FNP
FIRST NATIONS PORTFOLIO

Murru waaruu

(On Track)

Economic Development Seminar Series

Seminar 1

Treaty & Settlement — Background Paper

Australian National University | First Nations Portfolio

The purpose of this paper is to provide background information and to promote dialogue and debate at a seminar held on 15 February 2023 that will focus on the subject matter.

Author:
Russell Barnett
Honorary Associate Professor, First Nations Portfolio
Australian National University

Cultural Content Author:
Paul 'Girrawah' House
Senior Community Engagement Officer, First Nations Portfolio
Ngambri, Ngunnawal and Wiradyuri Custodian

Research Support:
Phoebe McClements, Associate, Australian Venture Consultants
Julian Thomas, Associate, Australian Venture Consultants

All artworks and creative designs in this ***Murru waaruu*** Seminar Background Paper have been created by **Rohit Rao**. Rohit is a young artist and graduate student at the Australian National University Fenner School of Environment and Society.

Rohit is interested in using art and stories to challenge and communicate complex social and ecological issues and working with communities to imagine and implement alternatives to meet them.

Marramarra murru is a local Ngambri, Ngunnawal and Wiradyuri term that describes the creation of pathways. The pathways were created by Biyaami, the creator and protector who gifted and shared them with the ancestors. Passed on from generation to generation, these pathways serve to ensure survival and wellbeing through the maintenance and transfer of knowledge, lore, custom and cultural authority, as well as facilitating trade.

Like these ancient pathways, the ***Marramarra murru*** First Nations Economic Development Symposium held in June 2022 identified contemporary pathways to economic self-determination for Australia's First Nations peoples.

We speak to each other in many different ways such ***widyung*** (which way?), ***widyundhu*** (which way you?) or ***widyunggandhu*** (how you?). First Nation languages can be described as free word order languages which have a different foundational principle from that of English, a fixed word language. In fixed word order European languages such as English, everything is based on one framework or another of continuum (linear) logic. In the free word order of Australian Indigenous languages, it appears that the foundational frame is one of an unchanging (although manipulative) network of relationships. Behind these two different systems of logic is a different basic assumption about the nature of the cosmos.[1]

Australian Indigenous people place a very high value on relationships and identity and constantly think about relationships with other people, with the spiritual world, with place, and with the things in the living and spiritual world. The identity of all things (and people) is defined by their relationships with, or to, all 'identities' in the social, the spiritual and the physical environment.[2]

Our identity, relationship, actions, focus and transformation help keep our people 'on track'. A Ngambri, Ngunnawal and Wiradyuri term for this is ***murru waaruu***.

Foreshadowed by the ***Marramarra murru*** Symposium, the ***Murru waaruu*** First Nations Economic Development Seminar Series, the subject of this document, will comprise a series of topic-specific seminars that are designed to bring together leading scholars and practitioners to develop solutions for specific relevant issues, ensuring we remain on track to deliver a compelling, evidence-based case to transition the existing First Nations economic development policy paradigm in Australia to one the supports economic self-determination.

Paul 'Girrawah' House
Senior Community Engagement Officer, First Nations Portfolio
Ngambri, Ngunnawal and Wiradyuri Custodian

[1]*Grant, S. and Rudder, J. 2014, **A Grammar of Wiradjuri Language**, Restoration House, Canberra, page 4.*
[2]*Ibid*

Contents

Introduction

In 2017, First Nations leaders from across Australia issued the Uluru Statement from the Heart (see Appendix 1).

Immediately following its victory in the 2022 general election, the current Australian Labor Government undertook to implement the Uluru Statement from the Heart 'in full', a commitment that was reaffirmed in a speech by Prime Minister the Hon. Anthony Albanese, MP at the Garma Festival in July 2022. The Australian Government's commitment in this regard is supported by recently established advisory and communications frameworks and an appropriation of $240 million to the process of achieving constitutional reform that will be necessary to implement the Uluru Statement 'in full'[3] – a specific and key operational component of the Uluru Statement requires amendment to the Australian Constitution.

In essence there are two operational components of the Uluru Statement:

- **The Aboriginal and Torres Strait Islander Voice ('The Voice')**: a constitutionally enshrined, extra-parliamentary advisory structure that will provide a formal framework through which Australian Aboriginal and Torres Strait Islander peoples (First Nations) will have the opportunity to provide advice to the parliament on legislation that impacts them. The specific scope, design and operations of The Voice is yet to be determined and will be the responsibility of the Commonwealth Parliament and subject of future statute.

- **Makarrata Commission:** a federal statutory body of yet to be defined structure and scope that will be established with the purpose of overseeing agreement making and truth telling between Australian First Nations and Australian governments.

While not stated in the Uluru Statement from the Heart itself, the operational components of the Uluru Statement from the Heart are essentially about elevating the political, social and economic status of First Australians to a status that is more akin to that of Indigenous peoples of other nations that were former colonies of Britain and that were colonised during a similar period in history (United States, Canada and Aotearoa/New Zealand). This will be achieved by providing Australian First Nations with at least some direct influence over legislation that impacts their lives (albeit only advisory in nature) and a formal process for recognising past injustices associated with colonisation and determining restitution for those injustices.

The prospect of Australian First Nations being party to treaties, or agreements that bear semblance to the characteristics of a treaty, is a much-needed tangible and meaningful recognition of the fact that:

- Prior to colonisation, First Peoples lived on the Australian continent in distinct organised societies (First Nations) defined by distinct genetic lineage, cultural, political and territorial characteristics, with each such society prosecuting its perceived rights and recognising the rights of others – an historical fact that is now recognised in Australian law[4,5] and one that implies notions of a type of sovereignty that pre-dated British colonisation and was never ceded (see Appendix 2 for further explanation); and

- The process of colonisation of the Australian continent resulted in the lands, waters, sea country and natural resources within the territories of those First Nations and managed by them being appropriated, without the consent of First Nations, by colonial and subsequent state and federal governments.

Of immediate relevance to the Murru waaruu Seminar Series is the monetary and other compensation of an economic nature that may be payable to First Nations under a more consistent,

[3] *First Nations Portfolio (2022), Issues Paper on a First Nations Voice Referendum, Australian National University*
[4] *Mabo v Queensland (No. 2) HCA 23, (1992) 175 CLR 1*
[5] *Native Title Act 1993 (Cth)*

certain and expedited agreement-making framework, the establishment of which will presumably be a key focus of the proposed Makarrata Commission, and which could potentially be influenced by the advisory role of the proposed Voice. It is hoped that this will accelerate the growth of an economic asset for Australian First Nations, which in comparison to other former British colonies has some way to go.

- This paper and the seminar it informs explores the treaty and settlement frameworks and outcomes in several former British colonies that, for various reasons, are broadly comparable to Australia–United States, Canada and Aotearoa/New Zealand–and explains the contemporary framework for agreement making between Australian First Nations and Australian governments and suggests how that may evolve over time.

- It is important to note that while there is an obvious intersection between the subject matter of this paper and the upcoming referendum to enshrine a First Nations (Aboriginal and Torres Strait Islander) 'Voice' in the Australian Constitution, this referendum (and its subject matter) is only discussed in this paper to the extent that it may be relevant to the future agreement making and economic settlement environment.

Treaty and settlement as an economic asset

Under current international law, Article 2(1)(a) of the *Vienna Convention on the Law of Treaties 1969*[6] defines a treaty as an international agreement concluded between States in written form and governed by international law, whether embodied in a single or multiple instruments and whatever its particular designation. In this context a treaty is an agreement between nation-states or in some cases international organisations, whereby those parties agree that the agreement is binding at international law.

For the following reasons, the treaties with First Nations that were made in the United States, Canada and New Zealand, and those which are contemplated in Australia, do not and will not fall under the jurisdiction of the Vienna Convention and international law:

- Treaties that were concluded between First Nations and the colonial authorities in the United States, Canada and Aotearoa/New Zealand, whilst in some cases recognising First Nations as possessing a degree of statehood, were entered into prior to the Vienna Convention having legal effect in those nations; and

- In the case of treaties entered into post the Vienna Convention, the First Nations parties are not sovereign states for the purposes of the Vienna Convention.

In the context of any treaty or similar agreement making process that may occur in Australia as the result of the implementation of a Makarrata Commission, the term 'treaty' is used to describe any agreement, pact, accord, compact or covenant intended to be legally binding under Australian law and which sets out the rights and duties of First Nations peoples and the relevant State or Commonwealth government with respect to the relationship between those parties going forward. The term 'treaty' is used to describe these future agreements as they reflect a transaction that is designed to address historical injustices served on formerly sovereign (see Appendix 2) First Nations, and to seek, by a process of negotiation, political settlements with those displaced and dispossessed First Nations that provide for greater expression of Indigenous rights and lead to a more equal and reconciled Australia.

[6] *1155 UNTS 331*

For the purposes of comparison, the following subsections provide an overview of the history and evolution of treaty and agreement making in the former British colonies of the United States, Canada and Aotearoa/New Zealand.

First Nations treaties in the United States

The history of treaties between First Nations and the United States Government is vast, reflecting the societal values on which the United States was founded–in the context of the times, equality, liberty and free trade (see subsequent section) -and whilst not necessarily formed on just terms, negotiation and agreements with First Nations had a relatively significant role in the formation of the United States.

Over the period 1778 to 1871, the United States Government became party to over 500 treaties with North American Indigenous groups, with no fewer than 374 of these treaties ratified by the United States Congress. The following Figure 1[7] illustrates the timeline of treaties ratified by the United States Congress.

Many First Nations were party to multiple treaties. Treaties were also modified over time to include both bands that did not agree to the treaty terms in the first instance, as well as successor parties with interests in the treaty. Typical terms pertained to trade, access to First Nations lands for infrastructure development (such as roads, rail, telegraph lines, harbours and ports), service delivery (such as mail), settlements, industrial development and simple rights of passage, as well as mining and mineral rights. Compensation included compensation in the form of monetary payments or goods, hunting, food and natural resource gathering and fishing rights, assistance with economic development, such as transfer of agricultural knowledge, and provision of services such as health and education.

Proclamation of the *Indian Appropriations Act* in 1871 resulted in the cessation of the United States Government recognising individual tribes within the United States as independent nations with whom the United States may contract by treaty, ending approximately a century of treaty-making between the United States Government and First Nations. Since this time, relationships between the United States Government and First Nations have taken a statutory form.

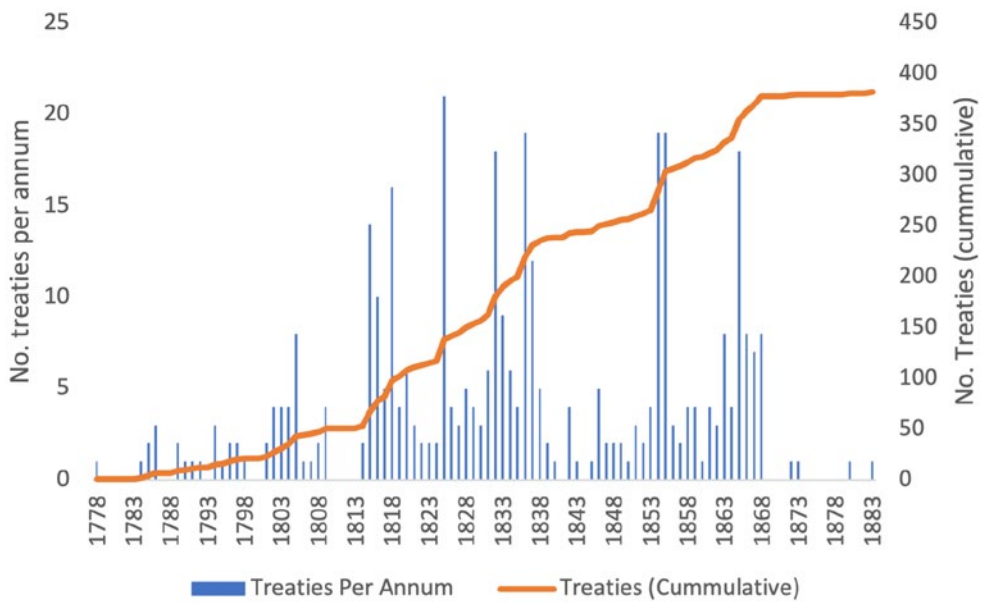


Figure 1 – Timeline of First Nations Treaties ratified by the United States Congress

[7]*Derived from: Kapla, C. (1904),* ***Indian Affairs: Laws and Treaties****, Vol. II IN: Oklahoma State University Libraries (2022), Tribal Treaty Database*

First Nations treaties in Canada

Whilst not at the same scale as the United States, treaties between colonising governments and Indigenous peoples also had a prominent role in the formation of Canada. The treaty landscape in Canada is generally discussed in terms of historical (or pre-Calder decision of the Canadian Supreme Court in 1973) treaties and modern (or Canadian Comprehensive Land Claim) treaties.[8]

Historical treaties

Prior to the Calder Decision (see next subsection), the Crown and subsequent colonial and provincial governments of Canada entered into 70 treaties over the period of 1701 to 1923. Adopting various forms of instruments and typically incorporating some nominal form of compensation and ongoing land and resource access rights, and subject to much continued disputation, these treaties facilitated the colonisation and European settlement that led to modern-day Canada.

The historical treaties can be further categorised as follows:

- **Treaties of Peace and Neutrality (1701-1760):** military confrontation between European powers for control of North America saw a shift in the dynamics of relationships between Indigenous peoples and principally the French and British from relationships that revolved primarily around commerce, to relationships of a more military nature, including access to lands for supply chains and provision of warriors for troops and militia in exchange for monetary compensation, arms and protection. In 1760, when Montreal (France's last territory in Canada was surrendered), two treaties were entered into with British officials and Indigenous allies of the French – Swegatch and Huron-Wendate – ending what had been 150 years of alliances between the French and Indigenous peoples of the St Lawrence Valley region.
- **Peace and Friendship Treaties (1779):** along the east coast of Canada, peace and Friendship Treaties were signed with the Mi'kmaq, Maliseet and Passamaquoddy in the years preceding 1779. Two of the treaties – Treaty or Articles of Peace and Friendship Renewed 1752 and Treaty of Peace and Friendship 1760 – contain treaty rights that have subsequently been recognised by the Supreme Court of Canada, with Section 35 of the Canadian Constitution specifically recognising and affirming treaty rights (see later section).
- **Upper Canada Land Surrenders (1764-1862):** also known as the Upper Canada Treaties and revolving around the surrender of Indigenous lands to the colonial government prior to Confederation and the creation of the province of Ontario. Covering much of modern-day south-western Ontario, the acquired lands were used for a range of purposes including European settlement.[9]
- **Douglas Treaties (1850-1854):** named after the Chief Factor of Fort Victoria and Governor of the Colony, James Douglas, the Douglas Treaties refer to a series of treaties with Indigenous groups of southern Vancouver Island, which included agreement to allow European Settlement.
- **Robinson Treaties (1847-1850):** up to the 1850s the majority of treaty-making in the region that is now Ontario was focused on the Southern Great Lakes and the St Lawrence River region for agricultural production and settlement. From the early 1840s, commercial interest in mineral resources in the area of unceded Indigenous lands bordering Lake Huron and Lake Superior grew. The colonial government granted mining licenses in the area regardless of there being any agreement with the Indigenous owners of that land. Initiated by the Anishinaabe in objection to the licenses being granted, treaty negotiations were facilitated by William Robinson, a member of the colonial legislature. They culminated in the Robinson-Superior Treaty in 1850 and subsequently the Robinson-Huron Treaty.

[8]Government of Canada (2022), Crown-Indigenous Relations and Northern Affairs Canada, (https://www.rcaanc-cirnac.gc.ca/eng/1100100032297/1544716489360)
[9]Morin, JP. (2010), ***Concepts of Extinguishment in the Upper Canada Land Surrender Treaties****, Aboriginal Policy Research Consortium International*

- **The Numbered Treaties (1871-1921):** similar to the United States at the time, the relatively new eastern-oriented Canadian Government saw the western side of the North American continent as having significant economic potential. Driven by Canadian political concerns that the relatively rapid western expansion of the United States would see parts of modern-day Western Canada appropriated by the United States from its Indigenous inhabitants, the new Canadian Federal Government entered into 11 individual treaties with Indigenous Groups in north-western Canada, bringing them under the jurisdiction of Canadian law.

- **Williams Treaties (1920):** gave effect to the surrender of the last substantial portion of the territory in the southern regions of Ontario to the Ontario provincial government.

The specific historical treaties are listed under each of these categories in the following Table 1, with their geographical reach illustrated in the subsequent Figure 2[10]

Table 1 – Historical Canadian Treaties

Treaties of Peace and Neutrality	**Peace and Friendship Treaties**	**Upper Canada Land Surrenders**	**Douglas Treaties**	**Robinson Treaties**	**The Numbered Treaties**	**Williams Treaties**
Huron-British Treaty 1760	· 1752 Peace and Friendship Treaty · 1760-61 Peace and Friendship Treaties	· Michilmackinac Island No.1 · Niagara Purchase No. 381 · Treaty No. 116 · McKee Treaty No. 2 · Between the Lakes Purchase and Collins Purchas No.3 · Brant Tract No. 3 ¾ · Treaty No. 8 · Penetanguishene Treaty No. 5 · London Township Treaty No. 6 · Sombra Township Treaty No.7 · St Joseph's Island Treaty No. 11 · Treaty No. 2 · Toronto Purchase No. 13 · Head of the Lake Treaty No. 14 · Lake Simcoe Treaty No. 16 · Lake Simcoe–Nottawasaga Treaty No. 18 · Ajetance Treaty No. 19 · Rice Lake Treaty No. 20 · Long Woods Treaty No. 25 · Rideau Purchase No. 27 ¼ · Huron Tract No. 29 · Manitoulin Island Treaty (1836) No. 45 · Saugeen Treaty (1836) No. 45 ½ · Saugeen Penninsula Treaty (1854) No. 72 · Manitoulin Island Treaty (1862) No. 94	· Teechamitsa Tribe · Kosampsom Tribe · Swengwhung Tribe · Chilcowitch Tribe · Whyomilth Tribe · Che-ko-nein Tribe · Ka-ky-aakan Tribe · Chewhaytsum Tribe · Sooke Tribe · Saanich Tribe–South Saanich · Saanich Tribe–North Saanich · Queackar Tribe · Queakeolth Tribe · Saalequun Tribe	· Ojibewa Indians of Lake Superior · Ojibewa Indians of Lake Huron	· No. 1 and No.2 · No. 3 · No. 4 · No. 5 · No. 6 · No. 7 · No. 8 · No. 9 · No. 10 · No. 11	· The Chippewa Indians · The Mississauga Indians

[10]*Government of Canada (2022), Crown-Indigenous Relations and Northern Affairs Canada, (https://www.rcaanc-cirnac.gc.ca/eng/1100100032297/1544716489360)*

Figure 2 – Canadian Historical Treaties

The Calder Decision

In 1967, a group of Nisga'a elders (including Frank Calder) initiated legal proceedings against the provincial Government of British Columbia, advocating that the Nisga'a title to their traditional lands had never been fully extinguished through historical treaty or other means. Both the British Columbia Supreme Court and Court of Appeal found in favour of British Columbia.

Upon appeal to the Canadian Supreme Court in 1973,[11], the Court determined that Indigenous title existed at the time of the Royal Proclamation (see subsequent section). This was the first time a Canadian court recognised that title to land could be derived from jurisdiction other than that of colonial law. However, on the issue of whether the Nisga'a claim to their lands was valid, the bench of the Canadian Supreme Court was divided. Three judges ruled that even though Indigenous title may have once existed, it was extinguished by colonisation and confederation.

Another three ruled that the Nisga'a title had not been extinguished by treaty or statute. The seventh judge ruled that the case should be dismissed as the result of a technicality in proceedings - the Nisga'a had failed to obtain permission to sue the Government of British Columbia from the attorney general.[12]

While this case did not settle the Nisga'a land claim, it established the pathway for the Canadian Government's Comprehensive Land Claims policy and what are referred to as the Canadian Modern Treaties.

Canadian Comprehensive Land Claim Policy and Modern Treaties

Established in 1973, at least partly in response to the outcome of the Calder Supreme Court Case, the Canadian Government established and implemented the Canadian Comprehensive Land Claim process – a framework for establishing land rights over areas of Canada where Indigenous land rights have not been addressed by treaties or other legal mechanisms. The process endeavours to achieve this by negotiating forward-looking agreements – commonly referred to as 'Modern Treaties' - with Indigenous groups, the Canadian Federal Government and the relevant provincial governments.

Modern Treaties are implemented through legislation and address such issues as ownership, use and management of land and resources, with many including provisions relating to Indigenous self-government (see subsequent Section). The following Table 2[13] lists the comprehensive land claims (modern treaties) and self-government arrangements that have been implemented to date.

[11]Calder et al v. Attorney General of British Columbia [1973] SCR 313
[12]Rynard, P. (2004), 'The Nisga'a Treaty: are we on the right track?', International Journal on Minority and Group Rights, 11(3), 289-298
[13]Crown-Indigenous Relations and Northern Affairs Canada (2022), Implementation of Modern Treaties and Self Government Agreement, Government of Canada.

Table 2 – Current Modern Treaties and Self-Government Arrangements

Province/Territory	**Modern Treaties**	**Self-Government Arrangements**

British Columbia	• Maa-nulth Final Agreement
	  • oHuu-ay-aht First Nations
	  • oKa:'yu:'k't'h'/Che:k:tles7et'h' First Nations
	  • oToquahy
	  • oUchucklesacht
	  • oUcluelet First Nation
	• Nisga'a Final Agreement
	• Tla'amin Final Agreement
	• Tsawwassen First Nation Final Agreement
		• Sechelt Indian Band Self-Government Agreement
		• Westbank First Nation Self-Government Agreement

Manitoba		• Sioux Valley Dakota Nation Self-Government Agreement
Newfoundland and Labrador	• Labrador Inuit Land Claims Agreement	
Northwest Territories	• Gwich'in Comprehensive Land Claim Agreement • Sahtu Dene and Métis Comprehensive Land Claim Agreement • Tlicho Land Claims and Self-Government Agreement • Inuvialuit Final Agreement	• Déline Final Self-Government Agreement
Nunavut	• Nunavut Agreement (formerly Nunavut Land Claims Agreements)	
Quebec	• James Bay and Northern Québec Agreement • Northeastern Québec Agreement • Nunavik Inuit Land Claims Agreement • Eeyou Marine Region Land Claims Agreement	

Yukon	• Yukon First Nations Final Agreements
	  • Champagne and Aishihik First Nations
	  • First Nation of Nacho Nyak Dun
	  • Teslin Tlingit Council
	  • Vuntut Gwitchin First Nation
	  • Little Salmon/Carmacks First Nation
	  • Selkirk First Nation
	  • Tr'ondëk Hwëch'in First Nation
	  • Ta'an Kwäch'än Council
	  • Kluane First Nation
	  • Kwanlin Dün First Nation
	  • Carcoss/Tagish First Nation
		• Yukon First Nations Self-Government Agreements
		  • Champagne and Aishihik First Nations
		  • First Nation of Nacho Nyak Dun
		  • Teslin Tlingit Council
		  • Vuntut Gwitchin First Nation
		  • Little Salmon/Carmacks First Nation
		  • Selkirk First Nation
		  • Tr'ondëk Hwëch'in First Nation
		  • Ta'an Kwäch'än Council
		  • Kluane First Nation
		  • Kwanlin Dün First Nation
		  • Carcoss/Tagish First Nation

In addition to the modern treaties and self-government agreements listed in the above Table 2 there is a small set of what are referred to as sectoral agreements, including Education Agreements in Nova Scotia (Mi'kmaq Education Agreement) and Ontario (Anishinabek Nation Education Agreement) and a Governance Agreement in Quebec (Agreement on Cree Nation Governance).

The following Figure 3[14] illustrates the areas of land that are subject to modern treaties, self-government and sectoral agreements.

[14]Wright, D. (2020), 'Dispute resolution in Modern Treaties: Evolutions, Observations and Next Steps', Arctic Review on Law and Politics, 11, 280-309

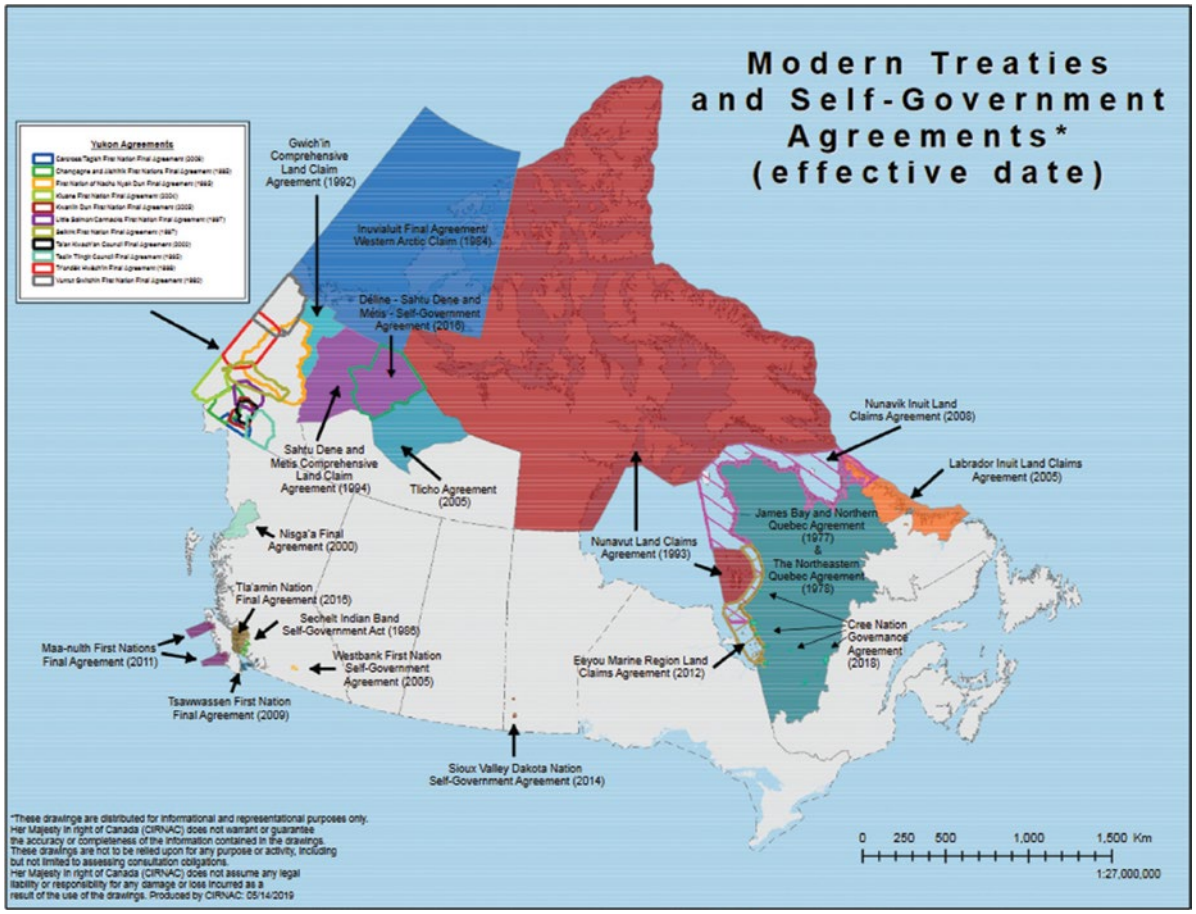


Figure 3 – Canadian Modern Treaties and Self-Government Agreements

To date the modern treaty and self-government framework has provided:

- Greater certainty with respect to Indigenous land rights over approximately 40 percent of the Canadian landmass
- Indigenous ownership over more than 600,000 square kilometres of lands representing and total area equivalent to 6 percent of the Canadian landmass or approximately the size of province of Manitoba
- Transfers of capital to Indigenous groups totalling more than CAD $3 billion
- Protection of cultural sites and practice, participation in land and resource management decisions and access to resource development opportunities
- In most cases, associated self-government rights

There are currently approximately 100 negotiations under the Canadian Comprehensive Land Claim framework that are ongoing.[15]

[15]*Crown-Indigenous Relations and Northern Affairs Canada (2022),* ***Implementation of Modern Treaties and Self Government****, Government of Canada.*

First Nations treaties in Aotearoa/New Zealand

Whilst the treaty framework in the United States is vast and Canada's significant, in no other former British colony does a treaty perform a more central role in nationhood than the case of Aotearoa/New Zealand. The seminal 1840 Treaty of Waitangi is recognised as a nation forming document in Aotearoa/New Zealand's uncodified constitution and continues to perform a key role in defining the relationship between Māori and the Government of New Zealand (see subsequent section).

While Māori tribes had early contact with European explorers, whalers, traders and escaped convicts from as early as the mid-17th century, inter-tribal warfare and the particularly hostile stance Māori peoples took toward 'invaders' of their lands meant that no real attempt to colonise Aotearoa/New Zealand took place until the 19th century. As colonisation of the Aotearoa/New Zealand islands and resulting conflict increased during the 1830s, both the Crown and Māori tribes expressed interest in formalising future relationships. The negotiations in this regard resulted in approximately 500 Māori tribal chiefs signing the Waitangi Treaty in 1840, which guaranteed Māori property rights and tribal autonomy, as well as the right to British citizenship in exchange for accepting British sovereignty.[16]

Agitation from Chiefs who did not sign the treaty, and who gained increasing empathy from signatories who were later unsatisfied with conflicting interpretations of the terms of the Treaty,[17], ultimately resulted in a resumption of sustained conflict from the 1860s to the 1880s. During this period, a vast majority of Māori lands (estimated at 63 million acres, or 95 percent of the Aotearoa/New Zealand landmass) were either confiscated by Britain as retribution for the rebellion or converted from communal ownership to individual title through the Native Land Court and encouraged to be sold to European migrants, with many of these sales later disputed with allegations that compensation was never fully delivered.[18]

From the mid-1960s, Māori activism and growing political power of Māori parties resulted in a willingness on the part of the New Zealand Government to revisit and redress past injustices and treaty breaches. Established in 1975, the Waitangi Tribunal is a permanent commission of inquiry charged with hearing, investigating and making recommendations on claims brought by Māori interests relating to breach of the terms of the Treaty of Waitangi. Originally limited to hearing contemporary matters, the terms of reference for this Inquiry were extended in 1985 to hear any breach dating back to 1840.

Reports from the Tribunal are then provided to the Office of Māori-Crown Relations (Te Arawhiti), which is then able to offer a treaty settlement with the affected peoples or communities. Settlement packages may include a range of redress pathways, including a formal apology by the Crown, financial redress (including interest), cultural redress, the transfer of and/or the option to purchase significant properties, recognition of ownership or control over natural resources, and changes to geographical names. After negotiation between the parties, once agreed these settlement treaties are enacted through legislation.

As of early 2022, 119 settlements had been enacted involving total monetary compensation of approximately NZ $3.9 billion (AUD $3.65 billion) in addition to numerous cultural commitments, creation of land interests, land estate transfers and other measures.[19]

[16]*Barnett, R. et al (2022),* ***Marramarra murru First Nations Economic Development Symposium: Symposium Background Paper,*** *First Nations Portfolio, Australian National University*

[17]*The Treaty of Waitangi was a bilingual treaty, produced in both English and Māori. According to the English version, the Māori ceded to the Crown absolutely and without reservation all the rights and powers of sovereignty (Article 1), but retained full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties (Article 2). In contrast, the Māori version is interpreted to state that the Māori only ceded to the Crown governance (Article 1) and retained sovereignty over their lands and estates, forests, fisheries and other properties (Article 2). See Jacinta Ruru, 'Asserting the Doctrine of Discovery in Aotearoa New Zealand: 1840-1960s' in Robert J. Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg,* ***Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*** *(Oxford university Press, 2010) 139*

[18]*Barnett, R. et al (2022),* ***Marramarra murru First Nations Economic Development Symposium: Symposium Background Paper****, First Nations Portfolio, Australian National University*

[19]*Waitangi Tribunal IN: First Nations Portfolio (2022),* ***Marramarra murru First Nations Economic Development Symposium Background Paper****, Australian National University*

Settlement agreements in Australia

Despite the demonstrable fact that at the time of colonisation Australia was inhabited by societies of First Australians (Aboriginal and Torres Strait Islander People) with their own notions of sovereignty and systems of governance over defined territories, British colonisation of the Australian continent was prosecuted in a completely different way to that of the United States, Canada and New Zealand.

In the case of these other colonies, Britain recognised that First Nations held some notion of sovereignty over their traditional lands (see Appendix 2) and therefore entered into treaties, albeit on grossly unjust terms. Whereas, in the case of Australia, Britain (falsely) claimed sovereignty over the Australian continent under the doctrine of ***terra nullius*** (land deemed to be unoccupied or uninhabited), and therefore did not enter into treaties at the time with the existing inhabitants. This was in contravention of the accepted international law of the time which said that sovereignty could only be acquired by colonising powers through cession (treaties), conquest, or occupation (which was the discovery and occupation of an uninhabited territory).[20]

As a result, settlements between Australian governments and First Nations are presently not the subject of treaty arrangements. While some settlements under specific state government regimes (see below) have been described by some as agreements that are akin to modern treaties (and have hence been described as being 'treaty-like'), others, while recognising some of these agreements as being significant and that they could inform aspects of treaty-making in Australia, consider them to fall short of true treaty arrangements.[22]

The Federal regime

In response to the Australian High Court's rejection of the legitimacy of Britain's claim of ***terra nullius,***[23] the *Native Title Act 1993* (Cth) establishes a system for the recognition and management of native title throughout Australia. As well as conferring upon Traditional Owners varying degrees of use and control over any traditional lands where native title can be established in accordance with the *Native Title Act*, chief among its practical impacts is creating a compensation regime, whereby native title holders may apply to the Federal Court to be compensated for certain past acts of Government that have the effect of damaging or diminishing their native title rights and interests.[24]

In accordance with Division 5 of the *Native Title Act*, compensation is payable for acts taken by the Crown in the right of the States, Territories or the Commonwealth that have impaired or extinguished[25] native title rights. This compensation is payable on 'just terms'[26] and unless explicitly requested by the entitled party (a request which can be refused), may only be comprised of monetary payments.

The method for calculating a monetary compensation reflecting 'just terms' is an evolving area of law that has been the subject of considerable jurisprudence since the seminal ***Timber Creek*** series of cases.[27] This is a complex area of law, the intricate details of which are beyond the scope of this paper. However, for the purposes of this paper it is sufficient to note that courts seem to have landed on 'just terms' having three important elements with respect to this context:

[20] *Mabo v Queensland No. 2, [1992] HCA 23 – 175, CLR 1*
[21] *Hobbs, H. and Williams, G. (2018), 'The Noongar Settlement: Australians first treaty',* ***Sydney Law Review****, 40(1)*
[22] *Australians for Native Title and Recognition (2022), Treaty in Western Australia: Fact Sheet*
[23] *Mabo v Queensland No. 2, [1992] HCA 23 – 175, CLR 1*
[24] *Division 5,* ***Native Title Act 1993*** *(Cth)*
[25] *s227,* ***Native Title Act 1993*** *(Cth)*
[26] *ss51, 53,* ***Native Title Act 1993*** *(Cth)*
[27] ***Griffiths v Northern Territory of Australia (No 3)*** *[2016] FCA 900;* ***Northern Territory of Australia v Griffiths*** *[2017] 256 FCR 478;* ***Northern Territory v Griffiths*** *(2019) 269 CLR 1*

- **Economic loss –** representing the market value of the land affected by the act of extinguishment or impairment at the date of extinguishment or impairment, adjusted according to the similarity of the specific native title interest to freehold title. Exclusive native title is valued at freehold market value, whereas non-exclusive native title will be discounted to the extent it differs in rights to freehold title.

- **Cultural loss –** is similar to the common law principle of solatium in compulsory acquisition of freehold tenure. It represents the spiritual or religious loss that has been caused by the extinguishment, diminishment or impairment of the native title. Jurisprudence relating to this matter demonstrates that the quantum of compensation for cultural loss may exceed the amount determined for economic loss by many orders of magnitude. Furthermore, to be compensable, the harm caused to culture need not be absolute.

- **Interest –** reflecting the impact of the passage of time on the value of money, simple interest is payable on the economic loss (but not the cultural loss) between the date the compensable act occurred and the date of the judgement, typically at the Federal Court Pre-judgement Interest Rate.

- The acts of governments on which compensation is payable may be categorised as:

- **Past Acts** - which are those that occurred before 1 July 1993 (if legislation) or before 1 January 1994 (if any other act) that because of the *Racial Discrimination Act 1975* (Cth) may have been invalid by virtue of their discriminatory effect on native title rights.

- **Intermediate Period Acts** –which are those that involve the granting of freehold or leasehold by the State between 1 January 1994 and 23 December 1996, per the date of the *Wik* decision, and which affect native title lands.28

- **Future Acts –** are prospective acts of the State not yet done which will affect native title rights and interests, typically development or declaration of conservation estate.

- Where past and intermediate period acts are the subject of court determined compensation, the compensation payable for future acts is negotiated as part of an Indigenous Land Use Agreement (ILUA) or other agreement that provides a third party with access to First Nations lands. An ILUA is essentially an agreement made between willing signatories under which each party agrees to perform (or not perform) certain actions. It therefore has many characteristics of and is subject to many of the same assumptions and principles of interpretation and operation, as a contract made under common law.29

- However, with immediate relevance to compensation, there are two aspects of ILUA's that differ to common law contract:

- **Doctrine of privity of contract does not apply**
The doctrine of privity of contract states that only those who voluntarily agree to a contract can be bound by its terms. However, an ILUA is not only binding on the parties that sign it, but also on all successors who may hold native title over the lands or waters subject to the agreement. Therefore, Traditional Owners who agree to the terms of an ILUA bind their descendants into perpetuity to those terms for so long as the ILUA remains in force. This means that Traditional Owners and their representative Prescribed Body Corporates (PBCs) executing an ILUA need to give consideration to the impact of the agreement on future generations, particularly where the impact on lands might be long term, but any economic benefits might not be. Furthermore, the operations of an ILUA will represent the interpretations of the laws and traditional customs at the time of signing, which may create challenges for future generations as laws and customs evolve.

[28] ***Wik Peoples v Queensland*** *(1996) 187 CLR 1*
[29] ***s24EA, Native Title Act 1993*** *(Cth)*
[30] *s24EA(1)(b),* ***Native Title Act 1993*** *(Cth)*

- **ILUAs provide less certainty than they are intended to** Most certainly, ILUA's improve certainty, but that certainty is heavily skewed in favour of the non-First Nations parties to the ILUA. Firstly, under subsection 34EA of the Native Title Act while the doctrine of privity does not apply to the First Nations party (therefore binding future Traditional Owners), it still applies to the non-First Nations parties. This means that any subsequent entity that acquires privately owned land that is covered by an ILUA from the original ILUA signatory is not bound by the terms of the ILUA, but any rights such as to compensation, given up by the First Nations party are lost, unless the ILUA drafting includes assignment or novation clauses.

  Secondly, once registered with the National Native Title Tribunal, an ILUA confers Native Title Act validity on all acts covered under it. In the context of a settlement agreement, once the statutory right to compensation for past acts is given up, First Nations parties have lost that right forever, and similarly any future acts authorised by the ILUA will also remain valid under the Native Title Act into perpetuity. However, while entering into the ILUA validates all past and future acts done under it forever, the remedies available for any breach of the ILUA terms are contractual only.

  Finally, unlike contracts more broadly, which may be amended to any extent as parties mutually agree, once registered, ILUA's are relatively immutable. Amendments to an ILUA are limited to matters permitted under Section 24ED of the Native Title Act, being minor boundary updates (but not including new areas of land or water) or updating described parties to an agreement where rights or liabilities have been assigned, novated or otherwise transferred. Again, this can be navigated by including specific obligations or agreed processes, or use of a companion agreement.

In 2021, the Federal, State and Territory Ministers responsible for native title met formally for the first time in 4 years. An outcome of this meeting was the in-principal endorsement of the National Guiding Principles for Native Title Compensation Agreement (National Guiding Principles). Summarised as follows, these principles are intended to guide best efforts to settle by compensation in order to promote national reconciliation:[31]

- Prioritise resolving claims through negotiation and agreement, while ensuring consistency across jurisdictions and with national best practice;
- Require that any agreement reached should be negotiated with the free, prior and informed consent of all native title parties and consider the aspirations of native title parties; and
- Require negotiated agreements to provide certainty for governments and native title parties as far as is reasonably practical.

State regimes

In addition to compensation that is payable under the national framework created by the Native Title Act, State Governments (particularly the States of Victoria and Western Australia) are demonstrating an appetite to enter into agreements that are linked to settlement arrangements in order to compensate for historical dispossession and enable future use of traditional lands. These arrangements can incorporate native title lands, other forms of First Nations tenure and entitlements that are of an ethical or moral nature, rather than strictly legal in nature.

Victoria

Having had force of law since September 2010, the Traditional Owner Settlement Act 2010 (Vic) provides traditional owners within the jurisdiction of Victoria an alternative settlement framework to that prescribed by the Native Title Act.

In effect, the Victorian legislation provides a legal framework for negotiation of a comprehensive out-of-court settlement package between the State of Victoria and a 'Traditional Owner Group Entity' (TOGE) that represents a traditional owner or native title group who, at their discretion, have elected to pursue settlement through the framework created by the Victorian legislation rather than the processes contained within the Native Title Act.

[31] ***https://www.ag.gov.au/legal-system/publications/national-guiding-principles-native-title-compensation-agreement-making***

In exchange for Traditional Owner group agreement to withdraw any native title claims and to not lodge any future claims, the comprehensive settlement package negotiated under the Victorian framework revolves around an overarching Recognition and Settlement Agreement (RSA) that recognises the Traditional Owner group and its rights[32] over a settlement area and can include other more specific agreements including:[33]

- **Land Agreement** that provides for the transfer of freehold land to the TOGE for economic or cultural purposes and grants of 'Aboriginal Title' to parks and reserves (subject to specific provisions of the State's primary conservation estate legislation, the ***Conservation, Forests and Lands Act 1987*** (Vic));

- **Funding Agreement** that provides financial resources to the TOGE to support its core operations, implement initiatives prescribed by the RSA and other economic development initiatives;

- **Participation Agreement** that prescribes how funds determined under the Funding Agreement are held and managed;

- **Land Use Activity Agreement** that specifically replaces the future acts regime under the Native Title legislation and governs activities that take place on Crown land, taking into account Traditional Owner rights and interest. It also contains a schedule of 'community benefits', or compensation for activities undertaken by the State;

- **Natural Resource Agreement** which provides for access to and sustainable use of natural resources, as well as Traditional Owner participation in natural resources management;

- **Traditional Owners land management agreement** which provides for joint management of parks and reserves held under Aboriginal title, including the establishment of traditional owner land management boards; and

- **Indigenous Land Use Agreement** whereby the agreement package may also include an ILUA between the TOGE and Victorian Government, registered under the national native title legislation, to ensure that the agreed settlement complies with the national legislation and in accordance with the *Native Title Act*, is binding on all native title holders.

At the traditional owner's discretion, financial compensation paid by the Victorian Government in accordance with the framework may be paid into a charitable trust approved by the Minister.[34]

Following the 2019 Timber Creek High Court decision (discussed above), the Victorian Government recently announced a first principles review of the framework prescribed by the Victorian legislation to ensure that it is facilitating adequate compensation for cultural loss as per the precedent set by the Timber Creek High Court determination.

As summarised in Appendix 4, the framework provided by this legislation has been used to both facilitate significant contemporary settlements and to revisit historical arrangements that are considered inadequate compared to modern agreements between the State and First Nations groups.

[32] Traditional owner rights are listed in s9 of the Act. Unlike native title, TOSA enables a traditional owner group to be recognised as the traditional owners over all public land within the settlement area whether or not native title has been extinguished.

[33] Division 1, Part 2 ***Traditional Owner Settlement Act 2010*** (Vic)

[34] s78(2), ***Traditional Owner Settlement Act 2010*** (Vic)

[35] Per ***Northern Territory v Griffiths*** (2019) 269 CLR 1 the High Court awarded compensation for both economic and cultural loss.

Western Australia

The Western Australian Government started entering into settlement arrangements in response to determinations under the *Native Title Act* in the early 2000s, including agreements with the Traditional Owners of the lands in and around the townships of Broome (Rubibi Agreement) and Esperance (Esperance Nyungar Agreement). These agreements revolved around the extinguishment of native title in exchange for various land interests and monetary compensation. However, primarily in response to the aforementioned High Court jurisprudence pertaining to compensation, several of these agreements have been or are in the process of being reviewed.

More recent settlements - the Noongar South West and Yamatji Nations settlements – which are summarised in Appendix 4, have involved much larger and diverse compensation and recognition, in exchange for extinguishment of native title.

South Australia

The only compensation paid to date in South Australia has been under the regime prescribed by the *Native Title Act*.

The Tjayiwara Unmuru Peoples were compensated for the loss of their native title over a relatively small piece of land that was developed into a highway. The compensation came as the land was excluded from their 2013 determination of non-exclusive native title. It was deemed to be an area of significant cultural value for Men's business and the construction of the highway broke songlines and senior men's ceremonial processes. The compensation amount is confidential, as is the case overall because of the sensitivity of the cultural business of the cultural sites.[36]

New South Wales

The payment of native title compensation in New South Wales is occurring separately from the *Native Title Act*. It is occurring in the context of compulsory acquisition of native title under the ***L****and Acquisition (Just Terms Compensation) Act 1999* (NSW). The New South Wales Valuer General has released a policy setting out the principles of assessing compensation for cultural loss (Compensation for Cultural Loss Arising from Compulsory Acquisition[37]) that is used alongside the *Land Acquisition (Just Terms Compensation) Act 1999* to determine compensation.

Cultural loss is approached through a lens of the cultural value of Country as a whole and how a First Nations group is connected to Country through their laws and customs. Once this is understood, an appreciation of the cultural value of the particular parcel of land can be more holistically understood. Cultural loss may include the spiritual and emotional loss or distress from loss of the Country, as well as loss of an ability to learn and teach culturally significant knowledge on Country or damage to sites of significance. Forms of cultural loss include access, residence, activities, practices, ecology, sites, trauma and progressive impairment.

Queensland

In 2019, the Queensland Government established the Native Title Compensation Project Management Office (PMO) within Queensland Treasury to manage future compensation claims and develop a native title compensation settlement framework. Little has been publicly released about the PMO. The Treasury's 2020-2021 Annual Report states that the PMO is managing existing native title claims, while continuing to develop the compensation settlement framework.

[36] ***https://www.nativetitlesa.org/compensation-for-tjayiwara-unmuru-peoples/***

[37] ***https://www.valuergeneral.nsw.gov.au/__data/assets/pdf_file/0008/230588/1.0_FINAL_Compensation_for_cultural_loss_arising_from_compulsory_acquisition_March_2022.pdf***

Private arrangements

The focus of this paper and the seminar it informs is treaty and settlement between First Nations and governments. However, it should be noted that the private sector and particularly resources industry companies in Australia have entered into significant land access agreements with traditional owners.

While the 1960s marked the first significant recognition by industry of First Nations' land rights,[38] formal arrangements did not start to become common practice until the second decade of the 21st Century. In circumstances where third parties negotiate access to First Nations lands for the purposes of extracting natural resources or installing productive infrastructure, it is not uncommon for the terms of those arrangements to include the payment of a lump sum amount and/or annual royalty to Traditional Owner interests. Where large payments are involved, it is common practice for the terms of the negotiation to include a requirement that these payments are made to a trust structure that provides for accumulation of wealth to the benefit of the First Nations interests, as well as governance around the management and disbursement of that wealth.

These arrangements are particularly prevalent in the Pilbara Region of Western Australia where across the three largest iron producers alone there are at least 21 such agreements with 14 common law native title holder counterparties.

Constitutional law and treaty and settlement

Another significant difference between Australia and the other former British colonies is the inclusion of First Nations' interests in national constitutional and other nation forming documentation and the link between treaties and those constitutional interests.

The key difference is that in the case of the United States, Canada and Aotearoa/New Zealand, First Nations are a distinct constitutional entity.[39] This is not the case in Australia. As discussed in this section, while the extent and mechanisms through which First Nations are established as constitutional entities differs across the United States, Canada and Aotearoa/New Zealand, this constitutional status means First Nations are, to varying degrees, recognised as having some state-like characteristics. This has led, again, to varying degrees, to recognition of modes of sub-national sovereignty and jurisdiction (see Appendix 2) for First Nations. In these instances, the relationship between First Nations and the government reflects aspects of a state-to-state relationship as opposed to a simple state-to-citizen relationship.

Constitutional recognition of First Peoples in former British Colonies

A profound difference between Australia and other former British colonies is the absence of any mention, let alone recognition of First Australians or Australian First Nations in nation forming documentation. Arguably, this absence –resulting from the overwhelmingly successful 1967 referendum to remove previously explicit discrimination against First Nations peoples (see Appendix 3)–reflects an improvement over the original document. However, it remains a hugely significant differentiator between Australia and the experiences of other former British colonies with significant Indigenous populations, such as Canada, Aotearoa/New Zealand and the United States. It can be reasonably argued that the absence of treaties between Australian First Nations and colonial and subsequent state governments and the decision to exclude First Nations in the formation of the Australian federation are central factors in the glacial pace of reforms supporting First Nations rights recognition, including progress toward economic self-determination in Australia.

The following subsections provide a brief overview of the nature of and extent to which Indigenous people and First Nations are recognised in the nation forming documents of Australia, Canada, New Zealand and the United States.

[38] In 1963, BHP signed an agreement providing a lump sum payment and royalties to access land on Groote Eylandt (Anindyliakwa Country)
[39] A 'constitutional entity' means any entity or office, however described that is created by a constitution.

United States

Background

Famously initially drafted by the 'Founding Fathers' in 1787 and subject of numerous subsequent amendments, the current Constitution of the United States is structured around several principles that underpin the political framework under which the United States operates, namely:

- Rights of individuals: encompassing inalienable human rights such as freedom of speech, freedom of assembly, freedom of religion and the controversial right to keep and bear arms;
- Federalism: namely the reservation of specific government and law-making powers between the Federal Government and the State Governments;
- Checks and balances: the notion that the three branches of government–executive, judicial and legislative–are separated, but each provided with the power to check the other branches and prevent any one branch from becoming too powerful;
- Popular sovereignty: the notion that all political power is vested in and derived from the people;
- Law and order: the notion that in order for there to be an effective union of the States a system of justice is required;
- Rule of law: the notion that all persons, institutions and entities are accountable to the laws that are publicly promulgated, equally enforced and independently adjudicated;
- Judicial independence: the notion that the judiciary should be independent from other branches of government and that courts should not be the subject of influence from other branches of government.

The United States Constitution

The United States Constitution, its first 10 amendments (that were ratified in 1791 and known collectively as the 'Bill of Rights') and the subsequent 17 amendments between 1795 and 1992 form the highest law of the United States of America.

The following Table 3 summarises the contents of the United States Constitution.

Table 3 – Summary of the United States Constitution

Article (Chapter)	**Summary**
Preamble	Whilst not law itself, the frequently cited preamble to the United States Constitution summarises the principles on which the federation was established: ***We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.***
1.	Establishes the operations of the legislative branch through the establishment of Congress and powers of the House of Representatives and the Senate.
2.	Establishes and confers power on the executive branch of government, which manages the daily operations of the federal government. It sets out key agencies and the appointment of a Secretary for each agency, who reports directly to the President.
3.	Sets out the framework for the judicial branch, identifying the US Supreme Court as the final court in the United States legal system, a process for the US Supreme Court to work with Congress to determine the scope of courts that are subordinate to the Supreme Court and the process for appointing justices.
4.	Prescribes the rights and roles of State governments and their judicial systems.
5.	Prescribes the mechanism and processes for giving effect to changes to the Constitution.
6.	Determines that the constitution and all the laws that are derived from it serve as the supreme law of the United States, including a requirement that all officials in the United States swear an oath to uphold the constitution.
7.	Details that only nine of the original states were required to approve the document for ratifying the United States Constitution.

United States Constitution and its Indigenous peoples

Important to the subject matter of this paper and the seminar that it informs, the distinct status of First Nations as constitutional entities has been established and repeatedly reinforced through treaties, the United States Constitution, Federal statute law and United States Supreme Court jurisprudence.[40]

The sovereignty of First Nations ('Indian tribes') in the United States is recognised by the United States Supreme Court's interpretation of Article 1 Section 8 Clause 3 of the United States Constitution, whereby it has determined that the United States Constitution intended First Nations to be recognised as sovereign governments, in a similar way that it recognises States of the United States and foreign governments as being sovereign.

> ***The Congress shall have the power to... regulate commerce with foreign nations, and among several states, and with the Indian tribes.***
>
> — *Article 1, Section 8, Clause 3–United States Constitution*

Since the early 19th century, the Supreme Court determined that Tribal Governments are not 'states' or 'foreign states' as contemplated by the Constitution, but rather 'domestic dependent nations'. While some legal debate continues, it is arguable that this Constitutional recognition should be understood as establishing a system of tri-federalism, where tribes are understood as constitutionally recognised sovereign entities along with the state and federal governments[41] (sometimes referred to by First Nations people as 'measured separatism'[42]), with many sovereign powers retained from pre-colonisation of North America.[43,44,45] Inarguably, the current state of American First Nations demonstrates at least de facto sovereignty over many areas of the nation (see Appendix 2).

Presently, there are 573 sovereign United States Tribal Nations that have formalised nation-to-nation-like relationships with the United States Federal Government. 40 percent of these are located in Alaska with the balance distributed across 35 other States. The governments of these Tribal Nations have powers to determine the structure of their government, and to pass laws and enforce laws through a tribal justice system. In accordance with the Indian *Self-Determination and Education Assistance Act 1975*, they are resourced by the Federal Bureau of Indian Affairs to provide public services such as social programmes, first-responder services, education, workforce development, energy, land management and infrastructure.[46] In most cases, Tribal Nations have their own constitutions and, by virtue of not being a parties to the United States Constitution, have not been constrained by the restrictions contained in the Bill of Rights or subsequent amendments of the United States Constitution,[47], circumstance that are somewhat curtailed by the passage of the Indian Civil Rights Act (1968).[48] Nevertheless, these Tribal Nations are characterised by the possession of some sovereign rights and jurisdiction (see Appendix 2) over a range of matters of government that impact them.

[41] Maddison, S. (2016), ***Indigenous reconciliation in the US shows how sovereignty and constitutional recognition work together***, The University of Melbourne
[42] Wilkinson IN: Riley, A.R. (2017), Native nations and the constitution: an inquiry into extra-constitutionality', Harvard Law Review Forum, 130(6), 173-199
[43] Johnson v McIntosh, 8, Wheat, 543 (1823)
[44] Cherokee Nation v. Georgia, 20 U.S. (5 Peters)
[45] Worcester v. Georgia (1832)
[46] National Congress of American Indians (2022), Tribal Governance (Tribal Governance | NCAI)
[47] Talton v. Maves, 163. U.S. 376 (1896)
[48] Robertson, L.G. (2001), Native Americans and the Law: Native Americans Under Current United States Law, University of Oklahoma College of Law Library and National Indian Law Library

Canada

Background

The modern Canadian nation was established in 1867 when four British colonies in the North American continent – Nova Scotia, New Brunswick, Quebec and Ontario – decided to unite to form a self-governing confederation[49] under the British Crown. This was enabled by a British Act of parliament, the British North America Act 1867, which set out the framework for much of the operation of the Canadian Government, including its federal structure, the structure of its federal parliament (a House of Commons and Senate), the justice system, and taxation system.

Between 1867 and 1999, six additional provinces – Manitoba, British Columbia, Saskatchewan, Alberta, Newfoundland and Labrador, and Prince Edward Island – joined the confederation, as well as the three territories of the Northwest Territories, Nunavut and Yukon.

The Canadian Constitution

Since 1867, there has been substantive amendment of the foundational law of Canada. As a mixed or 'hybrid', partly written and partly unwritten Constitution, and as formalised in the Constitution Act 1982, the Canadian Constitution consists of the Constitution Act itself, such parts of the former British North America Act 1867 (subsequently renamed the Constitution Act 1867) (as amended) as are retained, the Canadian Charter of Rights and Freedoms, and a number of other pre-confederation acts and unwritten conventions recognised by the Canadian Supreme Court.[50] Notably, the 1982 Act removed any reliance on the British parliament to achieve alteration of the Canadian Constitution, which technically, until this point, had the ability (if not actually ever exercised) to veto the preceding 28 amendments to the Canadian Constitution requested by the Canadian Government since federation.

Post 1982, the Canadian Constitution is as summarised in the following Table 4

Table 4 – Summary of the Canadian Constitution as repatriated

Part	Description
I & II	The preamble that describes the context of the Canadian confederation union formed in 1867.
III	Describes the powers of the executive branch of government.
IV	Describes the powers of the House of Commons and Senate.
V	Describes how the governments of the first for States – Ontario, Quebec, New Brunswick and Nova Scotia operate.
VI	Describes the different powers of the federal and provincial governments.
VII	Establishes the powers of the judicial branch of government
VIII	Details debt and payment arrangements between the colonies that formed part of the terms of 1867 union, as well as wider rules and regulations pertaining to economic arrangements between Canadian governments.
IX	Title 'Miscellaneous' this part addresses issues specific to the provinces of Ontario and Quebec, oaths of office, the languages of parliament, foreign treaties and the appointment of government officers.
X	This part mandates that the Government of Canada build a railroad from Quebec to Nova Scotia, and was repealed upon the completion of the railroad.
XI	Sets out a formula for deciding how many senators the Atlantic provinces are to get after Prince Edward Island and Newfoundland joined Canada.

[49] A confederation refers to a union of states in which the emphasis is on the autonomy of each constituent body, as a opposed to a 'federation' which is a union of states in which the emphasis on the supremacy of the common government.

[50] ***Reference Re Secession of Quebec*** [1998] 2 SCR 217

As part of the 1982 patriation, the incumbent Canadian Government also implemented a Canadian Charter of Rights and Freedoms as Part I of the constitution. This outlines a number of inalienable human rights, liberties and freedoms to be enjoyed by all Canadians. With the force of Constitutional protection, this prevents any Canadian government from passing law that contravenes those inalienable rights, liberties and freedoms, summarised in the following Table 5.

Table 5 – Canadian Charter of Rights and Freedoms

Rights	**Freedoms**
Democratic Rights: right to vote and run for office	Freedom of Conscience and Religion: the freedom to practice any religion and participate in its rituals, as well as avoid activities that violate one's religious beliefs.
Legal Rights: right to liberty, right to be informed of charges when arrested, to be tried quickly and fairly, and be protected from arbitrary or cruel punishment.	Freedom of the Press and other Media of Communication: the freedom to print, publish and distribute ideas in newspapers, magazines, books, television shows, the internet and other mediums.
Official Language Right: the right to receive government services in either English or French	Freedom of Association: the freedom to belong to organised groups or have association with groups and peoples of your choice.
Mobility Rights: the right to enter or leave Canada and live and work anywhere in Canada.	Freedom of Thought, Belief, Opinion and Expression: the freedom to speak or think ideas relating to any perspective on any topic.
Equality Rights: the right to equal treatment regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	Freedom of Peaceful Assembly: the freedom for groups of people to assemble for the purposes of meetings, protests and other public and private gatherings.
Language Education Rights: the right to have one's children educated in the language of their parents.	

The Canadian Constitution and its Indigenous peoples

The relationship between Indigenous (First Nations, Inuit and subsequently Metis) people of Canada and the modern Canadian Federal and Provincial Governments has largely come about as an evolution of arrangements between the British and French colonial powers and specific Indigenous peoples made during the 16th and 17th centuries.

Seeking wealth through predominantly the fur trade, treaties, alliances and commercial arrangements were struck between representatives of the varying colonial powers (including Spain, Britain, France and Portugal) and Indigenous peoples, on relatively equitable terms over the 16th and 17th centuries. However, following war between Britain, France and Spain and the resulting Treaty of Paris in 1763, whereby Britain took dominion of France's colonial territories in Canada, King George III declared by Royal Proclamation specific geographical boundaries for new colonies in Eastern Canada, with all lands external to those boundaries being 'Indian Territories'. In these Territories no settlement or trade was permitted without permission from the Indian Department.

As a result, in order to expand westward, both the Crown and individual provinces were required to enter into treaties with individual Canadian First Nations, a process that occurred over the duration of the 18th, 19th and 20th centuries.[51] This resulted in a large number of individual treaties in which First Nations ceded territory in return for compensation, usually monetary, protected reserves, and issue of perpetual rights for such activities as hunting and fishing.

[51] Barnett, R. et al (2022), ***Marramarra murru First Nations Economic Development Symposium: Symposium Background Paper,*** First Nations Portfolio, Australian National University

As is the case across all the former British colonies examined in this paper, Canadian Governments implemented various legislation and institutions designed to control the lives of Canada's Indigenous peoples, including providing the government with significant powers over Indian lands, resources and governance. However, over time, changes in public attitudes and voter pressure resulted in greater recognition of rights associated with the historical treaties and a pathway to modern treaties (see previous section).

The contemporary Canadian Constitution provides recognition of Indigenous Canadians and their rights inclusive of treaty rights through the following mechanisms:

- Section 25: 'guarantees' that the Canadian Charter of Rights and Freedoms 'shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights that pertain to the aboriginal peoples of Canada', whereby it has been argued that this section confers a unique (or sui generis) constitutional status on Indigenous Canadians in Canadian Law.[52]

- Section 35: which is interpreted as an inherent right to self-government, and states (1) the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed; (2) Aboriginal peoples of Canada includes Indian (First Nations), Inuit and Metis peoples of Canada; (3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired; and (4) Notwithstanding any other provision of the Constitution Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[53]

Aotearoa/New Zealand

Background

The process of colonisation of Aotearoa me Te Waipounamu[54] differs significantly to that of Northern America and Australia. As a result, and as mentioned previously, the treaty between Britain and the Māori performs a more central role in Aotearoa/New Zealand's nation forming documentation that it does of that in any other former British colony discussed in this paper.

The Aotearoa/New Zealand Constitution

Aotearoa/New Zealand did not commence its nationhood with a single constitutional document, but rather derived its sovereignty from what is referred to as an 'uncodified' or 'unwritten' constitution whereby its constitution is said to be the sum of Acts of Parliament, letters patent, jurisprudence and generally accepted practices or conventions that collectively define the main institutions of government and their powers. This likely reflects both the relatively gradual nature of the colonisation of Aotearoa me Te Waipounamu and formation of the Aotearoa/New Zealand nation.

While this uncodified constitution has become somewhat more structured, Aotearoa/New Zealand still lacks an entrenched constitution-the Aotearoa/New Zealand *Constitution Act 1986* provides a formal statement of Aotearoa/New Zealand's constitutional arrangements but can be amended via normal parliamentary legislative procedure. This broad framework of documents and jurisprudence constituting the uncodified constitution does not, in effect, have any paramount authority and so can be supplanted by acts of the New Zealand Parliament.[55]

Proponents of this framework argue that it provides a positive, adaptive constitutional framework, whereby governments can adapt to societal values of the times, unconstrained by judicial interpretation of an entrenched constitution.[56] Others may argue that it places too much authority in the hands of politicians and negates checks and balances afforded by constitutionally enshrined rules controlling the exercise of parliamentary and government powers.

[52] Macklem (2002) IN: Gussen, B. (2017), 'A comparative analysis of constitutional recognition of aboriginal peoples', ***Melbourne University Law Review***, 40(3)

[53] Department of Justice Canada (2013) IN: Reinders, K. (2019), A rights-based approach to Indigenous sovereignty, self-determination and self-government in Canada, College of Social and Applied Human Services, University of Guelph, Ontario, Canada

[54] [Aotearoa me Te Waipounamu' is the Māori term for the landmass that is now the north and south islands of New Zealand, with the term 'Aotearoa' now adopted as the Māori term for the nation of New Zealand.

[55] Morris, S. (2015), 'Lessons from New Zealand: Towards a better working relationship between Indigenous peoples and the state', Australian Indigenous Law Review, 18(2), 67-87

[56] Morris, S. (2015), 'Lessons from New Zealand: Towards a better working relationship between Indigenous peoples and the state', Australian Indigenous Law Review, 18(2), 67-87

The New Zealand Constitution and its Indigenous Peoples

Despite the post Waitangi Treaty history (discussed earlier), the Treaty provided the basis for the relationship between the Government and Māori people, with both acknowledging the underlying land rights of the Māori tribes and their right to both tribal autonomy and representation in the new Parliament. Four Māori seats were instated in the New Zealand Parliament in 1867 and all land-owning Māori men were granted universal suffrage, making New Zealand the first colonised country to grant Indigenous people the right to vote.

Parliamentary representation ensured Māori people remained highly engaged in the politics and policies of New Zealand Governments, with Māori parties and voting blocs key to several historical New Zealand Governments and cabinet position in those governments.

Notwithstanding the inherent flexibility of the New Zealand constitutional framework (as discussed above) and the fact that any doctrine established with respect to that framework can be changed by the will of Parliament through normal parliamentary processes, the Treaty of Waitangi, as well as the *New Zealand Bill of Rights Act 1990,* are considered as foundational documents that underpin important constitutional principles.[57]

The following Table 6[58] summarises the contents of the Treaty of Waitangi.

While many of the commitments made under the Treaty of Waitangi were subsequently abandoned, particularly on the part of the Crown, the document establishes a foundation of shared authority and an agreement pertaining to the relationship between the Māori people and the Crown as to the future of Aotearoa/New Zealand.

The document on its own has little legal standing, as laws can be passed by the New Zealand Parliament that contravene it and it is only enforceable where it is expressly incorporated into legislation. Regardless, the Treaty of Waitangi has underpinned the rights prosecuted by Māori in modern Aotearoa/New Zealand and has been instrumental in the development of various institutions and instruments that provide Māori with influence in relation to the governance of New Zealand, as well as the ability to address breaches of the Treaty and attain compensation for non-performance, including:

Table 6 – Summary of the Treaty of Waitangi

Preamble/Article	Summary
Preamble	Establishes the Treaty's purpose as protecting Māori rights and property, recognising British sovereign authority and establishing law, order and justice for Māori people and subjects of the Crown.
Article I	Declares that Māori chiefs cede their sovereignty and authority absolutely and without reservation to the British Crown (albeit this is disputed as the Māori text of the treaty employs a different interpretation of the notion of 'sovereignty'
Article II	Guarantees the Māori people full exclusive and undisturbed possession of their properties as long as they wish to retain those properties, albeit this is subject to the Māori Iwis yielding to the Crown the exclusive and pre-emptive right of alienation at agreed prices.
Article III	In consideration for entering into the Treaty, the Crown grants the Māori royal protection and imparts all rights and privileges of British subjects on the Māori.

[57] Constitutional Advisory Panel IN: Morris, S. (2015), 'Lessons from New Zealand: Towards a better working relationship between Indigenous peoples and the state', Australian Indigenous Law Review, 18(2), 67-87

[58] Morris, S. (2015), 'Lessons from New Zealand: Towards a better working relationship between Indigenous peoples and the state', Australian Indigenous Law Review, 18(2), 67-87

- **Māori Council:** with its origins in Māori advocacy in the 1800s, the Māori Council has been in place as a statutory instrument since 1962 to consider and promote Māori social and economic advancement, harmonious inter-ethnic relations and to collaborate with the national bureaucracy on Māori affairs in areas such as health, education, employment and cultural revitalisation. It is also charged with consulting with the Māori leadership nationally and making representations to the government regarding Māori affairs. It is a representative structure formed by a collective of Māori committees within each district and distinct from the Māori electoral roll (see below);

- **Waitangi Tribunal and Cultural Recognition:** established in 1975 the Waitangi Tribunal hears and resolves historical breaches of the Treaty of Waitangi, with settlements involving financial and cultural redress and recognition; and

- **Māori reserved seats in Parliament:** arguably the most unique aspect of Māori influence over the governance of New Zealand is seats in Parliament that are reserved for Māori representatives. This has been the case since 1867, when reserved seats in the House of Representatives were established. Māori Members of Parliament are chosen through a Māori electoral roll not attached exclusively to particular Māori territory. Each Māori New Zealand citizen may elect to be registered on the Māori electoral roll or the general electoral roll.

Australia

A brief history

The process of colonisation–or perhaps more accurately conquest-of the Australian continent by Great Britain occurred over a period of 71 years (1788 to 1859). Over no more than two generations of First Nations Australians and European settlers, the lands, waters, sea country and natural resources of around 500 Australian First Nations were progressively subsumed by six British colonies–New South Wales (1788), Tasmania (1825), Western Australia (1829), South Australia (1836), Victoria (1851) and Queensland (1859). It took only another 26 years, or one generation of First Australians and settlers, for a formal process toward federation to commence[59], with many of that generation becoming citizens of a federated Commonwealth of Australia in 1901.

The first iteration of a Constitution for the proposed new nation was introduced in the first Constitutional Convention of 1891, a document that proposed a federation of the six Australian British Colonies and New Zealand. New Zealand subsequently withdrew from the proposed new nation and a second Constitutional Convention was conducted between 1897 and 1898. The resulting proposed Constitution was carried by referendums conducted in each of the six Australian British colonies, with the Commonwealth of Australia proclaimed as a Federation of the now-States in 1901, with the British monarch as head of state.

The Australian Constitution

The Australian Constitution is given effect by the Commonwealth of Australia Constitution Act 1900, an Act of the British Parliament. Among other things, the Act gives effect to the federation of Australian colonies known as the Commonwealth of Australia and enacts the Australian Constitution, which is

> *Part 3: Proclamation of Commonwealth*
>
> ***It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.***

[59] Formation of the Federation Council of Australasia in 1867.

contained in Part 9 of the Act, binding governments, courts and the people of the Commonwealth of Australia to that Constitution. The Act took effect in Australia on 1 January 1901.

The following Table 7 summarises the contents of the Australian Constitution.

Notably, and unlike in other contemporary nations, the Australian Constitution does not incorporate a bill of rights,[60] albeit some rights are referenced (such as the right to compensation on just terms, right to trial by jury for federal offences and freedom of religious rights) and since Federation the High Court has held that a number of implied rights are held by Australian citizens, such as freedom of political communication.

As noted above, of particular importance is Section 51 of the Australian Constitution which lists 40 heads of power on which the Commonwealth Parliament may pass legislation (See Appendix 5).

The Australian Constitution and its Indigenous peoples

First Nations Australians were excluded from the drafting of the Australian Constitution and the formation of the Commonwealth of Australia. Nevertheless, until the 1967 Referendum (see Appendix 3), the original text in Section 51 (xxvi) explicitly mentioned 'the native race' in stating that the Commonwealth did not have power to make laws over them, leaving the State's with jurisdiction over First Australians within their borders. As well, Section 127 explicitly prevented the Commonwealth or States (or 'other part of the Commonwealth') from counting 'aboriginal natives' as part of their populations.

While the 1967 referendum removed the Section 51 limitation and repealed Section 127 entirely, resulting in a document which no longer mentioned Indigenous peoples, it did empower the Federal Government to count First Nations Australians in the National Census and make laws for them. This somewhat diluted the jurisdiction of the States over First Australians, but by no means transferred any jurisdiction to First Nations.

Table 7 – Contents of the Australian Constitution

Chapter	Summary
1. The Parliament	Describes the structure and powers of the Australian parliament and the issues on which the Australian Parliament can make laws, with other areas reserved for the legislatures of the States. Appendix 5 contains the areas under which the Australian Parliament may make laws.
2. The Executive Government	Describes the power of the formal elements of the executive government – the Crown, Governor General and Federal Executive Council.
3. The Judicature	Provides for the creation of the federal courts, including the High Court, which can interpret the law and settle disputes about the Constitution and is the highest court of appeal.
4. Finance and Trade	Financial and trade matters.
5. The States	Details the relationship between the Australian Parliament and the States and Territories and where State and Australian law conflicts, Australian law has primacy.
6. New States	Provides the Australian Parliament with power to override Territory Laws and to make laws for the representation of the Territories.
7. Miscellaneous	Various issues such as the location of the National capital.
8. Alteration of the Constitution	Describes the process for changing wording in the Constitution.

[60] A bill of rights is generally defined as a list of the most fundamental rights that are to be the rights of all citizens of a sovereign state.

The implication of treaty and constitutional recognition for economic self-determination

As is highlighted by the discussion throughout this paper, there is a strong linkage between the historical making of treaties between First Peoples and colonising powers, and latter-day recognition of the existence of the rights of First Peoples in the post-colonial nation states:

- **United States:** Interpretation of Article 1 Section 8 Clause 3 by jurisprudence and legislation has repeatedly confirmed that it was the intent of the authors of the Constitution to recognise First Nations as having a form of sovereign rights. These rights broadly derived from trade relationships and treaties that existed between First Nations, colonising powers and other parties prior to the formation of the United States. This interpretation has underpinned treaties and settlements since proclamation of the United States Constitution.

- **Canada:** the pre-existence of and respect for treaties between Canadian Indigenous peoples and colonial powers is recognised prior to the implementation of the *British North American Act 1867* through the Royal Proclamation of King George III, with the formation of further treaties occurring subsequent to implementation of the Act. Sections 25 and 35 of the more recent patriated Canadian Constitution re-affirm existing and future treaty rights (now termed 'comprehensive land claim agreements').

- **Aotearoa/New Zealand:** in the context of Aotearoa/New Zealand's uncodified constitution, in modern times the Treaty of Waitangi has been recognised by parliaments and the judiciary as a founding document of the nation, both prior to the New Zealand *Constitution Act 1986* and since its proclamation. This has underpinned redress for breaches of treaties and significant formal roles for Māori in the governance of Aotearoa/New Zealand, as well as ongoing treaty settlements between the Crown and the descendants of Māori First Nations, which encompass land rights, compensation and some influence over law-making in Aotearoa/New Zealand.

The constitutional circumstances for Australia are quite different:

- Australian High Court jurisprudence and subsequent federal legislation *(Native Title Act)* recognises that the British claim to the Australian continent under the legal doctrine of ***terra nullius*** is a falsehood. It is a matter of uncontested historical record that approximately 500 distinct First Nations, each with their own legal and governance systems, concept of sovereign rights and respected jurisdictions, inhabited the Australian continent prior to British colonisation.

- No Australian First Nation has ceded its sovereignty to the Crown and no treaties exist between a First Nation and the Crown.

- Whilst as a result of the 1967 amendments language that could be interpreted as discriminatory toward Australian First Nations has been removed from the Australian Constitution, the Constitution in its present form is silent as to Australia's Aboriginal and Torres Strait Islander peoples presence before settlement.

- While *The Native Title Act* and, as discussed below, other mechanisms, provide a basis for agreements pertaining to Australian First Nations lands and settlement arrangements, these are not rights that are enshrined in the Nation's highest law. Indeed, these property rights are expressly subservient to land grants made by the Crown post-settlement and are therefore, by definition, one of the weakest forms of land tenure within Australia's legal system.

The discussion in this paper so far has aimed to make clear that First Nations in the United States, Canada and Aotearoa/New Zealand have a much stronger contemporary legal basis for economic self-determination and as such, unsurprisingly, have made significantly greater progress in this regard to date.

Implementation of the Uluru Statement and treaty and settlement

As discussed in the introduction to this paper, the focus of the discussion contained herein is not the referendum that is required in accordance with Section 128 of the Australian Constitution to give effect to a Voice and the 'full' implementation of the Uluru Statement from the Heart. However, in light of the preceding discussion it would be remiss of this paper and the seminar it informs to not contemplate the potential impact constitutional reform and required statutes may have on the opportunity for Australian First Nations to achieve economic self-determination. This is particularly so given that elements of the operational components of the Uluru Statement from the Heart, whilst yet to be fully designed, emulate instruments and institutions that have enabled higher degrees of economic self-determination in other jurisdictions. For example, The Voice and the Makarrata Commission, as proposed, have potentially strong similarities to the Māori Council and Waitangi Tribunal respectively, which have been instituted in Aotearoa/New Zealand.

There is no reason to doubt the Australian Government's genuine and resolute intent with regards to full implementation of the Uluru Statement. In addition to the abovementioned pledges, the Australian Government has established two working groups– Referendum Working Group and Referendum Engagement Group –comprised of a cross section of respected First Nations leaders representing sections of the Australian First Nations community and key organisations that will advise on the required constitutional amendment and mechanisms to build community understanding, awareness and support for the Constitutional changes required to give effect to The Voice component of the Uluru Statement. The Australian Government has also allocated approximately $240 million to the process.[61]

Constitutional recognition of the Indigenous peoples of a nation state is derived from an understanding that those peoples are a legitimately distinct 'constitutional entity' or constituency within a plural legal order that can be seen to derive its authority from more than one source.[62] While the specific language that will be used in the Constitution to give effect to the Voice is as yet to be finalised and the intricacies of constitutional law are well beyond the scope of this paper,[63] the Voice being enshrined in the Constitution amounts to constitutional recognition of Australia's First peoples. This could provide clear recognition that by virtue of their heritage and circumstance, First Australians have a unique and distinct constitutional status. Given what has been proposed, it may provide an avenue for incorporating Indigenous perspectives into the highest levels of decision-making by government, opening the door for dialogue about other sovereign and jurisdictional rights.

Whilst only advisory in nature, the proposed structure creates a constitutional platform for Aboriginal and Torres Strait Islander people to have a specific role in the formulation of legislation and policies that affect them. This could be said to amount to a limited recognition of Indigenous self-determination, albeit a fairly diluted one under the current proposal.

A Constitutional Expert Group that is supporting the Referendum Working Group has advised the Working Group that based on what is understood of the proposed amendment to give effect to The Voice, its unanimous view is that, on the present language, the proposal would not confer any special rights. It forms this opinion on the basis that anyone can make representations to parliament, it is common practice for individuals and interest groups to do so and that is also common for Parliament to seek those representations when preparing laws. It also bases this view on the idea that nothing in The Voice proposal infringes on these constitutionally implied rights.[64]

The workshop discussion

Drawing on this paper, but primarily from the expertise of the workshop speakers and participants, the workshop will investigate the precise importance of treaties and forms of constitutional recognition (or otherwise) in underpinning optimal compensation for past injustices as a major First Nations asset and as a basis for optimal conditions for economic self-determination. This will include opportunities that may be associated with implementation of the Uluru Statement from the Heart.

[61] First Nations Portfolio (2022), Issues Paper on a First Nations Voice Referendum, Australian National University

[62] Reilley, A. (2006), 'A constitutional framework for Indigenous governance', Sydney Law Review, 28(403)

[63] However, these matters will be explored by constitutional law experts at the seminar.

[64] Twomey, A. 'An Indigenous Voice to Parliament will not give 'special rights' or create a veto', The Conversation, (An Indigenous Voice to Parliament will not give 'special rights' or create a veto (theconversation.com))

Appendix 1: The Uluru Statement for the Heart

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart: Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is ***a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.*** It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.

Appendix 2: Notions of Sovereignty, rights and jurisdiction

Sovereignty and sovereign rights

Central to the link between economic self-determination and constitutional recognition is the political construct of sovereignty and people's rights related to it.

The basic notion of sovereignty – the right of a state or government to govern within a territory – has underpinned statehood and political and legal discourse for centuries, if not millennia. However, as societies and structures of government have evolved, so has the concept of sovereignty, from the 'divine right of kings' to a modern understanding of sovereignty as deriving from the consent of the governed people. This is particularly so in the case of the past century with an increasing incidence of territories seeking independence from de-facto vassalage (such as many constituent nations of the former Union of Soviet Socialist Republics and subsequent Russian Federation) and the formation of economic alliances (such as the European Union). It also, of course includes efforts by Indigenous peoples to reclaim or have recognised varying degrees of sovereignty from the colonial powers which dispossessed or supplanted them from their ancestral lands.

It should be noted when discussing concepts of sovereignty that Western notions of sovereignty – such as those discussed in this appendix - can be different to those of Indigenous peoples. Examples of this are the 'spiritual notion' of sovereignty as expressed in the Uluru Statement from the Heart (Appendix 1) and the issues associated with different interpretations of the Treaty of Waitangi as discussed in the main body of this paper.

As a result, contemporary Western political and legal discourse now incorporates various types and jurisdictional scopes of sovereignty.[65] This, as well as and how sovereignty in whatever form it takes may be recognised, diluted or extinguished is discussed in this Appendix purely for the provision of additional context to the discussion in the main body of this paper.

In broad terms, the theoretical construct of sovereignty can be classified into five subtypes:

- Titular Sovereignty: is sovereignty in name or ceremony only – with holders framed as the notional source of power in a territory, but in their own right not capable of exercising any real or effective power. For example, for Commonwealth nations such as Australia, currently the King in the person of Charles III (or the Governor-General as his representative) is notionally the source of all political and legal power, but by convention, Constitutional and statutory law is unable to exercise any real authority.

- Internal and External Sovereignty: internal sovereignty refers to the power, generally of states, to exercise paramount authority over all persons, groups and institutions within a specific territory. External sovereignty (sometimes termed national or state sovereignty) refers to a state's authority over that territory in relation to other nation states at an international level, including, in the context of colonisation, the colonial power's sovereignty over the colonised territory as against other nations.

- Legal and Political Sovereignty: legal sovereignty is the power held and exercised by the state through the legislation it creates and enforces. Political sovereignty encompasses the sum of all influences in a state which lie behind the ability to exert power, including not only popular sovereignty (see below) but also including cultural, social, and potentially religious or other norms which vest the governing apparatus of the State with ability to effectively exert legal sovereignty without effective challenge.

[65] Dieter, G. (2015), *Sovereignty: the origin and future of a political and legal concept,* Columbia University Press, New York

- **De jure and De Facto Sovereignty:** an entity that has a legal right to control over a particular territory is said to exhibit *de jure* sovereignty, while an entity which holds actual effective control can be referred to as having *de facto* sovereignty. These two categories are not necessarily mutually exclusive with most national governments having both de jure and de facto sovereignty.

- **Popular Sovereignty:** whereby sovereignty is granted by the 'the will of the people'–the basis of a democratic society.

Whilst Australian First Nations have never ceded their sovereignty, the above discussion begs the question as to the contemporary status of sovereign rights of Australian First Nations according to Australian law.

The Mabo High Court decision determined that the basis on which Britain claimed sovereignty over the Australian continent–the doctrine of *terra nullius,* or that the Australia was unoccupied or uninhabited-was demonstrably false. By rejecting the legitimacy of Britain's claim of *terra nullius,* the High Court explicitly recognised that the Australian continent was inhabited by societies with their own notions of sovereignty over defined territories within the Australian continent at the time of colonisation, jurisprudence that is reflected in legislation such as the *Native Title Act,* as well as by predating legislation such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Further, as mentioned above, there is no evidence of any Australian First Nation ceding its sovereignty and a large and rapidly growing body of irrefutable evidence of First Nations sovereignty being subjugated and rejected by colonising governments through means of coercion and violent conquest in the absence of treaty.

Despite this, the *Mabo*[66] and later *Wik*[67] decisions the High Court did not overturn-and indeed could not overturn, it being a creation of the same legal system–the sovereignty of first the United Kingdom, then the Commonwealth of Australia (and its constituent entities) over the continent of Australia. Through effective paramount control over the whole of the continent, and the impossibility of winding back the clock on centuries of dispossession Australia's First Peoples, the never-ceded sovereignty of Australian First Nations has been effectively displaced without redress or compensation by the process of European settlement and colonisation. What has been left to the descendants of those First Nations is a much lesser type of control through land rights in the form of native title as well as other land rights legislation, both of which are enabled by and are subservient to the paramount, sovereign power of the settler State.

Where then does this leave First Nations sovereignty within Australia? Under settler law, First Nations are not seen to hold any legally meaningful sovereignty vis-à-vis the Australian State. However, as the Uluru Statement and the varying forms of treaty activism show, there is perhaps a growing movement towards accommodating a type of First Nations sovereignty, akin to titular, internal or popular sovereignty, within and as part of the modern Australian state.

Jurisdiction

Jurisdiction is a concept related to sovereignty and sovereign rights. In the context of government, jurisdiction refers to the territorial areas and areas of government in which a specific government has rights to make laws and govern.

For example, the Commonwealth of Australia, a sovereign nation, was established by six pre-existing separate and independent colonies of Britain-New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania –agreeing to federate, creating the Commonwealth of Australia in 1901. Through the Australian Constitution, they assigned powers to a central, federal Parliament to make laws with effect across the territories of the Australian states (formerly the colonies that formed the federation). Two Commonwealth territories, the Australian Capital Territory and the Northern Territory, were carved out of New South Wales and South Australia respectively, a decade after federation, and were given limited self-government powers by federal legislation in the late 1970s and 80s.

In accordance with the Australian Constitution, State government jurisdiction extends to making laws with respect to their territories on any matter that is not reserved for the

[66] Mabo v Queensland No. 2 [1992] HCA 23, 175 CLR 1
[67] Wik Peoples v State of Queensland and Others [1997], 141 ALR 129

Commonwealth Government in the Constitution, provided the exercise of that power does not contravene the Constitution and is not inconsistent with Commonwealth laws (per Section 109). Therefore, noting the paramount law-making power of the Commonwealth and exclusive Commonwealth powers set out in the Constitution, the federal and state Parliaments are generally said to exercise 'concurrent' law-making powers. While the Parliaments of the Territories can make laws in areas that have not been reserved for the Commonwealth Government, technically there are no constitutional guarantees to protect the exercise of Territory law-making power from Commonwealth interference. As subordinate jurisdictions given powers of self-government through federal legislation, the Commonwealth may unilaterally make laws that override Territory laws or that directly govern matters within the Territories.

In the context of the Australian federation, each State can be said to have jurisdiction over its territory in any matter of government and law making that has not been expressly assigned to the Federal Government under the Australian Constitution and the Federal Parliament has jurisdiction over all matters assigned to it – for example those enumerated in Section 51 and exclusive powers set out at Section 52, over the entire continent of Australia.

Therefore, in the context of the Australian federation, each State can be said to have unfettered jurisdiction over any matter of government and law making that has not been expressly assigned to the Federal Government, but generally limited by requirements for consistency with Commonwealth laws and to the extent of their land and sea borders. On the other hand, the Federal Government has legislative jurisdiction over the entirety of the Australian continent out to the limit of its territorial seas, but principally only in relation to any matters covered under Sections 51 and 52 (noting that other constitutional provisions extend, limit and qualify subject matter in these sectons). At a practical level, the line of High Court jurisprudence commencing in the 1920 ***Engineer's Case*** through the 1926 ***Roads Case,*** 1942 and 1957 ***Uniform Tax Cases***, the 1971 ***Concrete Pipes Case***, the 1975 Seas and ***Submerged Lands Case***, the 1983 ***Tasmanian Dam Case***, the 1990 ***Incorporation Case***, the 1997 ***Ha & Hammond Cases***, and the 2006 ***WorkChoices Case*** has seen Commonwealth jurisdiction expand dramatically since Federation.

The states and territories of Australia have also established another level of jurisdiction in the form of local governments, of which there are currently approximately 540.[68] Local government is not mentioned in the Constitution and the Commonwealth has no direct relationship with local governments. They are created and regulated by legislation of state and territory Parliaments. The scope of local government authority depends on powers state or territory governments confer upon them through enabling legislation, which is subject to rules of consistency with Commonwealth law and the Constitution.

In the context of First Nations affairs, jurisdiction is an important concept:

- Firstly, providing First Nations governance bodies with varying degrees of jurisdiction over their territories and aspects of laws that impact them has been used to return some notion of sovereign or co-sovereign rights to Indigenous peoples around the world.

- Secondly, despite the underlying foundations of some sovereign rights over colonised territories, Australian First Nations institutions such as Land Councils (where they represent Traditional Owner groups), Prescribed Body Corporates and other, appropriately representative, community leadership organisations have relatively very little jurisdiction over their respective traditional territories or in relation to laws that impact them.

- Thirdly, The Voice, whilst proposed as advisory in nature only, pursues the general notion that First Nations people should have at least a say in laws that impact them and their traditional lands.

[68] Australian Local Government Association

Appendix 3 – A history of Australian constitutional reform

The process for constitutional amendment

The process for amending the Australian Constitution is set out in Section 128 of the Constitution whereby a proposed amendment can only be adopted if:

1. It is passed by an absolute majority of the House of Representative (i.e., at least 76 of the 150 Members of Parliament must vote in favour of the proposed amendment) and an absolute majority of the Senate (i.e., at least 39 of the 76 Senators must vote in favour of the proposed amendment);[69] and then

2. Put to a ballot of the Australian electorate whereby the outcome of that ballot is:
   a. A majority of all Australian voters vote in support of the amendment; and
   b. A majority of voters in a majority of the States – New South Wales, Victoria, Tasmania, South Australia, Queensland and Western Australia – vote in support of the proposed amendment.

Historically, the conduct of referendums was regulated by the *Referendum (Constitution Alteration) Act* 1906 (Cth). Section 6A of that Act enabled a majority of the Members of Parliament who voted for the proposed amendment to authorise an argument in favour of the proposal of up to a maximum of 2,000 words. Those Members of Parliament who voted against the proposed amendment were similarly permitted to authorise their arguments against the proposed amendments, with both the 'for' and 'against' arguments submitted to the Chief Electoral Officer for distribution to all registered Australian voters by post. While the *Referendum (Constitution Alteration) Act 1906* (Cth) was repealed by the *Referendum (Machinery Provisions) Act 1984* (Cth), Section 11 of this new and current Act allows for a similar process for arguments 'for' and 'against' the proposed amendment to be provided to voters.

Lessons from relevant case studies in Australian constitutional reform

Historical outcomes from Constitutional reform referendums

Even if supported by the Australian parliament, executing a referendum that delivers the result prescribed by Section 128 for adoption of a proposed amendment is challenging – more than 80 percent of proposed amendments to the Australian Constitution that have been taken to referendum have failed. Since its proclamation, 44 proposals to amend the Constitution have been put to referendum by the Australian parliament in accordance with the abovementioned process. Only eight of these proposed amendments have met the prescribed referendum outcome for adoption.

Many of the earlier proposals to amend the Constitution took the form of parliamentary responses to decisions of the Australian High Court that Parliament deemed to be restrictive interpretations of the Commonwealth's Constitutional powers, and therefore amendment was necessary to enable the Australian Parliament to legislate as intended by the former Colonies through Federation. Several proposals have been put to referendum on more than a single occasion, including:

- Five attempts to extend the corporations power in Section 51;
- Six attempts to extend the Commonwealth's power over employment;
- Four attempts to amend the Constitution to ensure that elections for the Senate and the House of Representatives are held at the same time;
- Extension of Commonwealth power over monopolies; and
- Extension of Commonwealth power over rents and prices.

The following Table 8[70] summarises the outcomes of historical referenda to amend the Australian Constitution.

[69] Section 128 also contains a deadlock provision which enables a referendum to pass with a majority vote taken twice in one House.
[70] Australian Parliament House Standing Committee on Legal and Constitutional Affairs, Report on Constitutional Change, Part 2: History of Australian Referendums

Table 8 – Australian Constitutional Referendum Outcome (1906 to 1999)

Year	Proposal	Government		Percentage of total vote in favour of the proposed amendment							
			AUS	NSW	VIC	TAS	SA	QLD	WA	NT	ACT
1906	Senate elections	Protectionist (Deakin)	82.7	83.8	83.1	81.3	87.0	76.8	78.9		
1910	State debts, surplus revenue (finance)	Fusion (Deakin)	49.0	47.4	45.3	60.0	49.1	54.6	61.7		
1910	State debts; surplus revenue	Fusion (Deakin)	54.9	33.3	64.6	81.0	73.2	64.6	72.8		
1911	Trade & commerce; Nationalisation of monopolies	ALP (Fisher)	39.4	36.1	38.6	42.1	38.1	43.8	54.8		
1911	Trade & commerce; Nationalisation of monopolies	ALP (Fisher)	39.9	36.7	38.9	42.4	38.4	44.3	55.8		
1913	Railway disputes	ALP (Fisher)	49.1	46.7	48.8	45.0	51.3	54.2	52.4		
1913	Industrial matters	ALP (Fisher)	49.3	46.9	49.0	45.2	51.4	54.4	52.7		
1913	Corporations	ALP (Fisher)	49.3	46.8	49.1	45.1	51.3	54.3	52.8		
1913	Nationalisation of monopolies	ALP (Fisher)	49.3	46.8	49.0	45.2	51.3	54.2	53.2		
1913	Trade & commerce	ALP (Fisher)	49.4	46.9	49.1	45.2	51.3	54.3	52.9		
1913	Trusts	ALP (Fisher)	49.8	47.1	49.7	45.4	51.7	54.8	53.6		
1919	Nationalisation of monopolies	Nationalist (Hughes)	48.6	39.3	63.3	34.1	25.5	56.9	54.0		
1919	Legislative powers	Nationalist (Hughes)	49.7	39.9	64.7	33.4	25.3	57.4	51.7		
1926	Essential services	Nat-CP (Bruce)	42.8	50.4	35.6	48.6	31.3	50.6	25.9		
1926	Industry & commerce	Nat-CP (Bruce)	43.5	51.5	36.2	44.9	29.3	52.1	29.3		
1928	State debts	Nat-CP (Bruce)	74.3	64.5	87.6	66.9	62.7	88.6	57.5		
1937	Marketing	UAP (Lyons)	36.3	31.7	46.6	21.9	20.8	38.8	27.8		
1937	Aviation	UAP (Lyons)	53.6	47.3	65.1	38.9	40.1	61.9	47.6		
1944	Post-war reconstruction & democratic rights	ALP (Curtin)	46.0	45.4	49.3	38.9	50.6	36.5	52.3		
1946	Industrial employment	ALP (Chifley)	50.3	51.7	52.1	41.4	48.2	43.4	55.7		
1946	Marketing	ALP (Chifley)	50.6	51.8	52.4	42.5	48.7	43.7	56.2		
1946	Social services	ALP (Chifley)	54.4	54.0	56	50.6	51.7	51.3	62.3		
1948	Rents and prices	ALP (Chifley)	40.7	42.2	44.6	35.4	42.2	30.8	38.6		
1951	Communists & communism	Lib-CP (Menzies)	49.4	47.2	48.7	50.3	47.3	55.8	55.1		
1967	Parliament	Lib-CP (Holt)	40.3	51.0	30.9	23.1	33.9	44.1	29.0		
1967	Aboriginals	Lib-CP (Holt)	90.8	91.5	94.7	90.2	86.3	89.2	80.9		
1973	Incomes	ALP (Whitlam)	34.4	40.3	33.4	28.3	28.3	31.7	25.2		
1973	Prices	ALP (Whitlam)	43.8	48.6	45.2	38.2	41.2	38.5	31.9		
1974	Local Government Bodies	ALP (Whitlam)	46.8	50.8	47.4	43.7	42.5	43.7	40.7		
1974	Democratic elections	ALP (Whitlam)	47.3	50.5	47.7	40.8	44.1	43.7	42.9		
1974	Mode of altering the Constitution	ALP (Whitlam)	48.0	51.3	49.2	40.7	44.3	44.3	42.5		
1974	Simultaneous elections	ALP (Whitlam)	48.3	51.1	49.2	41.4	47.1	44.3	44.1		
1977	Simultaneous elections	Lib-NP (Fraser)	62.2	70.7	65.0	34.3	66.0	47.5	48.5		
1977	Senate casual vacancies	Lib-NP (Fraser)	73.3	81.6	76.1	53.8	76.6	58.9	57.1		
1977	Referendums	Lib-NP (Fraser)	77.7	83.9	80.8	62.2	83.3	59.6	72.6		
1977	Retirement of judges	Lib-NP (Fraser)	80.1	84.8	81.4	72.5	85.6	65.2	78.4		
1984	Interchange of powers	ALP (Hawke)	47.1	49.0	49.9	34.6	45.9	41.7	44.3	47.7	56.1
1984	Terms of Senators	ALP (Hawke)	50.6	52.9	53.2	39.3	50.0	45.6	46.5	51.9	56.5
1988	Rights and freedoms	ALP (Hawke)	30.8	29.7	33.4	25.5	26.0	32.9	28.1	37.1	40.7
1988	Parliamentary terms	ALP (Hawke)	32.9	31.7	36.2	25.3	26.8	35.2	30.7	38.1	43.6
1988	Local Government Bodies	ALP (Hawke)	33.6	31.7	36.1	27.5	29.9	38.3	29.8	38.8	39.8
1988	Fair elections	ALP (Hawke)	37.6	35.6	40.1	28.9	30.6	44.8	32.0	43.0	52.0
1999	Preamble	Lib-NP (Howard)	39.3	42.1	42.5	35.7	38.1	32.8	34.7	38.5	43.6
1999	Establishment of a Republic	Lib-NP (Howard)	45.1	46.4	49.8	40.4	43.6	37.4	41.5	48.8	63.3

Relevant case studies in Australian Constitutional Reform

Of the 44 attempts by Australian Governments to amend the Constitution, the most relevant as comparison case studies to the proposed amendments that are the subject of this paper are:

- 1967 successful referendum to remove language from the Constitution that is discriminatory towards First Australians and to enable the Federal Government to make laws for First Nations People and count them in the Australian population;

- 1999 proposed inclusion of a preamble in the Australian Constitution that recognises Australia's First peoples; and

- 1999 proposal to amend the Australian Constitution, repealing its status as constitutional monarchy and establishing the nation as a republic

While none of these are directly comparable to the amendments currently being considered, the first is relevant in so far as it pertains to recognition of First Australians and laws pertaining to them, the second is relevant in so far as it is a form of constitutional recognition of First Australian and the third is relevant because it proposes a change to the system of government, albeit arguably a far more significant change than that which would be given effect by the proposed Voice.

1967 Referendum

The 1967 Referendum is widely recognised as a historical turning point in relations between Australia and its First Peoples. Its proposed purpose was to remove any ground for the belief that the Australian Constitution discriminates against people of the Aboriginal race. It was to achieve this through two amendments:

- Amendment to Section 51 (xxvi) to remove the words 'other than the Aboriginal race in any State'; and

- Deletion of Section 127 which stated that 'Aboriginal natives' were not to be counted in determining the population of the nation.

If carried, the amendment would have, in addition to reducing the racist nature of the Constitution, two practical outcomes. Firstly, it enabled the Commonwealth Government to make laws pertaining specifically to First Nations people and secondly, it allowed the Australian Bureau of Statistics to count First Nations people in the Australian population.

The specific question that was put to the referendum was:

Do you approve the proposed law for the alternation of the Constitution entitled 'An Act to alter the Constitution to omit certain words relating to the people of the Aboriginal race in any state so that Aboriginals are to be counted in the reckoning of the population'?

This question was put to referendum together with a second, completely unrelated question pertaining to providing constitutional ability of a Parliament to increase the number of members of the House of Representatives without necessarily increasing the number of Senators in the Senate.

As summarised in the above Table 7, while the unrelated question was not carried, the question pertaining to the status of First Nations people in the Constitution was the most successful referendum to date. The proposed amendment to the Constitution was passed unanimously by both the House of Representatives and the Senate and as such a 'Against case' in accordance with Section 6A of the *Referendum (Constitution Alteration) Act 1906* (Cth) was not issued to voters. The 'For case' that was issued to voters in accordance with this Act made three key arguments for the amendment:

- The proposed amendments removed words from the Constitution that discriminate against Australia's First Peoples (at the time termed the 'Aboriginal race');

- The proposed amendments provided an avenue for the Federal Government to cooperate with the States to ensure that actions are taken in the best interests of First Nations Australians; and

- Common sense and Australia's international reputation required that Australia's First Peoples should be counted in the national Census.

Although not explicitly called out by the Commonwealth at the time, a further factor highlighted in public debate and which proved to be highly influential was that, until that time, s51(xxvi) had effectively granted to State governments

exclusive authority to legislate with respect to First Nations peoples. This State monopoly was responsible for enabling much of the worst excesses of the historically poor treatment of Australia's First Peoples by the former Colonies and subsequently state governments, which continued until the Constitution was amended in 1967. Indeed, following Federation, the wording of the Constitution as enacted in 1900 effectively changed the legal status of the First Peoples inhabitants of Australia from British subjects to wards of the new States and subject to their varying 'Aboriginal protection' laws.

1999 Referendum: The preamble

The 1999 referendum concerning the proposal to change Australia from a constitutional monarchy to a republic, also included a second question about support for a preamble in the Australian constitution. This is relevant to this paper because, among other things, it proposed to acknowledge Australia's First Peoples as a key component of the case for the preamble. While there were numerous previous drafts considered by the Howard Government, the final proposed draft of the preamble read as follows (emphasis added):

With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good.

We the Australian people commit ourselves to this Constitution:

- *Proud that our national unity has been forged by Australians from many ancestries;*
- *Never forgetting the sacrifices of all who defended out country and our liberty in time of war;*
- *Upholding freedom, tolerance, individual dignity and the rule of law;*
- *Honouring Aborigines and Torres Strait Islanders, the nations first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country;*
- *Recognising the nation building contribution of generations of immigrants;*
- *Mindful of our responsibility to protect our unique natural environment;*
- *Supportive of achievement as well as equality of opportunity for all;*
- *And valuing independence as dearly as the national spirit which binds us together in adversity and success.*

The specific question that was put to referendum was:

A proposed law: to alter the Constitution to insert a preamble. Do you approve of this proposed alternation?

Despite the Australian Labor Party voting against the preamble in Parliament (based on the belief it was inadequate), it agreed at a subsequent Caucus meeting not to oppose the amendment, mainly as the result of a view that its opposition to the preamble may undermine the chances of a successful referendum on the republic question.

An against case was authored by a single Independent Member of Parliament who was the only Member officially opposing the Preamble and desiring in accordance with Section 11 of the *Referendum (Machinery Provisions) Act 1984* (Cth) to author a 'against case'. Its key points were as follows:

- The preamble is premature in that it is uncertain at the time of voting whether the proposal for Australia to become a republic will succeed and in any event, has not been the subject of proper public consultation;
- The draft preamble has been authored by politicians, potentially has unknown legal implications and may prove divisive; and
- The preamble question is part of a political game and is being used as a distraction from the more impactful question pertaining to the formation of a republic.

The 'For case' authored in accordance with Section 11 of the *Referendum (Machinery Provisions) Act 1984* (Cth) made the following key points:

- The preamble will enable the Australian people to highlight the values and aspirations which unite Australians in support of their Constitution;

- It will make an important contribution to the process of national reconciliation between First Nations Australians and other Australians; and

- It will recognise at the end of the first century of Federation, the enduring priorities and influences that uniquely shape Australia's sense of nationhood

As summarised in Table 7 above, the proposed preamble failed to achieve a majority of the national vote and a majority of the vote in any of the States.

1999 Referendum: A Republic

The referendum question accompanying the above discussed proposal for a preamble in the Constitution represented arguably the most significant change in structure of the Australian nation since Federation. If successful, it would have altered the underlying structure of government such that Australia became a republic, independent of the British Monarchy. This proposal was the subject of a significant independent campaign that started a decade prior under the Australian Republic Movement and was eventually spearheaded by a future Australian Prime Minister, the Hon. Malcolm Turnbull.

The specific question read as follows:

A proposed law: to alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the Commonwealth Parliament. Do you approve of this proposed alteration?

The 'For case' made in accordance with Section 11 of the *Referendum (Machinery Provisions) Act 1984* (Cth) made the following key points:

- Becoming a republic is about having an Australian as the nation's head of state to represent Australian views and values, and becoming independent of the British monarchy;

- The proposed changes to the constitution, daily operations of the Australian Parliament and daily life for Australian people that are required to give effect to a republic under the proposed model will be minor;

- The responsibilities and office of the President will be little different to that those of the current Governor-General; and

- The appointment of a President will be more democratic than that of the current Governor General, but the President will not be a politician.

- The 'Against case' made in accordance with Section 11 of the *Referendum (Machinery Provisions) Act 1984* (Cth) made the following key points:

- The proposed republic is flawed, especially with respect to the way the President would be appointed and potentially dismissed;

- Australia is a prosperous, stable nation and there is no need to change its framework of government – the proposed change may have unknown consequences and result in instability; and

- The proposed model does not at a practical level add to Australia's independence.

As summarised in the above Table 7, the proposal to change Australia's framework of government to that of a republic was defeated by the national vote and the vote in each of the States.

Some general observations

An analysis of the above Table 7 and case studies provides the following general observations:

- **The vast majority of proposed amendments to the Constitution that have been taken to referendum have failed**
  As discussed above, over 80 percent of attempts to amend the Constitution have failed to meet the requirements of Section 128 for an amendment to be implemented.

- **Successful amendments typically receive resounding broad support from the electorate**
  Six of the eight proposed amendments that have been carried achieved national polling in excess of 70 percent. Further, of the eight proposals to amend the Constitution

that have met the requirements of Section 128, only one (1910: State debts; surplus revenue) has not met with majority support in all States.

- **Conservative governments have prosecuted the vast majority of successful referendums**
  To date, conservative Australian Governments (Fusion under Deakin; National-Country Party under Bruce; Liberal-Country Party under Holt; and Liberal-National Party under Fraser) have prosecuted seven of the eight referendums that have met the requirements under Section 128 for the amendment to be carried. The only successful referendum held under an Australian Labor Party Government was the 1946 amendment for Social Services under the Chiefly Government.

- **There is strong correlation between the presentation of a 'No' case and failure to meet the requirements of Section 128**
  Where referendums have utilised Section 6A of the *Referendum (Constitution Alteration) Act 1906* (Cth), or subsequently Section 11 of the *Referendum (Machinery Provisions) Act 1984* (Cth), to present a written case to voters that argues against the proposed amendment, the referendum has failed to achieve the requirements for the proposed amendment to be implemented in accordance with Section 128 of the Constitution.

- **Proposal to shift jurisdiction with respect to law making in matters of the economy and trade regulation have been the least popular**
  Proposed constitutional amendments that provide the Federal Government with extended powers to regulate matters associated with the economy and trade have received the lowest levels of voter support.

- **The outcomes of proposed amendments pertaining to the status of First Nations Australians have been mixed**
  The most successful referendum to date has been the 1967 referendum conducted under the Holt Liberal-Country Party government. The proposed amendments which had the effect of removing language in the Constitution that discriminates against First Nations people, allowed the Federal Government to make legislation for First Nations people and allowed the First Nations people to be counted in the National Census received support from over 90 percent of the National vote and votes in the States of New South Wales, Victoria and Tasmania and over 80 percent of the votes in the other three States.

  However, proposed amendments in 1999 to include a Preamble in the Constitution that (among several other things) recognised Australia's First Peoples did not receive a majority vote nationally or in any of the States. While these are not directly comparable amendments (in terms of both specificity and immediate impact), it is important to note the significant difference in voter response. These are discussed in further detail below.

Appendix 4: Settlements under the Victorian and Western Australian Agreement-making Regimes

Western Australia

Settlement	Settlement Package	Beneficiaries	Instrument	Other information
Yamatji Nations Settlement	$442 million in land, housing package, water rights, business support and investment, rentals from mining tenure and Oakajee industrial estate, including: · $195m for a Future Fund · $65m Economic Development Fund · $48.8m administration fund · $16.3m for the Land Fund · $5m over 5 years for the Business Development Unit · Ongoing revenue from on-country mining tenures · Yamatji Land Estate with 134,000 ha of reserve and 14,500ha of freehold, 8 Aboriginal Land Trust and money for land holding costs · Commercial and Industrial land valued at $8.7m Co-managed conservation estate (470,000ha) and funded ranger positions with $22m over 10 years $0.512m for restoration of culture and heritage management $15m housing package including social housing, government employee housing and interest in future developments Tourism funding to support Yamatji ventures in Geraldton and the Mid-West $21.3m for the creation of the Strategic Aboriginal Water Reserve of 25 gigalitres per year for domestic or commercial use or trade	9,000 $49,111 per beneficiary		
South West Native Title Settlement	Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016 (WA) $1.3 billion across six ILUAs invested over time in cash and land including: · Noongar Boodja Trust · Noongar Land Estate · Noongar Land Fund · Noongar housing program · Capital works program Co-managed conservation estate Land access passes to access Crown lands Community Development Framework Noongar Economic Participation Framework	30,000 $43,333 per beneficiary		

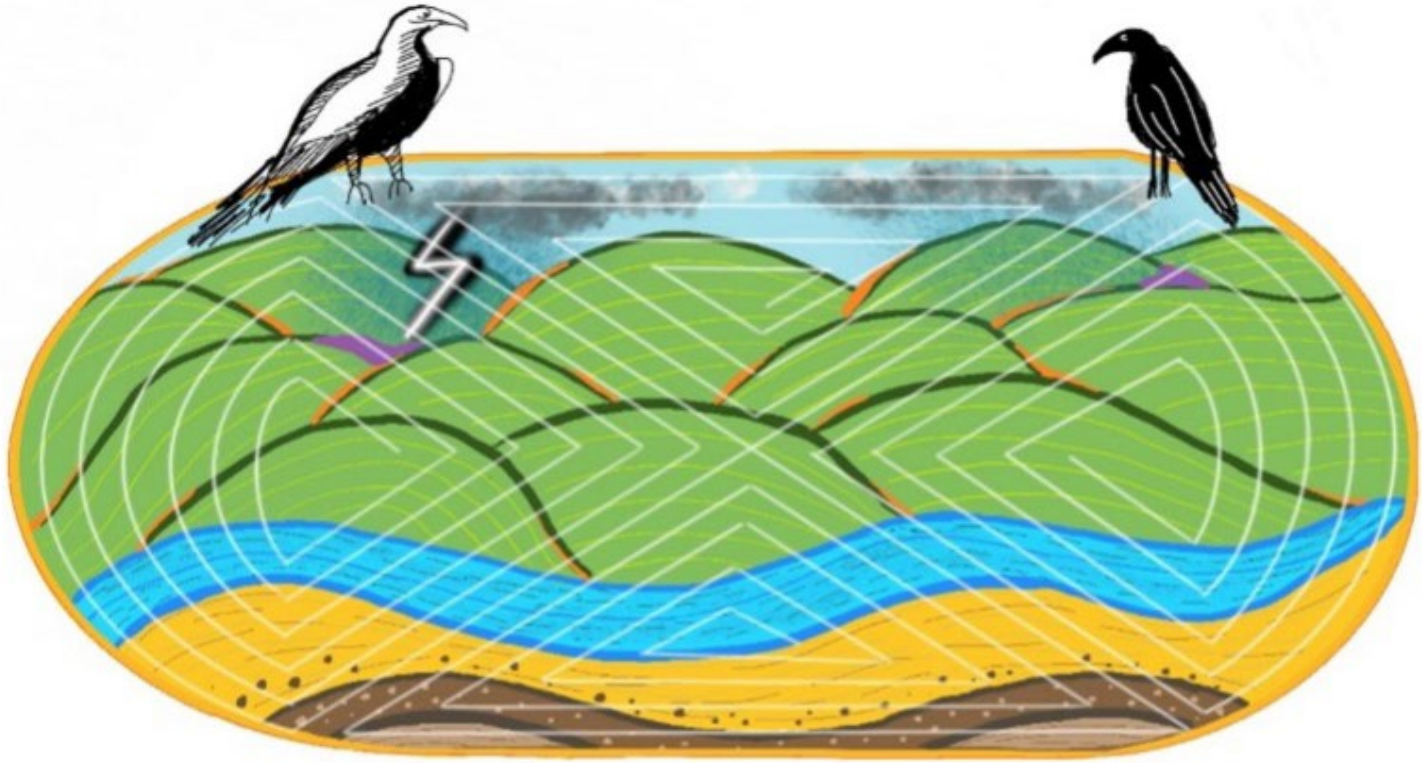
Victoria

Settlement	Settlement Package	Beneficiaries	Instrument	Other information
The Wotjobaluk, Jaadwa, Jadaawadjali, Wergaia and Jupagulk consent determination Wimmera Clans Barengi Gadjin Land Council	Non-exclusive native title rights to hunt, fish, gather and camp for personal, domestic and non-commercial communal needs over traditional lands on the Wimmera River. ILUA executed that saw surrender of native title rights and interest in exchange for the transfer, by private treaty, of freehold title to three parcels of culturally significant crown land, some recognition, cash and cooperative management over conservation estate.		Originally a consent determination under the ***Native Title Act 1993*** in 2005. In 2017 commenced enhancement of the agreement under the ***Traditional Owner Settlement Act 2010 (***Vic).	The first settlement in Victoria to recognise Native Title.
The Gunaikurnai consent determination Gunaikurnai Land Waters Aboriginal Corporation (GLWAC)	Recognition of Traditional Owner Rights to access Crown land within the determination for traditional purposes & associated Natural Resources Agreement to do this $12 million in funding: · $10m to Trust to be distributed by GLWAC · $2m to establish and operate GLWAC Land agreement granting Aboriginal title over 10 national parks and reserves (46,000ha) to be jointly managed Traditional Owner Natural Resources Agreement Cultural strengthening commitments	600 members of corporation	***Traditional Owner Settlement Act 2010 (V***ic) in 2010. Understood that re-negotiation is underway.	First settlement under the ***Traditional Owner Settlement Act 2010 (***Vic). In 2018, signed a Joint Management Plan over 10 jointly managed parks and reserves to supersede the 2010 plan. In 2020 an agreement between GLWAC and Victorian Government to receive 2 gigalitres of unallocated water in the Mitchell River, representing the first time TOs were allocated water ownership in a river system
Dja Dja Wurrung Recognition and Settlement Agreement Dja Dja Wurrung Clans Aboriginal Corporation	Recognition statement Cultural recognition measures Funding agreement for a total of $9.65m: · $5m to Trust · $3.25m to economic development funding · $0.9m to core operational funding · $0.5m in guaranteed contracts for works on public lands for the Dja Dja Wurrung Enterprises entity Land agreement · Two freehold property titles (56.2 ha) · Six parks and reserves as Aboriginal title (47,523 ha) TO Land Management Agreement Land Use Activity Agreement Natural Resource Agreement		***Traditional Owner Settlement Act 2010 (***Vic) in 2013.	
Taungurung Recognition and Settlement Agreement Taungurung Land and Waters Council Aboriginal Corporation (TLWAC)	Recognition and Settlement Agreement Funding agreement of $34m: · $0.32m in start-up funding for TLWAC · $25.6m into trust · $7.9m for joint management planning and operations including establishing Traditional Owner Land Management Board and employment of rangers Land agreement for transfer of up to 5 freehold title public land parcels, nine parks and reserves Land Use Agreement Natural Resource Agreement A Traditional Owner Land Management Agreement for joint management of parks and reserved granted as Aboriginal title ILUA that surrenders the Taungurung people's native title rights and interests, except over freehold title that is transferred		***Traditional Owner Settlement Act 2010*** (Vic) in 2020.	

Appendix 5: Section 51 of the Australian Constitution

The [Commonwealth] Parliament shall, subject to this Constitution, have power12 to make laws for the peace, order, and good government of the Commonwealth with respect to:

i. trade and commerce with other countries, and among the States;
ii. taxation; but so as not to discriminate between States or parts of States;
iii. bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;
iv. borrowing money on the public credit of the Commonwealth;
v. postal, telegraphic, telephonic, and other like services;
vi. the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;
vii. lighthouses, lightships, beacons and buoys;
viii. astronomical and meteorological observations;
ix. quarantine;
x. fisheries in Australian waters beyond territorial limits;
xi. census and statistics;
xii. currency, coinage, and legal tender;
xiii. banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;
xiv. insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;
xv. weights and measures;
xvi. bills of exchange and promissory notes;
xvii. bankruptcy and insolvency;
xviii. copyrights, patents of inventions and designs, and trade marks;
xix. naturalization and aliens;
xx. foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;
xxi. marriage;
xxii. divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;
xxiii. invalid and old-age pensions;
xxiii. (A). the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;
xxiv. the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;
xxv. the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;
xxvi. the people of any race for whom it is deemed necessary to make special laws;
xxvii. immigration and emigration;
xxviii. the influx of criminals;
xxix. external affairs;
xxx. the relations of the Commonwealth with the islands of the Pacific;
xxxi. the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;
xxxii. the control of railways with respect to transport for the naval and military purposes of the Commonwealth;
xxxiii. the acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;
xxxiv. railway construction and extension in any State with the consent of that State;
xxxv. conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;
xxxvi. matters in respect of which this Constitution makes provision until the Parliament otherwise provides;
xxxvii. matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States,15 but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;
xxxviii. the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;
xxxix. matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.



Yukeembruk Yibaay-maliyan mayiny (The Crow and Eagle-hawk People)

Crow and Eagle-hawk men lived at opposite ends of the Brindabella (Goondawarra) mountain range. Between the two camps lived two sisters, who were under the protection of Yibaay-Maliyan because they were related to him. Yukeembruk wished to marry the sisters, but they were forbidden to him by kinship laws. Upset by Yibaay-maliyan's refusal to approve marriage, Yukeembruk decided to kill his enemy's son. While Yibaay-maliyan was out hunting he tricked the boy to eat and drink until his belly was full, then he speared him. Yibaay-maliyan returned from hunting early as he knew something was wrong. While hunting he missed two wallabies, which had never happened before. Yukeembruk tried to make Yibaay-maliyan believe that many men came to camp, killed the boy and wounded Yukeembruk himself in the leg. The two men dug a burial site, but Yibaay-maliyan who had not been deceived by the story, tricked Yukeembruk into testing the size of the grave, placed his boy's body on top of him and buried the murderer alive. Yukeembruk dug his way out like a wombat but was transformed into a Crow. Yibaay-maliyan's camp was struck by lightning and he was transformed into an Eagle.

Paul 'Girrawah' House
Senior Community Engagement Officer, First Nations Portfolio
Ngambri, Ngunnawal and Wiradyuri Custodian

Australian National University | First Nations Portfolio

First Nations Portfolio
+61 2 6125 0722
anufirstnations.com.au
The Australian National University
Canberra ACT 2600 Australia

CRICOS Provider No. 00120C

Australian National University | First Nations Portfolio