Treaty.<sup>116</sup> The Tribunal made several recommendations for appropriate redress, which included recognising Maori as an official language of New Zealand. This and many other recommendations were subsequently taken up by the government.<sup>117</sup> Maori was recognised as an official language in legislation<sup>118</sup> and the fact that Maori language rights are protected under the Treaty is recognised in the preamble to the *Maori Language Act 1987* (NZ).<sup>119</sup> The Maori Language Commission was established<sup>120</sup> to promote New Zealand as a bicultural nation.<sup>121</sup>

The cultural component of the Waitangi Tribunal settlements has helped propel recognition of Maori culture and heritage in a tangible way. The New Zealand National Geographic Board<sup>122</sup> undertakes dual language place naming, with Maori place names sometimes flowing from Treaty settlements, then included in the relevant settlement legislation.<sup>123</sup> The process of dual naming 'recognises the equal and special significance of both the original Maori and non-Maori names'<sup>124</sup> and New Zealand itself now carries its Maori name: Aotearoa. Maori culture is increasingly seen as New Zealand's culture.

The settlements mechanism demonstrates that Maori recognition is a practical work in progress. Settlements allow recognition to incrementally continue and increase. The Crown has committed to reaching a final settlement with each Maori tribe, with each settlement intended to be a final settlement of all historical grievances, so that the Maori and the Crown can move forward together in a constructive partnership for the future.<sup>125</sup> This process, started in 1975, is now reaching its conclusion.<sup>126</sup>

The settlements processes, along with the other practical forms of Maori recognition, could be seen as measures which have 'supplemented the deficient legitimacy of the legal order ... that began in 1840' such that the 'Maori expectations based on the Treaty and also in some measure

on the historical record of dealings between coloniser and colonised, have been partly fulfilled.<sup>127</sup>

There is much Australia can learn from what has been achieved through New Zealand's Waitangi Tribunal negotiations and settlements.

### C Maori Reserved Seats in Parliament

Reserved Maori seats in Parliament are an important part of the practical recognition of Maori in New Zealand, and are an integral part of the political expectations that have arisen from Treaty principles.<sup>128</sup> New Zealand has had reserved Maori seats since 1867.<sup>129</sup> The reserved seats sit in the House of Representatives and are chosen through a Maori electoral roll not attached exclusively to particular Maori territory. Rather, every Maori person, wherever they reside, may choose whether to vote on the Maori roll, or the general roll.<sup>130</sup> The Maori electoral population,<sup>131</sup> as ascertained by the number of Maori people who have registered on the Maori roll, is divided into Maori electoral districts.<sup>132</sup> The Maori districts cover the entire country and territorially co-exist with the general roll.

One view is that the Maori seats were initially implemented as a tool for political control and minimisation of Maori power, as Maori in the 1860s were in the majority.<sup>133</sup> Lloyd explains:

At a time when Maori greatly outnumbered non-Maori, dedicated seats allowed the political power of Maori to be constrained, limiting their vote to the Maori electoral roll and the four Maori seats alone.<sup>134</sup>

Others argue that the reserved seats were implemented to address the problem that the Maori were disenfranchised because of the property rules that were a condition of voting rights. Only males over 21 with an individual property title were allowed to vote.<sup>135</sup> The Maori practiced communal ownership,<sup>136</sup> and though they could undertake processes to gain individual title, this was slow and many were mistrustful of aggressive Crown tactics to individualise Maori title as a way of eroding Maori governance and authority.<sup>137</sup> Accordingly, many Maori men who should otherwise have been allowed to vote were not democratically represented.<sup>138</sup>

The allocation of reserved seats was initially a temporary measure, purportedly to ensure that the Maori were

represented while governments undertook the process of giving Maori males individual property titles.<sup>139</sup> However the number of seats given was not proportionate to the number of Maori men in the population. Thus, the seats were probably 'discriminatory tokenism',<sup>140</sup> rather than a genuine attempt at proportional representation.<sup>141</sup> Some argue that the move involved 'no high intentions or moral principles',<sup>142</sup> but was a 'way of rewarding Maori loyalists and placating Maori rebels.'<sup>143</sup> Others say that there was some element of responding to international pressure, especially since the Crown was generating tax revenue from the Maori people.<sup>144</sup> Whatever the many reasons, the existence of the reserved seats was further extended.<sup>145</sup>

Universal suffrage in New Zealand was achieved in 1893, but was split into two race-based voting rolls. From 1893 to 1975, 'full-blood' Maoris had to be on the Maori voting roll, 'half-bloods' (or 'half-castes') could choose which roll to be on, and any person with less than half Maori lineage had to be on the European roll.<sup>146</sup> In 1975, Maori were given the choice of which roll they wanted to be on, and the European roll was renamed the 'general roll'.<sup>147</sup> The reserved Maori seats remained, perhaps out of 'indifference and neglect',<sup>148</sup> but also perhaps as an affirmative way to address historical wrongs through promoting a stronger Maori political voice.<sup>149</sup>

The modern measures have significantly increased Maori representation in Parliament and 'New Zealand achieved parity between the proportion of Maori in its population and the proportion of Maori representatives in parliament following the 2002 national elections.'<sup>150</sup> Similarly, there are now more Maori sitting in general seats.<sup>151</sup> As the Constitutional Advisory Panel explains, 'Maori MPs who are elected to general seats are responsible for representing all their constituents. MPs elected to the Maori seats ensure a distinctive Māori voice in the issues considered by Parliament.'<sup>152</sup>

The Maori reserved seats have come to be associated with Treaty of Waitangi principles:<sup>153</sup>

Maori seats have acquired, for Maori, a particular significance in relation to the Treaty of Waitangi. They have come to be seen as a means of recognition, and continued faith with the terms of, the Treaty... Dedicated seats symbolize 'a recognition of the position of the Maori people as a 'Treaty partner' in the enterprise of national government', and have thus become a 'treaty icon'.<sup>154</sup>

However, there have been criticisms of the reserved seats on the basis that they contravene equality before the law principles.<sup>155</sup> The 1993 Royal Commission on the Electoral System recommended the reserved seats be abolished,<sup>156</sup> though these recommendations were ignored.

Since 2002 the number of Maori MPs in Parliament has exceeded the proportional number of Maori in the population. Some have argued that this undermines fair proportional representation of all New Zealanders, and may therefore be a case of 'discriminatory privilege',<sup>157</sup> or reverse discrimination.<sup>158</sup> The Treaty argument too has been refuted, because while Maori people might view the reserved seats as a reflection of their constitutional position under the Treaty, the Treaty does not expressly establish reserved seats.<sup>159</sup> Joseph argues that 'the concepts of partnership and the Crown's duty of active protection define the Treaty relationship but neither concept mandates separate Maori representation.'<sup>160</sup> Indeed, Article Three confers upon the Maori the same rights and privileges as British subjects – equality before the law. Maori thus arguably have the right to participate equally in the electoral system, but not with greater preferences than other citizens.<sup>161</sup> The reserved seats could thus be seen as contrary to the right of equal citizenship,<sup>162</sup> because it institutionalises 'Maori separatism'.<sup>163</sup> The debate about reserved seats in New Zealand is paralleled in the Australian debate about the compatibility of Indigenous recognition with the principle of equality before the law in a liberal democracy.<sup>164</sup>

The principle of equality before the law, however, is not cut and dry. Liberalism allows for positive measures to ensure equality of opportunities and fair and equal participation given the historical and contemporary circumstances. For example, 'special measures' at international law, the positive expression of the racial non-discrimination principle, allow for affirmative measures to promote equal opportunities and address past discrimination, to ensure that all groups have equal enjoyment of their human rights, particularly given past denial of rights.<sup>165</sup> In New Zealand, positive measures like reserved seats can be justified not only as a manifestation of an original sovereignty-sharing agreement, but also (since there is dispute about the correct meaning and terms of this agreement) as a measure to equalise a historically imbalanced power relationship.

New Zealand has no entrenched Constitution, no entrenched bill of rights and the Treaty is not legally binding unless legislated, which is subject to political will. In this

environment of strong parliamentary sovereignty, reserved Maori seats can be understood as a political and procedural mechanism for protecting Maori rights, by allowing the meaning of Treaty principles to be more fairly contested within democratic processes in which Maori peoples are afforded a distinct voice – as recognition of their position as a legitimate constitutional constituency and Treaty partners within New Zealand's constitutional framework.

If New Zealand had an entrenched Constitution which protected Maori rights through rights clauses, it would be up to the judiciary to interpret the clauses and strike down breaching laws. With reserved Maori seats, however, Maori MPs have a platform to effectively influence Parliament's laws at their inception and to pro-actively negotiate the accommodation of Maori rights on an ongoing basis. Reserved Maori seats may thus be a more democratic and pre-emptive solution to the problem of breached Maori rights than any legal entrenchment of the Treaty or a constitutionalised bill of rights. It is a form of recognition that involves Maori as active partners and participants in the governance of the nation, rather than as occasional litigants. It must be noted, however, that reserved Maori seats have been in place since 1867, and this did not prevent discrimination against Maori and breaches of Maori rights under the Treaty. However over time, and with proportional representation, the Maori voice in Parliament has become stronger.

Australia too must think through how best to protect Indigenous rights and interests in our own constitutional arrangements. Which kind of guarantee is politically achievable and best for Australia: a judicially adjudicated racial non-discrimination guarantee, or a political and procedural guarantee that Indigenous voices will be heard and represented in the political process?

## **V Lessons for Australia**

### **A Judicially Interpreted Constitutional Rights Clauses are not the Only Solution**

Australia's parliamentary supremacy is limited by our Constitution, but the Constitution contains no bill of rights and has been largely ineffective in protecting the rights of Australia's most disadvantaged minority – Indigenous people. It is not just the lack of rights clauses that is a problem. There is also no representation of Indigenous peoples as a polity within our check-and-balance federalism.

If Australia's Constitution mostly protects citizens' rights through democratic procedures and federal power sharing, then Indigenous people have decisively missed out on that political and procedural protection.

It is true that Indigenous people can (now at least) vote like all other citizens. But being only three per cent of the population, Indigenous people hardly get an influential say in Parliament, even on matters directly concerning them. Arguably, past racial discrimination has occurred because Parliaments have never been good at listening to minority Indigenous views. This is why Indigenous advocates have for decades sought constitutional reform and recognition: because constitutional guarantees are a way of tempering majoritarian rule.<sup>166</sup> Constitutional recognition could implement a stable and enduring constitutional guarantee that the discrimination of the past will not be repeated, and that the Indigenous relationship with the state will be fairer than it has been historically.

The solution proposed by the Expert Panel and the Joint Select Committee was that a racial non-discrimination clause be adopted in the Constitution.<sup>167</sup> However, this proposal has been criticised on the grounds that it would undermine parliamentary supremacy and give too much power to the judiciary.<sup>168</sup> Given that bipartisan support is crucial for referendum success,<sup>169</sup> these objections must be contended with. If a racial non-discrimination clause is not the answer to the challenge of protecting Indigenous rights and interests within Australia's constitutional system, then what is a better solution?<sup>170</sup> How can we maintain parliamentary supremacy, while ensuring that Indigenous rights and interests are fairly protected?

It may be that, like New Zealand, we should turn our minds to more democratic, institutional and procedural solutions. Could that mean a set of reserved Indigenous seats? In my view that is a doubtful political possibility. Might, then, it be an Indigenous Australian version of the Maori Council, perhaps with constitutional status?

Indigenous advocates for decades have argued for Indigenous representation and a voice within federal parliamentary procedures.<sup>171</sup> The best, and most politically achievable, way to implement a guaranteed Indigenous voice in Indigenous affairs may be through a constitutionally mandated Indigenous representative body.<sup>172</sup> If drafted to be a non-justiciable, political and procedural amendment,

as suggested by Professor Anne Twomey,<sup>173</sup> this option could give effect to Indigenous aspirations for a guaranteed voice and representation in their affairs, while respecting parliamentary supremacy and avoiding the possibility of laws being struck down.<sup>174</sup>

Learning from the Maori Council experience, legislative flexibility can be maintained in the design, composition and details of the body. Parliament could retain the flexibility to evolve and update the institution as necessary. But if a successful referendum to implement this kind of constitutional amendment were achieved, the constitutional imperative for the Indigenous voice in Indigenous affairs – and the political authority derived from the endorsement of the Australian people through a successful referendum – would always remain.<sup>175</sup>

## **B Set in Place High-Level Principles for a Fairer Future Relationship**

The Treaty of Waitangi has come to carry moral and political power, even though it is, of itself, legally unenforceable.<sup>176</sup> In that sense, it could be viewed as a symbolic statement of agreed principles that over time has come into practical fruition. Though a non-legal document, the Treaty is now considered New Zealand's founding constitutional document<sup>177</sup> and is considered 'quasi-constitutional'. The Treaty has been integral in allowing Maori to hold the Crown accountable to its promises over time.

Could Australia put in place similarly agreed principles, arising out of Indigenous-state negotiations, that should govern a fairer future relationship between Indigenous peoples and the state? If all the relevant principles cannot be constitutionally entrenched, perhaps they could be effected in legislation as well? Could an Australian *Statute of Reconciliation* over the years come to carry similar political and moral authority as the Treaty of Waitangi in New Zealand? Could its principles similarly come into practical fruition?

Freeman and Leeser propose an extra-constitutional Declaration to effect Indigenous recognition: a 'historical and aspirational statement of no more than 300 words,' subject to a popular vote to ensure political legitimacy,<sup>178</sup> as part of a potential package of reforms effecting Indigenous recognition. Perhaps this idea can be combined with and strengthened through inclusion of the Declaration in a

Statute enacted with the concurrence of all the states, as Professor Greg Craven suggests.<sup>179</sup>

Potentially, a *Reconciliation Statute* could contain an introductory Declaration of Indigenous history and heritage and an articulation of shared national values and future aspirations. The body of the Statute could contain important agreed principles relevant to Indigenous affairs and reconciliation, to set out a better working relationship between Indigenous peoples and government. It could establish a formal framework for, as Reilley describes, 'ethical engagement with and accommodation of Indigenous peoples.'<sup>180</sup> H.C. Coombs similarly suggested an 'Act of Self-Determination' to articulate 'agreed divisions of responsibility and powers between Aboriginal Australians and the Commonwealth.'<sup>181</sup> All these proposals suggest articulation of high-level principles to govern effective power-sharing between parties, which could supplement and enhance those rules which should be provided by the Constitution (for example rules proposed by Pearson, Twomey and others requiring Parliament to consult with and consider the advice of an Indigenous body when making laws and policies for Indigenous affairs).<sup>182</sup>

Thus, if constitutional entrenchment of all the desired principles and values is politically unachievable, perhaps such principles can be established in a *Reconciliation Statute* to sit alongside the constitutional changes. The principles articulated could be agreed upon by Indigenous peoples and Commonwealth and state governments, to promote better and fairer relations between Indigenous peoples and governments federally, and could include those ideas which the Expert Panel sought to have entrenched in the Constitution. For example, the Statute could include the importance of racial non-discrimination, equality before the law, equal citizenship and equal opportunities; the importance of Indigenous cultures, languages and heritage; and the importance of Indigenous relationships to land. The Statute could also articulate key principles of the UN Declaration on the Rights of Indigenous Peoples, particularly principles to do with Indigenous self-determination and the importance of genuine Indigenous consultation and participation in government decisions that affect Indigenous interests.<sup>183</sup>

The appropriate constitutional guarantee could thus be supplemented and enhanced by the legislated principles of a *Reconciliation Statute*. Not being in the Constitution,

these principles could be articulated in a richer way in a *Reconciliation Statute* without the anxiety associated with constitutional interpretation.

### C Pursue Just Agreement-Making and Settlements

Australia already has settlement mechanisms between Indigenous peoples and government under the Native Title Tribunal structure<sup>184</sup> and under state land rights regimes. Sometimes effective settlements can be reached. The recent \$1.3 billion Noongar settlement in Western Australia, to be paid in annual instalments of \$50 million over 12 years into a Noongar Future Fund,<sup>185</sup> is comparable to a Treaty settlement.<sup>186</sup> The deal included the Crown handing over 320,000 hectares of land to the Noongar.<sup>187</sup>

Noel Pearson argues that native title and land rights regimes, along with other initiatives for reform and recognition in Indigenous affairs, may have the potential to together 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.' Pearson argues that the streams of innovation currently being pursued in Indigenous affairs<sup>188</sup> could lead into what could one day be understood as regional First Nations treaties.<sup>189</sup> Warren Mundine similarly contends that 'a formal agreement or declaration between Australia and its first peoples' is needed 'between Australia and each Aboriginal and Torres Strait Islander tribal group, nation to nation' and that drawn-out Native Title cases should be fairly settled.<sup>190</sup> He states:

In the next term of Federal parliament, Australians will be asked to pass a referendum that formally recognises Indigenous people in the Australian Constitution. Wouldn't it be fitting if we also implement a system of governance that recognises the Indigenous nations and gives members of those nations the ability to govern matters concerning their traditional lands, assets, culture, language and heritage.<sup>191</sup>

Both Mundine<sup>192</sup> and Pearson,<sup>193</sup> as well as countless Indigenous advocates historically, call for governance structures to encourage Indigenous self-determination and leadership in their affairs. It may be that the Australian government could work towards a settlement process with each Indigenous group, similar to that undertaken in New Zealand,<sup>194</sup> as part of the package of reforms.<sup>195</sup> The settlements that occur in Australia through the native title

regime could be expanded to include cultural redress, an accounting of history and formal apologies, in addition to land and financial compensation. If this process were pursued wholeheartedly, it could significantly affect our sense of national self-esteem in Indigenous affairs. It could also help propel practical recognition of Indigenous languages and heritage, as has occurred in New Zealand.

#### **D Cultural Recognition Should be Part of the Package**

Like New Zealand, Australia could implement simple legislative reforms to recognise Indigenous cultures and languages. If constitutional entrenchment of a clause recognising Indigenous languages as recommended by the Expert Panel is unachievable, perhaps this recognition can happen in legislation as some have suggested.

Australia could have an *Australian Languages Recognition Act*, mapping the Indigenous Australian language groups and recognising them as official Australian languages. Dual place naming mechanisms could be set up under the Act, connecting with any settlement mechanisms, as happens in New Zealand. An Australian Languages Commission could be established to document, promote, teach and revitalise Indigenous Australian Languages.

New Zealand has succeeded in making Maori heritage a celebrated part of New Zealand's national identity. Australia can do the same through practical cultural recognition measures effected through legislation and policy. This should be part of the Indigenous recognition package.

#### **VI Conclusion**

The broad lesson from New Zealand is that Indigenous recognition is a practical, not just a symbolic, reform challenge. The New Zealand comparison encourages us to think practically and creatively in our search for the appropriate, politically viable solutions for fair forms of Indigenous constitutional recognition. Recognition can and should mean much more than a new, symbolic preamble to the Constitution. It should address the working, operational relationship between Indigenous peoples and the state, through constitutional and legislative reforms that should arise out of genuine negotiations between Indigenous peoples and the state.

The New Zealand example also demonstrates that judicially adjudicated constitutional rights clauses are not the only way to protect Indigenous rights and interests. Indigenous rights protection can also occur through procedural and political mechanisms. If lack of political consensus and attachment to parliamentary supremacy prevents the implementation of an entrenched protection against racial discrimination to protect Indigenous minority interests in Australia, perhaps the reforms for Indigenous constitutional recognition could include an Indigenous representative body, constitutionally authorised to engage with the state on Indigenous matters.<sup>196</sup>

Indigenous recognition could thus entail a constitutional guarantee for Indigenous peoples to exercise a political voice in their affairs. It could mean the legislative articulation of high-level principles to extrapolate the agreed terms for a fairer future relationship between Indigenous peoples and the state. It could mean the implementation of ongoing negotiation and agreement mechanisms between Indigenous peoples and the state, to redress past wrongs and agree upon new, fairer terms on which to engage in the future. It could mean legislative recognition of Indigenous languages and heritage, so that Indigenous Australian heritage is promoted as the heritage of the nation. Indigenous recognition in Australia could be a package of constitutional and legislative reforms containing all these kinds of measures.

Things indeed happened much better for the Indigenous peoples across the Tasman. But there is no reason Australia cannot do equal or better than New Zealand has done in effecting just measures for Indigenous recognition, to ensure Indigenous peoples take a fair place in our contemporary nation. If we adopt the right set of reforms, non-Indigenous Australians need lose nothing. But Indigenous peoples, and Australia as a nation, could gain a lot.

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1 This paper further develops research explored in a Cape York Institute report called 'What Can We Learn from New Zealand for Constitutional Recognition of Indigenous Peoples in Australia?',

- which was submitted to the Joint Select Committee on Constitutional Recognition of Indigenous Peoples: see Cape York Institute, Submission No 38.2 (Supplementary to Submission) to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (Joint Select Committee), Parliament of Australia, August 2014. The discussion presented in this paper does not represent Cape York Institute policy.
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  - 3 Ibid 82–91, 157; Patricia Karvelas, 'Most People Want Racial Discrimination Removed from the Constitution', *The Australian* (online), 11 November 2011 <<http://www.theaustralian.com.au/national-affairs/indigenous/most-people-want-race-discrimination-removed-from-constitution/story-fn9hm1pm-1226191898365>>.
  - 4 For a full analysis of these objections, see Shireen Morris, 'Undemocratic, Uncertain and Politically Unviable? An Analysis of and Response to Objections to a Proposed Racial Non-Discrimination Clause as Part of Constitutional Reforms for Indigenous Recognition' (2014) 40 *Monash University Law Review* 488.
  - 5 Joint Select Committee, Parliament of Australia, *Final Report* (2015) Recommendation 5.
  - 6 See Victoria Laurie and Natasha Robinson, 'Time To Get a Move On with Constitutional Recognition: Ken Wyatt', *The Australian* (online), 10 July 2015 <<http://www.theaustralian.com.au/national-affairs/indigenous/time-to-get-a-move-on-with-recognition-ken-wyatt/story-fn9hm1pm-1227435934291?sv=2b850b1c0046794061a432510ccddb3>>.
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  - 8 See for example, Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution' (2014) 25 *Public Law Review* 83; Anne Twomey, 'A Revised Proposal for Indigenous Constitutional Recognition' (2014) 36 *Sydney Law Review* 381.
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  - 10 Damien Freeman and Julian Leeser, *The Australian Declaration of Recognition: Capturing the Nation's Aspirations by Recognising Indigenous Australians* (2014) <<http://damienfreeman.com/wp-content/uploads/2014/11/DTF-14.pdf>>; Greg Craven, 'Throw Off the Right Number of Sandbags and Indigenous Recognition Might Float', *The Australian* (online), 23 August 2014 <<http://www.theaustralian.com.au/opinion/columnists/throw-off-the-right-number-of-sandbags-and-indigenous-recognition-might-fly/story-fnhuln9g-1227033725769>>; Greg Craven, 'We Need to Work Out How Indigenous Voices Can Be Heard', *The Australian* (online), 13 September 2014 <<http://www.theaustralian.com.au/opinion/columnists/we-need-to-work-out-how-indigenous-voices-can-be-heard/story-fnhuln9g-1227057093551>>; see also Megan Davis, 'Political Timetables Trump Workable Timetables: Indigenous Constitutional Recognition and the Temptation of Symbolism over Substance' (2014) 8(15) *Indigenous Law Bulletin* 6, 8-9.
  - 11 Chris Mitchell, 'Towards a National Settlement', *The Australian* (online), 17 September 2014 <<http://www.theaustralian.com.au/opinion/editorials/towards-a-national-settlement/story-e6frg71x-1227060703461>>; Rosie Lewis, 'Reserve Seats for Aboriginal MPs, says PUP Senator Jacqui Lambie,' *The Australian* (online), 14 September 2014 <<http://www.theaustralian.com.au/national-affairs/indigenous/reserve-seats-for-aboriginal-mps-says-pup-senator-jacqui-lambie/story-fn9hm1pm-1227057107740>>; Misha Schubert, 'Indigenous Want Seats Reserved,' *The Age* (online), 31 July 2011 <<http://www.smh.com.au/national/indigenous-want-seats-reserved-20110730-1i5i0.html>>.
  - 12 Michael Gordon, 'Paul Keating Pushes "Unfinished Business" of Indigenous Treaty and Republic', *Sydney Morning Herald* (online), 16 October 2015 <<http://www.smh.com.au/federal-politics/political-news/paul-keating-pushes-unfinished-business-of-indigenous-treaty-and-republic-20151015-gkaidx.html>>. His call follows decades of such calls from Indigenous people.
  - 13 Frank Brennan, *No Small Change: The Road to Recognition for Indigenous Australia* (University of Queensland Press, 2015); see also Tony Abbott's comments in Michael Gordon, 'Indigenous Recognition: Tony Abbott Says Pushing for Big Changes to Constitution Will Fail', *Sydney Morning Herald* (online), 28 August 2015 <<http://www.smh.com.au/federal-politics/political-news/indigenous-recognition-tony-abbott-says-pushing-for-big-changes-to-constitution-will-fail-20150828-gj9xpc.html>>.
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- 20 Pearson, above n 9, 40-43.
- 21 Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, 2001) 5.
- 22 Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014) 151. For other discussions sceptical of recognition see Frantz Fanon, *Black Skin, White Masks* (Pluto Press, 1986); Elizabeth Povinelli, 'The Cunning of Recognition' (1998) 11 *Australian Feminist Law Journal* 3.
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- 24 Hawkes notes that 'federalism can accommodate multiple identities and loyalties within a state, as well as different "levels" of government, some with shared sovereignty. In Australia, for example, both the Commonwealth and state governments are sovereign within their respective spheres of jurisdiction': David C. Hawkes, *Indigenous Peoples: Self-Government and Intergovernmental Relations* (UNESCO, 2001) 154.
- 25 For example, 'the idea of treaties with indigenous peoples as federative instruments is one that may hold promise for accommodating the self-determination of indigenous peoples within federal states': *ibid* 156.
- 26 Suri Ratnapala, 'Bills of Rights in Functioning Parliamentary Democracies: Kantian, Consequentialist and Institutional Scepticisms' (2010) 34 *Melbourne University Law Review* 592, 609.
- 27 Gerald N Rosenberg, 'Constitutional Cants' in Charles Stampford & Tom Round (eds), *Beyond the Republic* (Federation Press, 2001) 227.
- 28 It is interesting to note that, as Kingsbury explains, when the New Zealand bill of rights was being formulated, 'many Maori were unwilling to have the Treaty placed in a formal hierarchy of written law in a way that might compromise its mana, or special authority': Kingsbury, above n 18, 103.
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- 31 See also Chiara Lawry, 'Beyond the Apology: Achieving Full and Effective Reparations For the Stolen Generations' (2010) 18(2) *Australian Indigenous Law Review* 83.
- 32 Noel Pearson, 'Indigenous People Need a Lot More Than Just Symbolism', *The Australian* (online), 4 July 2015 <<http://www.theaustralian.com.au/opinion/columnists/indigenous-people-need-a-lot-more-than-just-symbolism/story-e6frg786-1227427588706>>.
- 33 Jeffrey Goldsworthy, 'Constitutional Cultures, Democracy, and Unwritten Principles' [2012] *University of Illinois Law Review* 683, 687-8.
- 34 Jack Balkin distinguishes four types of textual devices that are employed within Constitutions: rules, standards, principles and silences: see Jack Balkin, *Living Originalism* (Harvard University Press, 2011). See also Brendan Lim, 'Review Essay: An Australian Reads 'Living Originalism'' (2012) 34 *Sydney Law Review* 809, 812.
- 35 There is an extensive history of Indigenous advocacy for practical, rather than just symbolic, constitutional reform to protect Indigenous rights and interests. See for example: the Yolngu petition in 2008, see Galarrwuy Yunupingu, 'Truth, Tradition and Tomorrow' (December 2008) *The Monthly*; Council for Aboriginal Reconciliation, 'Going Forward: Social Justice for the First Australians: a Submission to the Commonwealth Government' (1995) 35-38; Galarrwuy Yunupingu, 'We Know These Things to be True' (Vincent Lingiari Memorial Lecture, 20 August 1998); Patrick Dodson, 'Until the chains are broken' (Vincent Lingiari Memorial Lecture, 8 September 1999); Noel Pearson, 'Next Step For the Nation is To Leave Race Behind', *The Australian* (online), 25 May 2013 <<http://www.theaustralian.com.au/national-affairs/in-depth/next-step-is-for-australia-to-leave-race-behind/story-fnihym2m-1226650078153>>.
- 36 There is a good history of the advocacy in Alexander Reilley, 'Dedicated Seats in the Federal Parliament for Indigenous



- Australians' (2001) 2(1) *Balayi: Law, Culture and Colonialism* 73, 82–3.
- 37 As Yolngu leader Galarrwuy Yunupingu explained 'If our Indigenous rights were recognised in the Constitution, it would not be so easy for Governments to change the laws all the time, and wipe out our rights...': Galarrwuy Yunupingu, 'We Know These Things to be True', above n 35.
- 38 Pearson, 'Indigenous People Need a Lot More Than Just Symbolism', above n 2.
- 39 See Natasha Robinson, 'Indigenous Recognition "Must Be Real": Aboriginal Leaders', *The Australian* (online), 6 July 2015 <<http://www.theaustralian.com.au/national-affairs/indigenous/indigenous-recognition-must-be-real-aboriginal-leaders/story-fn9hm1pm-1227429783554?sv=d9283de8284e7ba8503d9734e1a25703>>.
- 40 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2013, 1123 (Tony Abbott).
- 41 '...its purpose was to establish a relationship between two peoples in one nation': Constitutional Advisory Panel, 'New Zealand's Constitution: A Report on a Conversation' (November 2013) 35.
- 42 Ibid 23; The Rt Hon Sir Kenneth Keith, *On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government*, (2008) Cabinet Manual 2008 <<http://www.cabinetmanual.cabinetoffice.govt.nz/>>.
- 43 See Noel Cox, *Technology and Legal Systems* (Ashgate, 2006) 4. One exception is s 17 of the *Constitution Act 1986 (NZ)*. The Electoral Act 1993 (NZ) also contains some semi-entrenched provisions: see Anthony Angelo, *Constitutional Law in New Zealand* (Walters Kluwer, 2011) 17–8.
- 44 In Australia, amending the Constitution requires a majority of voters in a majority of states, under s 128.
- 45 Interestingly, however, in New Zealand a referendum can be requested a successful petition under the *Citizens Initiated Referenda Act 1993 (NZ)* or on government initiative. These referenda can be either binding, which means government must act on the result, or indicative (non-binding). In New Zealand, referenda have been put in relation to compulsory military training, parliamentary terms, and electoral reform: see Electoral Commission, *Referenda*, (20 October 2014) <<http://www.elections.org.nz/voting-system/referenda>>.
- 46 Nick Mereu, 'A Written Constitution for New Zealand?' (2009) 2 *New Zealand Law Students Journal* 217, 219.
- 47 Constitutional Advisory Panel, above n 41, 24. For example, as will be explained below, New Zealand's electoral arrangements changed in 1993 with the introduction of proportional representation.
- 48 It is an arrangement which, in Allan's view, may be preferable to Australia's more static and 'locked in' constitutional architecture: James Allan, 'A Public Conversation on Constitutionalism and the Judiciary Between Professor James Allan and the Honourable Michael Kirby AC CMG' (2009) 33 *Melbourne University Law Review* 1032, 1038.
- 49 For more on the principles of parliamentary sovereignty, see Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010).
- 50 See Julie Taylor, 'Human Rights Protection in Australia and Parliamentary Supremacy' (2004) 32 *Federal Law Review* 57, 58–60.
- 51 Constitutional Advisory Panel, above n 41, 23.
- 52 Ibid 30.
- 53 Ibid 25.
- 54 David V. Williams, 'Te Tiriti o Waitangi: Unique Relationship Between Crown and Tangata Whenua?' in I.H.J. Kawharu (ed) *Waitangi: Maori and Pakeha perspectives of the Treaty of Waitangi* (Oxford University Press, 1989) 64.
- 55 Bishop Manu Bennett, cited in Human Rights Commission, 'Human Rights and the Treaty of Waitangi: te mana i Waitangi' (2003).
- 56 New Zealand Human Rights Commission, 'Human Rights in New Zealand' (2010) 39.
- 57 Constitutional Advisory Panel, above n 41, 29.
- 58 Ibid 13.
- 59 *Hoani Te Heuheu Tukino v. Aotea Dist. Maori Land Bd.* [1941] A.C. 308 (P.C.).
- 60 Constitutional Advisory Panel, above n 41, 32.
- 61 Chief Judge E.T. Durie, 'Justice, Biculturalism and the Politics of Law' in *Justice and Identity: Antipodean Practices* (Allen & Unwin, 1995) 33; New Zealand Human Rights Commission, above n 56.
- 62 Constitutional Advisory Panel, above n 41, 29.
- 63 Article Two has also been interpreted to give Maori the right to live as Maori, or the right to self-determination, see New Zealand Human Rights Commission, above n 56, 39.
- 64 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 705.
- 65 Carwyn Jones, 'Strengthening Partnership between States and Indigenous Peoples: Treaties, Agreements and Other Constructive Arrangements' (Office of the United Nations High Commissioner for Human Rights, Geneva, 16–17 July 2012) 2.
- 66 *Wi Parata v Bishop of Wellington* (1877) 3 NZJur (NS) 72 (SC), 78.
- 67 Jacinta Ruru, 'Finding Support For a Changed Property Discourse in Aotearoa New Zealand in the United Declaration of the Rights of Indigenous Peoples' (2011) 15 *Lewis & Clark Law Review* 951, 964.
- 68 *Wi Parata v Bishop of Wellington* (1877) 3 NZJur (NS) 72 (SC), 77, 78.

- 69 Noel Cox, 'The Treaty of Waitangi and the Relationship Between the Crown and the Maori in New Zealand' (2003) 28 *Brooklyn Journal of International Law* 123, 140.
- 70 *Nireaha Tamaki v. Baker* [1901] A.C. 561 (P.C.) 577.
- 71 Ruru, above n 67, 965.
- 72 *Hoani Te Heuheu Tukino v. Aotea Dist. Maori Land Bd.* [1941] A.C. 308 (P.C.). This principle is followed today.
- 73 Ruru, above n 67, 960-962.
- 74 This may have been due to the greater linguistic and cultural diversity of the Indigenous Australian tribes as compared to the Maori, which might have made the negotiation of a single, national treaty more practically difficult.
- 75 James Boyce, *1835: The Founding of Melbourne & the Conquest of Australia* (2008, Black Inc); see also Malcolm Turnbull, 'Beneath the Boulevards: book review of James Boyce, *1835: The Founding of Melbourne & the Conquest of Australia*' (July 2011) *The Monthly*.
- 76 J Morgan, *The Life and Adventures of William Buckley* (Archibald MacDougall, Hobart, 1852).
- 77 Boyce, above n 75; Turnbull above n 75.
- 78 'Whereas, it has been represented to me, that divers of His Majesty's Subjects have taken possession of vacant Lands of the Crown, within the limits of this Colony, under the pretence of a treaty, bargain, or contract, for the purchase thereof, with the Aboriginal Natives; Now therefore, I, the Governor, in virtue and in exercise of the power and authority in me vested, do hereby proclaim and notify to all His Majesty's Subjects, and others whom it may concern, that every such treaty, bargain, and contract with the Aboriginal Natives, as aforesaid, for the possession, title, or claim to any Lands lying and being within the limits of the Government of the Colony of New South Wales... is void and of no effect against the rights of the Crown; and that all Persons who shall be found in possession of any such Lands as aforesaid, without the license or authority of His Majesty's Government, for such purpose, first had and obtained, will be considered as trespassers, and liable to be dealt with in like manner as other intruders upon the vacant Lands of the Crown within the said Colony.': Governor Bourke's Proclamation, 1835 (UK): <[http://www.foundingdocs.gov.au/resources/transcripts/nsw7\\_doc\\_1835.pdf](http://www.foundingdocs.gov.au/resources/transcripts/nsw7_doc_1835.pdf)>.
- 79 Henry Reynolds, *The law of the land* (Penguin, 2003) 159.
- 80 Shireen Morris, 'Re-evaluating Mabo: the Case for Native Title Reform to Remove Discrimination and Promote Economic Opportunity', (2012) 5(3) *AIATSIS Native Title Research Unit: Issues Paper* 5.
- 81 This was also consistent with early jurisprudence from the US concerning Indian title: see *Johnson v. M'Intosh*, 8 Wheat. 543 (1823); *United States v. Paine Lumber Co.*, 206 U.S. 467 (1907). See also discussion of the confusion surrounding private purchases of Indian land in the US: see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) 221-35. In the USA, the Crown issued similar kinds of instructions to forbid bargains struck between settlers: see historical resources listed in Kent McNeil, 'Self-Government and the Inalienability of Aboriginal Title' (Osgoode Hall Law School, July 2001) <[http://fngovernance.org/ncfng\\_research/inalienability.pdf](http://fngovernance.org/ncfng_research/inalienability.pdf)>.
- 82 Pearson, 'Indigenous People Need a Lot More Than Just Symbolism', above n 32.
- 83 Ibid.
- 84 *Mabo v Queensland* (1992) 175 CLR 1.
- 85 Ibid 104-5.
- 86 This might be meaningful to the Indigenous representative trying to negotiate the deal, if not ultimately to the Crown representative making the promise.
- 87 *Mabo v Queensland* (1992) 175 CLR 1, 105.
- 88 Secret Instructions to Captain Cook, 30 June 1768: <[http://foundingdocs.gov.au/resources/transcripts/nsw1\\_doc\\_1768.pdf](http://foundingdocs.gov.au/resources/transcripts/nsw1_doc_1768.pdf)>.
- 89 Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth', above n 9, 40.
- 90 Governor Phillip's Instructions 25 April 1787 (UK): <[www.foundingdocs.gov.au/resources/transcripts/nsw2\\_doc\\_1787.rtf](http://www.foundingdocs.gov.au/resources/transcripts/nsw2_doc_1787.rtf)>.
- 91 See Reilley, 'Dedicated Seats in the Federal Parliament for Indigenous Australians', above n 36, 82.
- 92 See Galarrwuy Yunupingu, 'Truth, Tradition and Tomorrow', above n 3535.
- 93 For the Treaty's effect on contemporary social policy see M.H Durie, 'The Treaty of Waitangi Perspectives for Social Policy' in I.H. Kawharu (ed) *Waitangi: Maori and Pakeha perspectives of the Treaty of Waitangi* (Oxford University Press, 1989) 280.
- 94 Augie Fleras and Paul Spoonley, *Recalling Aotearoa: Indigenous politics and ethnic relations in New Zealand* (Oxford University Press, 1999) 115-127; see also New Zealand Human Rights Commission, above n 56, 131-147.
- 95 Fleras and Spoonley, above n 94, 115-127; see also New Zealand Human Rights Commission, above n 56, 39.
- 96 *New Zealand Māori Council v Attorney-General* [1987] NZLR 641; New Zealand Human Rights Commission, above n 56, 39. See also the United Nations Declaration on the Rights of Indigenous Peoples, which states in its preamble: 'Treaties are the basis for a strengthened partnership between Indigenous people and the state'.
- 97 Philip Joseph, 'The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress' (New Zealand Business Roundtable, May 2008).
- 98 See Mark Barnett and Kim Connolly-Stone, 'The Treaty of Waitangi

- and Social Policy' (December 1998) 11 *Social Policy Journal of New Zealand* <<http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj11/treaty-of-waitangi-and-social-policy.html>>.
- 99 Te Kaunihere Maori o Aotearoa: New Zealand Maori Council, *Our History* <<http://www.maoricouncil.com/2013/02/02/our-history/>>.
- 100 *Maori Community Development Act 1962* (NZ).
- 101 Ibid s 18.
- 102 Declared at any time by resolution of the New Zealand Maori Council: Ibid s 14.
- 103 There are currently 16 Maori Council Districts across New Zealand.
- 104 *Maori Community Development Act 1962* (NZ) s 8.
- 105 See for example *New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641* (the Lands case).
- 106 Adam Bennett, 'Fears for Future of Maori Council', *New Zealand Herald* (online), 27 September 2013 <[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11131143](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11131143)>.
- 107 *Treaty of Waitangi Act 1975* (NZ).
- 108 Jones, above n 65.
- 109 F.M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, 1999) 158; see also Fleras and Spoonley, above n 94, 132.
- 110 A similar truth and reconciliation process has been undertaken in Canada: see Kirsten Anker, 'Symptoms of Sovereignty? Apologies, Indigenous Rights and Reconciliation in Canada and Australia,' in Ruth Buchanan & Peter Zumbansen, *Law in Transition: Human Rights, Development and Transitional Justice* (Hart Publishing, 2014) 253-254; James 'Youngblood' Henderson, 'Constitutional Vision and Judicial Commitment: Aboriginal Treaty Rights in Canada' (2010) 14 *Australian Indigenous Law Review* 24.
- 111 *Waikato Raupatu Claims Settlement Act 1995* (NZ).
- 112 New Zealand History, *The Treaty in Practice: the Waikato-Tainui Claim* (7 July 2014) Ministry of Culture and Heritage <<http://www.nzhistory.net.nz/politics/treaty/the-treaty-in-practice/waikato-tainui>>.
- 113 Ibid.
- 114 Richard S. Hill, *Ngā Whakataunga Tiriti – Treaty of Waitangi Settlement Process - Different paths to Settlement* (13 July 2010) Te Ara - the Encyclopedia of New Zealand <<http://www.TeAra.govt.nz/en/video/33050/royal-apology-to-tainui-1995>>.
- 115 The apology included expression of 'profound regret ... for the loss of lives' and 'the devastation of property and social life', the wrongful confiscations of land and resources and the 'crippling impact on the welfare, economy and development of Waikato.' It acknowledged the 'sense of grief, the justice of which under the Treaty of Waitangi has remained unrecognised, has given rise to Waikato's two principles "i riro whenua atu, me hoki whenua mai" (as land was taken, land should be returned) and "ko to moni hei utu mo te hara" (the money is the acknowledgment by the Crown of their crime).' And it agreed 'to provide redress' by returning 'as much land as is possible that the Crown has in its possession to Waikato': *Waikato Raupatu Claims Settlement Act 1995* (NZ) s 6. The Maori version is recorded in s 5.
- 116 Article Two has also been interpreted to give Maori the right to live as Maori, or the right to self-determination, see New Zealand Human Rights Commission, above n 56, 39.
- 117 New Zealand Human Rights Commission, above n 56, 47-48; Jones, above n 65.
- 118 *Māori Language Act 1987* (NZ) s 3.
- 119 The Preamble states: 'Whereas in the Treaty of Waitangi the Crown confirmed and guaranteed to the Māori people, among other things, all their taonga: And whereas the Māori language is one such taonga.'
- 120 *Māori Language Act 1987* (NZ) s 6.
- 121 New Zealand Human Rights Commission, above n 56, 47-48; Jones, above n 65.
- 122 Set up under the *New Zealand Geographic Board (Ngā Pou Taunaha o Aotearoa) Act 2008*.
- 123 Land Information New Zealand: Toiti Te Whenua, *Treaty of Waitangi Settlement Names* <<http://www.linz.govt.nz/regulatory/place-names/propose-place-name/treaty-waitangi-claims-settlement-names>>.
- 124 Ibid.
- 125 Damien Freeman, 'Addressing Aboriginal Disadvantage — That's What I Call a Defining Moment', *The Australian* (online), 6 September 2014 <<http://www.theaustralian.com.au/opinion/addressing-aboriginal-disadvantage-thats-what-i-call-a-defining-moment/story-e6frg6zo-1227049493965>>.
- 126 Constitutional Advisory Panel, above n 41, 33.
- 127 Brookfield, above n 109, 158.
- 128 Constitutional Advisory Panel, above n 41, 39.
- 129 See Catherine Iorns Magallanes, 'Indigenous Political Representation: Identified Parliamentary Seats as a Form of Indigenous Self-Determination', in B.A. Hocking (ed), *Unfinished Constitutional Business?* (Aboriginal Studies Press, 2005) 106; Brian Lloyd, 'Dedicated Indigenous Representation in the Australian Parliament' (Research Paper No. 23, Australian Parliament, Parliamentary Library, Politics and Public Administrations Section, 2009).
- 130 *Electoral Act 1993* (NZ) s 76.
- 131 A Maori person for electoral purposes is today defined as a person of 'the Maori race of New Zealand' and the descendants of such a person: *Electoral Act 1993* (NZ) s 3(1).
- 132 *Electoral Act 1993* (NZ) s 45.
- 133 Iorns Magallanes, above n 129, 106-17.

- 134 Lloyd, above n 129.
- 135 Joseph, above n 97.
- 136 Sarah McClelland 'Maori Electoral Representation: Challenge to Orthodoxy' [1997] 17(3) *New Zealand Universities Law Review* 272, 275; New Zealand Parliamentary Library, 'The Origins of the Maori Seats' (Parliamentary Library Research Paper, May 2009) 3.
- 137 New Zealand Parliamentary Library, above n 136, 6.
- 138 Ibid 3; Andrew Geddis, 'A Dual Track Democracy? The Symbolic Role of the Maori Seats in New Zealand's Electoral System' (2006) 5(4) *Election Law Journal* 347, 352.
- 139 New Zealand Parliamentary Library, above n 136, 3.
- 140 Joseph, above n 97, 14.
- 141 Alan Ward, *A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand* (Auckland University Press, 1973) 209.
- 142 Tina Dahlberg, 'Maori Representation in Parliament and Tino Rangatiratanga' (1996) 2(1) *He Pukenga Korero* 62, 63.
- 143 New Zealand Parliamentary Library, above n 136, 8.
- 144 Claudia Orange, *The Treaty of Waitangi* (Allen & Unwin, 1987) 184; New Zealand Parliamentary Library, above n 136, 8.
- 145 Geddis, above n 138, 352.
- 146 Ibid 353.
- 147 Jeremy Sparrow, *The Truth About the Maori Seats* (Thesis submitted in partial fulfilment of LLB (Honours), University of Otago, 2010) 5.
- 148 Joseph, above n 97, 5.
- 149 Lloyd, above n 129.
- 150 Ibid.
- 151 BV Harris, 'The Treaty of Waitangi and the Constitutional Future of New Zealand' (2005) *New Zealand Law Review* 189, 199.
- 152 Constitutional Advisory Panel, above n 41, 39.
- 153 Geddis, above n 138, 358.
- 154 Lloyd, above n 129.
- 155 Constitutional Advisory Panel, above n 41, 39.
- 156 The Commission's reasons were as follows: Maori are a relatively large minority in New Zealand and would achieve proportional representation without reserved seats; Maori MPs being only accountable to Maori gives the impression that non-Maori MPs are only accountable to non-Maori, which is incorrect; all MPs should be accountable to Maori, not just specifically Maori MPs; A unified electoral roll would be better for social cohesion; It is a violation of the democratic principle of equality before the law: New Zealand Royal Commission on the Electoral System, *Towards a Better Democracy* (1986) 86. See also Joseph, above n 97, 16.
- 157 Joseph, above n 97, 14-15.
- 158 Sparrow, above n 147, 13; Joseph, above n 97, 11-12.
- 159 Joseph, above n 97, 17; New Zealand Royal Commission on the Electoral System, *Towards a Better Democracy* (1986) 86.
- 160 Joseph, above n 97, 17.
- 161 Ibid 18.
- 162 Ibid 17.
- 163 Ibid 21.
- 164 See, eg, citations referred to at above n 15.
- 165 *International Convention on the Elimination of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)* art 1(4).
- 166 Pearson, 'Indigenous People Need a Lot More Than Just Symbolism', above n 32.
- 167 Expert Panel, above n 2, xviii; Joint Select Committee, *Final Report*, above n 5, Recommendation 5.
- 168 Morris, 'Undemocratic, Uncertain and Politically Unviable?', above n 4.
- 169 Williams and Hume, above n 7, 244-246.
- 170 Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth', above n 9, 65.
- 171 There is a detailed history in Reilley, 'Dedicated Seats in the Federal Parliament for Indigenous Australians', above n 36.
- 172 Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' above n 9, 65-67; Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples', above n 9.
- 173 Twomey's draft constitutional amendment would provide, in a new Chapter 1A to the Constitution:
- 60A(1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [insert appropriate name, perhaps drawn from an Aboriginal or Torres Strait Islander language], which shall have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.
- (2) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, powers and procedures of the [body].
- (3) The Prime Minister [or the Speaker/President of the Senate] shall cause a copy of the [body's] advice to be tabled in each House of Parliament as soon as practicable after receiving it.
- (4) The House of Representatives and the Senate shall give consideration to the tabled advice of the [body] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples: see Anne Twomey, 'Putting words to the Tune of Constitutional Recognition', *The Conversation*, 20 May 2015 <<http://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>>.
- 174 See also Fergal Davis, 'Noel Pearson's Proposal Could Deliver

- Real Authority for Indigenous Australia', *The Guardian* (online), 14 April 2015 <<http://www.theguardian.com/commentisfree/2015/apr/14/noel-pearsons-proposal-could-deliver-real-authority-for-indigenous-australia>>.
- 175 Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples', above n 9; Cheryl Saunders, 'Indigenous Constitutional Recognition: The Concept of Consultation' (2015) 8(19) *Indigenous Law Bulletin* 19; Fergal Davis, 'The Problem of Authority and the Proposal for an Indigenous Advisory Body' (2015) 8(19) *Indigenous Law Bulletin* 23.
- 176 Cox, above n 69, 132.
- 177 Ibid 123-4.
- 178 Freeman and Leaser, above n 10, 2-4.
- 179 Craven, above n 10.
- 180 Reilley, 'A Constitutional Framework for Indigenous Governance', above n 17, 425.
- 181 H.C. Coombs, *Aboriginal Autonomy* (Cambridge University Press, 1994) 226-8.
- 182 Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth', above n 9; Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples', above n 9.
- 183 See Articles 3, 4, 18 and 19 of *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007); Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth', above n 9, 41-46.
- 184 Under the *Native Title Act 1993 (Cth)*.
- 185 Kathryn Diss, 'Claimants Ink \$1.3 Billion Western Australia Noongar Native Title Deal', *ABC News* (online), 30 March 2015 <<http://www.abc.net.au/news/2015-03-30/south-west-noongar-native-title-deal-inked/6357746>>.
- 186 As was pointed out by former Indigenous Affairs Minister, Fred Chaney.
- 187 Diss, above n 185.
- 188 Particularly the proposed Empowered Communities structural reforms which seek to rebalance the power relationship between Indigenous peoples and government in communities that opt-in: see Empowered Communities, 'Empowered Peoples Design Report' (Wunan Foundation, 2015).
- 189 Michael McKenna, 'Noel Pearson's Regional Treaty Push', *The Australian* (online), 19 June 2015 <<http://www.theaustralian.com.au/national-affairs/indigenous/noel-pearsons-regional-treaty-push/story-fn9hm1pm-1227404930543>>; Noel Pearson, 'In Pursuit of a Regional, Reciprocal Responsibility Settlement for Cape York' (Speech delivered at the National Native Title Conference, Port Douglas, 18 June 2015).
- 190 Patricia Karvelas, 'Warren Mundine: Treaty Needed With Each First Nation', *The Australian* (online), 11 December 2014 <<http://www.theaustralian.com.au/national-affairs/indigenous/warren-mundine-treaty-needed-with-each-first-nation/story-fn9hm1pm-1227151788054>>.
- 191 Warren Mundine, 'Shooting an Elephant: Four Giant Steps' (Speech delivered at the Garma Festival Corporate Dinner, 10 August 2013) 5.
- 192 Ibid.
- 193 Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth', above n 9, 65-67.
- 194 Contemporary treaty making processes also happens effectively in Canada: see James 'Youngblood' Henderson, 'Empowering Treaty Federalism' (1994) 58 *Saskatchewan Law Review* 241; Pamela O'Connor, 'Indigenous Difference and the Constitution of Canada: Book Review' (2001) 27 *Monash Law Review* 376.
- 195 See Reilley, 'A Constitutional Framework for Indigenous Governance', above n 17.
- 196 Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples', above n 9; Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth', above n 9.