AUSTRALIA'S RECONCILIATION PROCESS IN ITS INTERNATIONAL CONTEXT: RECOGNITION AND THE HEALTH & WELLBEING OF AUSTRALIA'S ABORIGINAL & TORRES STRAIT ISLANDER PEOPLES

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I Introduction

Australia's reconciliation process is unlike any other in the world. Eschewing the twin pillars of truth and justice – the foundation of reconciliation movements globally – post-2001 the debate has almost singularly focused on citizenship rights.[1] Reconciliation Action Plans (RAPs) developed by Reconciliation Australia (the post-reconciliation-era entity created to continue the work of reconciliation) are targeted at improving the disparity in employment outcomes in the private and public sector. However, this approach has ostensibly replaced the 'unfinished business' between the state and Aboriginal and Torres Strait Islander peoples, as the core business of reconciliation.[2] The focus on citizenship rights and statistical equality – particularly evident in the post-Howard era – as opposed to Indigenous rights, has permitted the nation to delay and avoid the uncomfortable conversations required to address the anguished disengagement of the first peoples.[3] The proliferation of RAPs to the exclusion of the bread and butter of reconciliation movements, truth and justice, is uniquely Australian. It continues despite the displeasure of many with the current reconciliation agenda and RAPs supplanting the aspirations of Aboriginal and Torres Strait Islander peoples which are the genesis of the reconciliation movement. The taxpayer-funded campaign for constitutional recognition, Recognise, similarly animates disquiet within the indigenous polity that Australia is seeking to recognise in the Constitution.[4]

How is it that the Indigenous polity, in a Western liberal democracy like Australia, can be so marginalised and its opinions have so little traction in the national conversation? How did it come to this? There is no simple explanation. In part, to understand requires a forensic knowledge of Aboriginal history that few have the time or the inclination to master. But the aim of this article is to suggest at least a partial answer. For the past five years I have served as an expert on the United Nations Permanent Forum on Indigenous Issues and I have learned firsthand about the many and varied ways in which Western and non-Western liberal democracies 'recognise' indigenous polities. It is no exaggeration to say that Australia lags behind the rest of the world in structural accommodation of their first peoples. This is not the end of the story because in addition, we do not have in place the types of structural measures adopted by other United Nations member states to temper the majoritarianism of the ballot box or scrutinise the quality of decision-making on indigenous law and policy between elections, such as a charter of rights. These dual limitations, no indigenous structural accommodation and no entrenched accountability measures, combine to render even more acute the marginalisation of indigenous peoples in Australia.

In this article I want to explore my partial answer focusing on the proposition put forward by the Prime Minister's Expert Panel on the Recognition of Aboriginal and Torres Strait Islanders in the Constitution[5] and the Royal Australian & New Zealand College of Psychiatrists,[6] to name a few, of the link between recognition and a concomitant improvement in Indigenous health and well-being more broadly. More needs to be done to explain why this is the case. It is not sufficient to simply make the assertion that recognition *will* improve the health and well-being of Aboriginal and Torres Strait Islander peoples. Understanding the link, however, is crucial to the recognition debate because it explains why it is indigenous peoples seek *substantive* reform of the Constitution not symbolic or minimalist reform. It also explains why Indigenous peoples are likely to walk

away from constitutional reform if it is merely minimalist, conservative or incremental change, rejecting the notion that *something* is better than nothing.

If it is the case that substantive reform is too ambitious for Australia, then it is important to understand better why it is that Aboriginal people continue to pursue substantive recognition when the conventional constitutional calculus of successful referendums, eight out of forty-four since 1901, would appear to render such an amendment unachievable. I seek to explain this in 3 ways: Part II explains Australia's exceptionalism in the domestic protection of human rights; Part III discusses Australia's exceptionalism when it comes to accommodation of indigenous polities; and Part IV explores Australia's exceptionalism in the reconciliation process. By exploring these three factors I hope to provide a clearer picture, from a legal perspective, of why it is that substantive recognition is necessary to improve the health and well-being of Aboriginal and Torres Strait Islander peoples.

II Exceptionalism in Australia's Human Rights Framework

A Human Rights in Australia

Australia is a party to all of the significant international human rights instruments including those on civil and political rights, economic, social and cultural rights, rights of the women, rights of the child, rights of persons with disabilities.[7] This means Australia also submits itself to the scrutiny of the United Nations supervisory committees of each of the conventions, that periodically review Australia's implementation of such rights with input from civil society. In addition Australia has signed the relevant optional protocols, which are ancillary agreements which permit individual complaints. However, the majority of the international human rights agreements that Australia is party to, are, in fact, not enshrined in statute but rather are scheduled to the *Australian Human Rights Commission Act 1986* (Cth), with only a select portion of rights whose violation can trigger the complaint action that falls under the Commission's purview.

Australia has a small number of expressly guaranteed constitutional rights such as in section 80, the 'right to trial by jury' if charged with a Commonwealth indictable offence; although that right has been deemed 'practically worthless' by constitutional lawyers, having been limited in scope via High Court interpretation.[8] But in the main the constitutional 'rights' that do exist are primarily economic rights, such as section 51 (xxxvi), the right to just terms compensation for compulsory acquisition of property by the Commonwealth, or section 117, the right not to be discriminated against on the basis of state residence, or section 92 governing freedom of interstate trade. In addition s 116 is an express limit on the law-making power of the Commonwealth Parliament. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion. However, this does not create a justiciable individual right to the free exercise of religion. In addition to this, flowing from the principle of representative and responsible government, we have the implied right of freedom of political communication[9] and the implied constitutional protection of the right to vote.[10] The common law is also a source of many rights through tort or contract or property law.

B Rights Reluctance

Unlike other common law countries and virtually all states who have developed constitutions post World War Two, Australia has no written list or written catalogue of rights that readily and simply identifies to Australian citizens what their rights are. While Australia is regarded as a high income or developed economy it has a uniquely 'rights reluctant'[11] culture. This is curious, considering Australia had developed a strong economic and social human rights framework such as labour force rights long before they emerged in the post-WW2 United Nations human rights consensus. Australia has historically not done well when it comes to contemporary indicia of the rule of law, in particular, equality before the law and non-discrimination. The last vestiges of compulsory racial segregation[12] lingering till the passage of the *Racial Discrimination Act* in 1975.[13] And in my experience at the UN, the White Australia Policy and the 'protection' era of compulsory racial segregation of Aboriginal and Torres Strait Islander people from the 1890s to its ostensible end in 1967, are well known internationally, despite slipping from the nation's own narrative.

While Australia has a number of structural checks and balances that are intended to protect the human rights of Australian citizens, including responsible government, separation of powers, federalism embodied in a bicameral parliament, representative government and section 128 (the referendum provision that requires a majority of Australians and a majority of states to amend the Constitution), our rights-

reluctant culture is sustained by the very strong commitment to 'parliamentary sovereignty' in our political and legal system.[14] The commitment to a strong form of parliamentary sovereignty is one that promotes the idea that, subject to the structural checks and balances, Parliament should remain unencumbered by any further accountability measures. A V Dicey was the British constitutional jurist whose thinking on parliamentary sovereignty influenced many of the drafters.[15] Without going into too much detail about his theory, the term 'Diceyan' describes a faith in the rule of law and the moderate and wise way legislators behave. Put simply, this view is that those countries like the US who adopt a bill of rights do so because, unlike the United Kingdom, they could not trust their elected politicians to do the right thing by the people. Further, Dicey argued that the common law did the work of 'rights' sufficiently and incrementally without a bill of rights. It was also thought that a federal system was an important bulwark against state violations of rights; if a citizen did not like their treatment in a particular state, they could simply move to another state. Of course federalism as a form of rights protection is not useful to Aboriginal and Torres Strait Islander peoples, who have a connection to country and cannot simply move interstate if they disapprove of decisions. The bottom line of the Diceyan culture is that: parliamentarians will do the right thing by the people, and protections such as a bill of rights or entrenched human rights are an *admission* that parliamentarians may not measure up.

Many countries have dispensed with this relatively absolutist notion of parliamentary sovereignty including Canada, New Zealand and the United Kingdom.[16] Yet the Australian political class continues to eschew strong forms of 'rights entrenchment', have a particular aversion to evangelical approaches to rights, and are sceptical of any fetter on parliamentary power. What does all of this mean for Aboriginal and Torres Strait Islander peoples? The impact of parliamentary sovereignty and the limited recognition of human rights in Australia are compounded by the exceptionalism in Australia's democratic governance, described next, when it comes to the accommodation of indigenous polities.

III Exceptionalism in Australia's Democratic Governance When It Comes to the Structural Accommodation of Aboriginal Polities

In international law the putative right to democratic governance tells us that liberal democracies are distinguished by free, fair and periodic multi-party elections.[17] This right to democratic governance is underpinned by the United Nations Charter and the ICCPR. In our democracy, like many Western liberal democracies, citizen input is limited to the ballot box at periodic elections; this is known as procedural democracy. Ours is regarded as a minimalist liberal democracy. It is minimalist because it limits citizen's participation to that procedural right and there is less scrutiny of the quality of decision-making between those elections.

Australia is not unique in this regard. This explains advocacy for a bill of rights or a federal corruption commission, for example. Of course there are opportunities for input between elections; submissions to parliamentary inquiries, protest, letters to editors, lobbying politicians, as well as a robust media, but there are important limitations to each of these. Virtually all liberal democracies are majoritarian and this structure pushes mainstream political parties to become attuned to the middle ground, because it is the middle that matters most at the ballot box. This poses a problem for distinct cultural minority groups like Aboriginal and Torres Strait Islander peoples. At first glance, it is not that their lives are less valuable or that their claims are not valid but that they are numerically not useful in a majoritarian culture. But contemporary politics can and does re-calibrate those groups, those interests and those claims in a way that does render them invalid or illegitimate. Most liberal democracies temper that majoritarianism in a variety of ways; electoral systems that encourage more independent or minority voices or 'rights', bills of rights or charters of rights.

In the case of Indigenous peoples, most states of the world have tempered majoritarianism through post-colonial treaties, agreements or other constructive arrangements, reserved seats, indigenous electoral roles, indigenous ombudsmen, autonomous arrangements or indigenous parliaments.[18] Australia, however, has resisted such types of structural accommodation of Indigenous peoples. The acute nature of majoritarian politics in Australia combined with the lack of any formal accommodation or recognition of Aboriginal and Torres Strait Islander peoples at first contact has produced a damaging 'double whammy', one that is fundamental to understanding the situation of first peoples in Australia. Our democratic culture is a serious challenge for Indigenous peoples who constitute approximately three percent of 22 million people.[19] Much of the trajectory of indigenous advocacy over the decades – pre and post 1967 – has been aimed at moderating the crude majoritarianism

of mainstream politics. And underpinning this advocacy is the principle that communities know their own communities better than outsiders, and that mechanisms that enable the participation of Indigenous peoples in external, non-indigenous decision-making processes, such as parliament, allows for greater Indigenous influence over decisions in practice. Further, that providing human beings with the freedom to participate in decision-making about their own lives – including the freedom to think and imagine and dream about their own version of the good life – is a good thing.

Faced with state disinterest and inertia it has been international law that has been the primary source of Indigenous peoples' rights in Australia. The *Racial Discrimination Act* – the domestic expression of the *International Convention on the Elimination of All Forms of Racial Discrimination* – has been more critical to the realisation of indigenous peoples' rights than anything conceived of by the Australian state; the *Mabo* litigation survived because of its very enactment.[20] The *Mabo* decision was also heavily influenced by Australia's obligations in international law under the *International Covenant on Civil and Political Rights*.[21] The appeal to supranational institutions such as the United Nations in the absence of domestic legal protections is not uncommon in the world. What is remarkable about Indigenous legal activism is the success it has had in being accommodated within the structures of the UN. Unlike the rights of minorities who post-September 11 have struggled for international recognition, Indigenous peoples have, since the 1980s, had five mechanisms devoted to the elaboration of the normative framework of indigenous rights.[22] And in 2007 much of this legal activism paid off with the United Nations General Assembly's adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*.[23]

The Declaration is one of the few instruments passed by the UN General Assembly in which the rights bearers participated actively in the development of the standards alongside states.[24] And it is a collective rights instrument – it is the first time the international community has agreed that for Indigenous peoples, one cannot exercise self-determination or enjoy individual rights if self-determination as a peoples is not recognised. Each and every article in the declaration is a response to a particular human rights violation committed by states with Indigenous peoples.[25] The drafting working group is an example of legal story telling in which Indigenous peoples of the world shared their stories and those stories were developed into an international legal document.[26] Many, many Australian Aboriginal and Torres Strait Islander peoples participated in its development.

While there is academic debate about the binding/non-binding nature of the Declaration, my view as an international lawyer is that too much emphasis is placed on this question, when it fact the most effective thing about human rights is that they provide a universal language or vocabulary that can be employed by communities in the work they do.[27] The binding/non-binding debate is a distraction that obfuscates other uses of the Declaration. In fact, overall I would argue that Australians take a far too legalistic approach to human rights, as if the only human rights victory is one that can be achieved through the courts. The UNDRIP is, like all human rights instruments, a catalogue of minimum standards and for countries like Australia a significant proportion have already been implemented. However, in relation to the core principles, in particular the right to self-determination and the right to participate in decision-making, expressing a vision of how Indigenous peoples would like to live their lives, Australia does not fare well. The Declaration states in Article 3 that Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. What does all of this international law on the right to self-determination actually mean in the context of democratic participation?

The Expert Mechanism on the Rights of Indigenous Peoples, which is a mechanism of the UN Human Rights Council, has conducted a study on this very topic:

> Indigenous peoples are among the most excluded, marginalized and disadvantaged sectors of society ... Decision-making rights and participation by indigenous peoples in decisions that affect them is necessary to enable them to protect, inter alia, their cultures, including their languages and their lands, territories and resources. [28]

First the Expert Mechanism tells us that the most significant indicator of good practice is likely to be the extent to which indigenous peoples were involved in the design of the practice and their agreement to it. This is so critical to Indigenous peoples because many 'remain vulnerable to top-down State interventions that take little or no account of their rights and circumstances' and this is 'an underlying cause for land dispossession, conflict, human rights violations, displacement and the loss of sustainable livelihoods'.[29] The adoption by the General Assembly of the UNDRIP

expounded not only on the right to self-determination and participation in decision-making processes affecting them, but also the right to 'control the outcome of such processes'.[30] The Declaration contains more than 20 general provisions pertaining to indigenous peoples and decision-making. This is because 'the right to full and effective participation in external decision-making is of fundamental importance to indigenous peoples' enjoyment of other human rights'.[31] International law and the jurisprudence recognises that the 'duty to consult indigenous peoples applies whenever a measure or decision specifically affecting indigenous peoples is being considered (for example, affecting their lands or livelihood)'.[32] This duty also applies in situations where the State considers decisions or measures that potentially affect the wider society, but which affect indigenous peoples, and in particular in instances where decisions may have a disproportionally significant effect on indigenous peoples. How have different states dealt with this? In many and varied ways in Panama, Norway[33], Sweden[34] and Finland[35], New Caledonia[36], Inuit Circumpolar region, New Zealand[37], Burundi[38], the Russian Federation[39], Nepal[40], South Africa[41], and Colombia.[42]

By contrast, since the abolition of the Aboriginal and Torres Strait Islander Commission, self-determination has been eviscerated from the lexicon of Australian politicians and policy makers and inelegantly dismissed as a 'failed experiment' or antithetical to economic development.[43] This runs counter to the experience in many successful liberal democracies around the world that do succeed in delivering far better outcomes in health and well-being, employment and education than we have in Australia. Economic development is inextricably linked to self-determination. Self-determination is about freedom. Yet despite the adjournment in its use by the political elite in Australia, the language of self-determination remains alive in Aboriginal communities.[44] This disconnect is significant. That indigenous peoples seek self-determination but their words are not heard or ignored is important. This disconnect *scaffolds* the ongoing disparity in health and other outcomes.

As I described in the 2012 Naarm Oration, given Australia's history – the protection era for example, where draconian controls were placed on Aboriginal people's right to speak language, right to marriage, freedom of movement, freedom of speech and association, right to hold property and right to participate in political decisions that govern one's life – it would be ahistorical to pillory or admonish the allegiance of the Aboriginal political domain to rights and the right to self-determination.[45] If we understand the 'double whammy' of a rights-reluctant culture combined with no structural accommodation, it is easier to understand what Aboriginal and Torres Strait Islander polities have to contend with. This is certainly not the case for the majority of, if not all, western and non-western liberal democracies with Indigenous populations. Australia is not the only country grappling with this complex issue. However, we are one of the few that refuse to engage with it by invoking very strong forms of formal equality and applying a reductionist approach to Indigenous Australians, viewing them as merely a sub-group of Australians, not as first peoples who claim the status of a polity.

IV Exceptionalism in Australia's Reconciliation Process

Where does that leave us now? A good starting point is Prime Minister Bob Hawke's decision to establish a reconciliation process in the early 1990s. The creation of the Council for Aboriginal Reconciliation was a political answer to Hawke's promise to enact a national statutory land rights framework and his subsequent failure to do so. The Reconciliation Council was created, also, as a response to Bob Hawke's promise of a treaty and his failure to deliver on that promise.[46] This is a critical point because as I alluded to above, the Australian reconciliation movement emerged not from a commitment to the pursuit of truth and justice, but as a political compromise.

The Council for Aboriginal Reconciliation did excellent work. Over a period of ten years it consulted the Australian community and the Indigenous community about reconciliation and addressing unfinished business. It designed a roadmap for addressing that unfinished business.[47] When it handed its report to the Prime Minister in 2000, polling at the time revealed a majority of Australians to be in favour of a treaty. This illustrates the benefits of sustained attention on an issue. Disappointingly, the roadmap to reconciliation developed and designed from the many hands of Australians who participated in it remains unimplemented. Coupled with this is the unimplemented settlement from the *Mabo* decision. Not long after the establishment of the Council for Aboriginal Reconciliation, the High Court of Australia handed down its decision in *Mabo* finding that, among many things, Aboriginal land rights and interests had existed prior to the arrival of the

British.[48] The political response to this negotiated by Prime Minister Paul Keating was three fold. First, a legislative framework to facilitate the claim and determination of native title, by way of the *Native Title Act 1993* (Cth). The second being a Land Fund created for those Indigenous groups whose native title would have been extinguished; and third, a Social Justice Package. The Social Justice Package was the response to the unresolved issues raised by the High Court in its finding of native title; that is to say, Aboriginal people had never ceded any territory to the British arrivals. That the land was never ceded and sovereignty was not passed is a matter of legal fact, and for many the High Court's decision unsatisfactorily elided this critical fact. This issue remains alive in Aboriginal communities today. It accounts for why, when I was a member of the Prime Minister's Expert Panel on the Recognition of Aboriginal and Torres Strait Islanders in the Constitution, every single Aboriginal and Torres Strait Islander community wanted to speak about sovereignty and a treaty. The significance of a treaty is a coming together of both sides to acknowledge what has been done and to agree on a process on moving forward; moving past the wrong. And critically, the Social Justice Package that the Aboriginal and Torres Strait Islander Commission (ATSIC) developed in consultation with communities across Australia, *Recognition, Rights, Reform*, like the roadmap of the Council, remains unimplemented.[49]

Since the Prime Minister's Expert Panel on the Recognition of Aboriginal and Torres Strait Islanders Peoples in the Constitution handed its report to the PM in 2012, there has been lacklustre momentum toward constitutional reform.[50] While there is occasional polling done by the taxpayer funded campaign Recognise indicating a majority of Australians would vote 'Yes' in a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution, there is no agreed model. In the absence of an agreed amendment, they are polling an emotion, an indeterminate concept. Many prominent health organisations too have agreed that constitutional recognition will improve Aboriginal health and well-being, but again, with no agreed model. This has given rise to suspicion among Aboriginal and Torres Strait Islander people that the type of 'recognition' people are talking about or agreeing upon is what is known as 'weak' form recognition. Recognition is a complex notion in political and legal theory. Charles Taylor called this 'the politics of recognition'.[51] There is a spectrum of recognition. Strong recognition is something like agreements or treaties or indigenous parliaments or entrenched indigenous rights – critically it means the redistribution of public power within the state.[52] The weaker end of the spectrum is non-constitutional symbolism – language that makes reference to Indigenous peoples' unique relationship with ancestral land and waters, for example, but is not structural accommodation. As Dylan Lino has pointed out, 'written constitutions are a major site of contestation in the political struggles of marginalised groups to have their identities respected within public institutions'.[53] It is, of course, the weaker end that many in Australia assume that the polling is about. That there is a lack of debate about what 'recognition' could or should mean, may in part be driven by the fact that it is so difficult to change Australia's rigid constitution. Only 8 out of 44 referendums have succeeded and it is almost 40 years since the last successful referendum. The 8 successful referendums had bi-partisan support.

Weak recognition in terms of the state recognising Aboriginal culture has never been a primary plank of the Aboriginal movement for constitutional reform. 'Recognition' in this weak sense is a legacy of the 1999 republic referendum, where the Australian people rejected outright a weak recognition of Aboriginal and Torres Strait Islander people in a preamble to the Constitution. It is important to remind ourselves that few Aboriginal leaders supported this recognition. The elected leaders of ATSIC at the time did not, nor did the Land Council leadership.[54] This is a case where the government continued with that form of recognition despite the fact *Aboriginal people* did not support it.[55] Prior to the 2007 federal election, then Prime Minister, John Howard announced he would commit to symbolic recognition of Aboriginal people in the Constitution if elected.[56] However, the election of the Labor government meant Prime Minister Gillard continued the process by establishing the Expert Panel to determine whether Australians wanted recognition and what form it would take.

We must be careful in espousing the health benefits of 'weak' form recognition. It is true Canada, NZ and US have better health outcomes *and* recognition but their constitutional 'recognition' in written and unwritten form is 'strong' form recognition. Of the package of proposals recommended by the Expert Panel, based on extensive consultation with the Australian people and the indigenous polity, section 116A, a racial non-discrimination clause[57] is a strong form of recognition. Section 51A as recommended by the expert panel is also strong form recognition. This is because the statement of recognition is the preamble to the head of power

and the statement is intended to provide the legislature and the court some parameters for the use of the power. The Indigenous advisory parliamentary body proposed by Marion Scrymgour[58] and the Cape York Institute[59] is also an example of strong form recognition. These are carefully considered proposals for law reform by Indigenous people, identifying ways to constrain a parliament attuned primarily to majoritarian democracy.

Despite the clear and powerful impetus motivating the Indigenous polity for strong reform, there is simultaneously huge pressure on mob to accept minimalism. That is to say, given the poor referendum outcomes over the years, Indigenous peoples should not argue for substantive change but accept what is referred to as 'conservative', 'gradualism' or 'symbolism'. This is where the debate flounders. Political elites stifling reform in favor of a minimalist approach. We regularly hear that race relations could be damaged if a referendum failed or race relations could be damaged if the process was abandoned.[60] This is the unfair pressure on Aboriginal and Torres Strait Islander people that I am alluding to. We must be careful to acknowledge that while symbolism – if that is what it is – is nice and may have some salutary benefits, as Dylan Lino argues 'the pursuit of wholly symbolic recognition in written constitutions often neglects valid grievances about how power is wielded by the state over the group in question'.[61] This is a perspective that very few are considering in the current debate. In many ways it is hugely irresponsible to suggest minimalist 'recognition' will close the gap and fix race relations – the kind of hyperbole I am hearing around the country – without elaborating, up front, on how a minor textual legal amendment or symbolism can achieve those things or oblige government to act. This is why so many Aboriginal and Torres Strait Islander peoples view minimalism/symbolism/gradualism, at least without a pre-negotiated political agreement on a package of reform, as either neutral or no change. Further, the suggestion constitutional recognition will improve 'race relations' is never accompanied by an assessment of race relations now.[62] If the model were symbolic—a description of who Indigenous peoples were and are—to suggest an improvement in race relations because of this is speculative not evidence based; especially if such a referendum ignores what Dylan Lino argues is the legitimate grievances of the polity being recognised 'about how power is wielded by the state.'[63]

V Conclusion

There is a great chasm between what the Australian state wants for Indigenous peoples and what Indigenous peoples seek. This is apparent from the Hansard transcripts of the Joint Select Parliamentary Committee on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, which had the task of consulting Aboriginal and Torres Strait Islander peoples on constitutional recognition: the people consulted did not want to talk about 'recognition'. It is there in black and white and it makes for stark reading. The Aboriginal people consulted spoke about voicelessness and powerlessness and hopelessness. It is despairing reading. It made me reflect at the historic Kirribilli meeting of Aboriginal leaders in 2015 with Prime Minister Tony Abbott and Opposition Leader Bill Shorten, sitting there as a lawyer among all of these heavy lifters in the Aboriginal health, legal and land sector; what must it be like for a Prime Minister to be sitting around the table with a most profoundly unhappy polity?

But I want to end with a quote from an Old Testament scholar who I have been reading. I have read every constitutional text and analysis on referendums and indigenous recognition for five years. I am now seeking more philosophical, theological guidance, on what Noel Pearson calls the existential crisis at the heart of the Australian nation when dealing with Aboriginal and Torres Strait Islander peoples. I turned to Walter Brueggeman through a twitter tip off. He was recommended as an antidote to what Ta-Nehisi Coates experienced in book review after book review of his essay *Between The World And Me*.[64] Coates was struck by the book reviewers, non-African-American reviewers, who said his book provided no hope and was too pessimistic. Since then, Coates has said it is not he who is pessimistic but they who are politically naïve. I am interested in this visceral response to Coates because of the hyper-optimism of the philanthrocapitalism that is at the heart of the current Indigenous reconciliation milieu, and the exceptionalism that is bestowed upon Indigenous success stories; the constant thirst for upbeat, optimistic stories that give *white Australia* hope, what Coates calls 'reveling in a specious hope'.[65] Brueggeman reflects on society today that is 'strong on self-congratulation', that knows about 'initiative and self-actualisation and countless other things', but has nearly lost 'the capacity to lament the death of the old world'.[66] Brueggeman says that there is mourning to be done with those who know pain and suffering and

lack the power or freedom to bring it to speech. He argues that this mourning is a precondition to joy and that 'those who have not cared enough to grieve will not know joy'.[67] This resonates with me when reflecting on the current recognition process. There has been no formal reckoning of Australia's history from the political economy of killing to the lengthy period of compulsory racial segregation but for the occasional symbolic acknowledgement, such as the Apology to the Stolen Generations. I cannot speak for all Aboriginal and Torres Strait Islander peoples but it often seems as if Australia would like to skip the difficult part of reconciliation – listening and hearing the testimony of those who have suffered and how they think amends should be made – and move immediately to recovery and a peaceful co-existence. It is for this reason that a failure to hear 'haunt sites where the goal is political transition, reconciliation or forgiveness'.[68] This is the case with Australia. The failure to hear what Aboriginal and Torres Strait Islander say haunts reconciliation. It is why it has failed to date. And yet, on an optimistic note, it seems to me that the recognition project is inadvertently providing the Indigenous polity with renewed confidence to argue for a politically negotiated settlement that allows them to settle these grievances and to design a peaceful path forward. This renewed vigour for a treaty neatly aligns with Bruggeman's version of hope, which I believe best reflects the current mood of the Aboriginal and Torres Strait Islander community in its ambivalence about state-willed symbolism in favour of something more meaningful and durable:

> Hope, on the one hand, is an absurdity too embarrassing to speak about, for it flies in the face of all those claims we have been told are facts. Hope is the refusal to accept the reading of reality which is the majority opinion; and one does that only at great political and existential risk. On the other hand, hope is subversive, for it limits the grandiose pretension of the present, daring to announce that the present to which we have all made commitments is now called into question.[69]

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1 See generally Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Ashgate, 2008).

2 Patrick Dodson, 'Beyond the Mourning Gate: Dealing with Unfinished Business', (The 2000 Wentworth Lecture, Australian Institute of Aboriginal and Torres Strait Islander Studies, 22 May 2000).

3 See generally Kirrily Jordan, Hannah Bulloch and Geoff Buchanan, 'Statistical Equality and Cultural Difference in Indigenous Wellbeing Frameworks: A New Expression of an Enduring Debate' (2010) 45 *Australian Journal of Social Issues*, 333-362; Jane Robbins, 'Policy approaches to Addressing Aboriginal Social Inclusion in South Australia' (2015) 50 *Australian Journal of Social Issues*, 171-189; Will Sanders, 'Journey Without End: Reconciliation Between Australia's Indigenous and Settler Peoples', (Discussion Paper No. 237, Centre for Aboriginal Economic Policy Research, 2002).

4 Jason O'Neil, 'Indigenous Constitutional Recognition and the Politics of Distraction' (2014) 8 *Indigenous Law Bulletin* 15; Gordon Chalmers, 'The con-stitutional re-cognition (s)cam-pain: The Campaign for the Hidden Recognition of First Nations Peoples' Racial Inferiority' (2014) 15 *Indigenous Law Bulletin* 27-30; Celeste Liddle, 'I Don't Want You're Recognise Campaign – It's Nothing but a Sham', *The Guardian* (online), 18 August 2014 <http://www.theguardian.com/commentisfree/2014/aug/18/i-dont-want-your-recognise-campaign-its-nothing-but-a-sham>; Amy McQuire, '"Recognising" the Artful Con That Is the Constitutional Reform Debate' *New Matilda* (online), 12 December 2014 <https://newmatilda.com/2014/12/12/recognising-artful-con-constitutional-reform-debate/>.

5 The Expert Panel on Constitutional Recognition of Indigenous Australians ('Expert Panel'), *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012).

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