

## Reconciliation, a Postcolonial Settlement and the Constitutional Recognition Debates: a review essay

Laura Deane

### Works discussed in this essay:

*It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* edited by Megan Davis and Marcia Langton. Melbourne University Press 2016. (IOC)

Keith Windschuttle, *The Break-Up of Australia: The Real Agenda behind Aboriginal Recognition*. Quadrant Books, 2016. (BUA)

### Introduction: Culture Wars 2.0?

In 2017, with a Parliament that features the newly-elected Senator Pauline Hanson, flanked by a handful of One Nation members, Australia seems to be entering a new Culture Wars. Senator Hanson's 2016 maiden speech, much criticised for its scapegoating of Muslim Australians, revisited old ground. Indeed, much of the criticism remarked upon the fact that she seemed to have simply inserted 'Muslim Australians' in place of the 'Asians' or 'Aboriginal Australians' who were represented as the 'problem' for Australia back in 1996, when the Culture Wars polarised the nation. The Culture Wars 1.0 were characterised by an over-reaction to the *Mabo* decision of 1992, which polarised the nation by recognising that Native Title was not extinguished by white settlement, and that Terra Nullius was a 'legal fiction'. The newly-recognised rights of Indigenous Australians to *their* lands resulted in concerted opposition by powerful mining and pastoral lobbies, who argued that the *Mabo* decision diluted their rights to exploit Australian land. The Howard Government joined in, falsely claiming that Native Title legislation would threaten family homes. When the High Court found in the *Wik* case of 1996 that pastoral leases were not extinguished by Native Title, but could 'co-exist', the Government seized on the decision to find ways to extinguish Native Title. Howard's Wik 10-point plan inserted a 'national interest' provision over Crown lands, and restricted both the time limits for claims to be lodged, and the types of lands that could be claimed. Mining and pastoral interests were reframed as 'national' interests', while Indigenous claims to territory were diluted,<sup>1</sup> with Indigenous Land Use agreements effectively extinguishing Native Title when Indigenous and non-Indigenous parties reached an agreement. However, compensatory royalties would be provided to Indigenous traditional owners in exchange for mining or other commercial activities on their lands.<sup>2</sup> In its dominant usage, 'settlement' in the Australian context implies the

<sup>1</sup> For an analysis of this, see Peter Gale, *The Politics of Fear: Lighting the Wik* (Frenchs Forest: Pearson Education, 2004).

<sup>2</sup> National Native Title Tribunal, Fact Sheet about Indigenous Land Use Agreements, available: <http://www.nntt.gov.au/Information%20Publications/1.About%20Indigenous%20Land%20Use%20Agreements.pdf>

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peaceable takeover of Indigenous territories in the name of the British Empire since 1788, with resultant waves of British immigration leading to the production of 'Australia' as a nation-state in 1901. These debates demonstrated that it was land – white possession and ownership – that was at stake throughout the following decade in an increasingly divisive debate about the politics of Reconciliation.

The question of how Australia was 'settled' was, and remains, a key issue in the vexed questions of Constitutional recognition, reform and Re/conciliation. As this issue of *Transnational Literature* is published in the very month that marks the 50<sup>th</sup> anniversary of the 1967 Referendum giving the Federal Parliament the power to make laws for Indigenous Australians, it seems timely to consider the state of Australia's political relationship with Indigenous Australians through an examination of the current debates about Constitutional Recognition. The promised Referendum on the Constitutional Recognition of Indigenous Australians was to have been held this May, but has again been delayed. Fifty years after that historic Referendum on Indigenous rights, Constitutional recognition seeks to reframe the relationship between the settler state and the Indigenous peoples who have always lived here by instating a Constitutional presence in place of an absence. The move towards Constitutional recognition has strong bipartisan support, with former Prime Minister Tony Abbott arguing in 2015 that it would be a 'unifying and liberating'<sup>3</sup> moment for the nation, and the Labor party naming Constitutional Recognition among its '100 positive policies'.<sup>4</sup> Current Prime Minister Malcolm Turnbull also supports the unifying principles behind the move. That *nothing* will happen on the 50<sup>th</sup> anniversary of the 1967 Referendum, which marked an important turning point in the relationship between the state and its Indigenous peoples, should not pass by unremarked. Recognition of Indigenous Australians in the Constitution, or more precisely, in the Preamble to the Constitution, was a 2007 election promise by the Howard Government to deliver a 'new' form of Reconciliation. This occurred 10 years after Howard's notorious appearance at the 1997 Reconciliation Convention, where he refused to apologise to Indigenous Australia in recognition of the *Bringing Them Home* Inquiry's recommendations. Instead, Howard stated, he would work towards 'practical' Reconciliation, improving Indigenous health, housing, education, and employment. This not only marked a new low in Indigenous affairs, but further derailed the formal process of Reconciliation instituted by Labor in 1991. In 2004, Howard axed the Reconciliation portfolio following a post-election Cabinet reshuffle, and moved to abolish ATSIC, Australia's first national body representing Indigenous affairs. Reconciliation was formally off the Government's agenda. However, in 2007, Howard announced that he would amend the Preamble to the Constitution to include Indigenous Australians, in a move toward a

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<sup>3</sup>'Abbott backs Indigenous Constitutional recognition', *SBS News* 16 March 2013

<http://www.sbs.com.au/news/article/2013/03/16/abbott-backs-indigenous-constitutional-recognition>

<sup>4</sup> Labor Party, *Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, available:

[http://www.100positivepolicies.org.au/constitutional\\_recognition\\_of\\_aboriginal\\_and\\_torres\\_strait\\_islander\\_peoples](http://www.100positivepolicies.org.au/constitutional_recognition_of_aboriginal_and_torres_strait_islander_peoples)

‘new’ Reconciliation, in which Indigenous national representation and land rights were secondary to a practical Reconciliation agenda that aimed to bring about ‘statistical’ equality.<sup>5</sup> Changing the wording of the Preamble was Howard’s belated attempt to recognise the importance of *symbolic* as well as ‘practical’ Reconciliation. This history of political and policy shifts demonstrates the extent to which Indigenous rights to land continue to unsettle the settler nation in its willingness to recognise, and indeed, reconcile with, Indigenous Australia.

## Recognition and Reconciliation

Constitutional recognition, in the political discourse at least, is represented as a pathway to Reconciliation. Its relevance to Reconciliation is visible in the Australian Government’s latest Closing the Gap Report, where it sits above, or frames, the Government’s statement on Reconciliation:

The recognition of Aboriginal and Torres Strait Islander people in Australia’s Constitution is another step in the journey of healing. It speaks to the nation we are today and the nation we want to become in the future. It also complements the work all Australian states have done in recognising our First Peoples in their constitutions.<sup>6</sup>

However, the character of the reform, whether a statement of recognition should sit in a Preamble to the Constitution or somewhere inside it, and how it should be worded, remain matters of critical debate. The Referendum Council released a discussion paper in 2016,<sup>7</sup> and has been engaging in a process of consultation with Aboriginal communities, which will culminate in a national Indigenous Constitutional Convention to be held at Uluru in May, coinciding with the anniversary of the 1967 Referendum.<sup>8</sup> Its report will be provided to government by the end of June this year. Key directions for how the nation manages recognition are expected to flow from this process. However, if current indications are anything to go by, a Referendum on Constitutional recognition is unlikely to proceed. A report in the *Australian* at the beginning of April suggests that Indigenous Australians would prefer an Indigenous ‘voice or body in the parliament that could influence law and policymaking’ and offer a ‘substantive’ outcome rather than the ‘minimalist’ constitutional change currently being proposed.<sup>9</sup> The body could have a ‘statutory right to make submissions on any proposed laws affecting Indigenous Australians’, an outcome, notes the *Australian*, that would satisfy Constitutional conservatives as a ‘reasonable

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<sup>5</sup> John Altman, ‘Beyond Closing the Gap: Valuing Diversity in Indigenous Australia’, *Centre for Aboriginal Economic Policy Research Working Paper* 54. 2009, 1.

<sup>6</sup> Australian Government Department of Prime Minister and Cabinet, *Closing the Gap Prime Minister’s Report 2017*, available: [closingthegap.pmc.gov.au/sites/default/files/ctg-report-2017.pdf](https://closingthegap.pmc.gov.au/sites/default/files/ctg-report-2017.pdf)

<sup>7</sup> Referendum Council 2016, *Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, available: <https://www.referendumcouncil.org.au/resources/discussion-paper>

<sup>8</sup> Notably, the language of the Closing the Gap Report and the language of the Referendum Council differ. The Council’s website describes this as a First Nations Convention: see <https://www.referendumcouncil.org.au/dialogues>

<sup>9</sup> Stephen Fitzpatrick, ‘Communities seek a voice in consultation’, *The Weekend Australian*, 1-2 April 2017, p. 9.

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compromise'.<sup>10</sup> However, the article does not mention the reason that Constitutional conservatives would be so keen offer their support: because it would result in a 'minimal' change to the Constitution that would remove references to race and insert a statement of 'acknowledgement'. The latest of these consultations with Indigenous leaders, held in Adelaide in April, renewed the call for a 'constitutionally guaranteed' and 'properly representative', rather than 'hand-picked', parliamentary body.<sup>11</sup>

The call for such a body reflects the absence of genuine consultation between the Federal Government and Indigenous communities since ATSIC was abolished in 2005, and runs in parallel with the Indigenous campaign for a form of recognition that would encompass some form of Treaty between the Government and Indigenous peoples. As *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition* makes clear, there is much debate within Indigenous communities about the supposed benefits of Constitutional reform. Several contributors to this volume of critical essays argue that a Treaty should occur alongside a statement of recognition in the nation's founding document. As Teila Reid contends in 'Keeping the Fight Alive', a 'treaty provides a mechanism outside the Constitution to reformulate the relationship between the state and first peoples', and could 'replace a referendum process' (IOC 158). This is particularly pertinent, as many Indigenous critics remain unconvinced that a Referendum will bring about the change they seek in their relationship with government. Some progress is occurring on this front, with both the South Australian and Victorian Labor governments opening Treaty negotiations with their Indigenous nations in 2016. Indigenous nations are considering a range of models that would provide them with the means to negotiate with State governments, and in South Australia, the Ngarrindjeri Regional Authority's model has been proposed for other South Australian Indigenous peoples to consider as they formalise political structures and organisations to deal with the treaty process. Activism to bring about a Treaty between Indigenous people and the state has been strengthened by the Rudd-Gillard Government's 2009 ratification of the United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP 2007), which obligates the nation to support Indigenous Australians' economic, social and cultural rights, rights to land, and rights to self-determination. However, calls for a postcolonial settlement, taking the form of a negotiated agreement, or Treaty, between the Commonwealth and Indigenous peoples are not new. Indeed, such political demands have a long history in the Australian nation-space, originating in the swiftly overturned Batman Treaty of 1835 in Victoria, while, a century later, William Cooper petitioned then British King, George V, for Indigenous representation.<sup>12</sup> Demand for recognition and

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<sup>10</sup> Fitzpatrick, *Communities* 9.

<sup>11</sup> Stephen Fitzpatrick, 'Minimal constitutional reform won't wash with First Peoples', *The Australian* (10 April 2017) available: <http://www.theaustralian.com.au/national-affairs/indigenous/minimal-constitutional-reform-wont-wash-with-first-peoples/news-story/64d3b6071db2e91fe21d9e1a61b6de5f>

<sup>12</sup> *Bark Petitions: Indigenous art and reform for the rights of Indigenous Australians*, Australian Parliamentary Library, <http://www.australia.gov.au/about-australia/australian-story/bark-petitions-indigenous-art>

representation gained traction with the Yirrkala Bark Petitions of 1963,<sup>13</sup> and the Barunga Statement of 1988, which prompted Prime Minister Bob Hawke to promise – but ultimately, to fail to deliver – formal Treaty negotiations with Australia’s Indigenous peoples. In 2000, Prime Minister Howard refused to countenance Treaty as a resolution of matters between the state and Indigenous Australia, arguing that ‘a nation does not make treaties with itself’. Yet, only a fortnight or so earlier, he had agreed that ‘this land and its waters were settled as colonies without treaty or consent’.<sup>14</sup> In refusing to agree to a process of agreement-making, Howard failed to recognise that settler nations such as Canada, New Zealand and the United States had formalised agreements with their Indigenous peoples, and this had not threatened their national sovereignty.

The Referendum Council noted in 2012 that Canada, the United States and New Zealand all have treaties in place with their Indigenous peoples, conferring forms of dependent-nation, or nation-within-the nation, status on these indigenous nations. In all these jurisdictions, the right of indigenous citizens to self-government and indigenous sovereignty have been recognised at law, while colonisation – that is, the assertion of sovereignty by colonial powers – is understood to have ‘diminished’ rather than extinguished Indigenous sovereignty. By contrast, the 1840 Treaty of Waitangi signed between Maori and Pakeha in New Zealand can be interpreted as ‘cession’ of Indigenous sovereignty, although this is contested between the Maori and English translations.<sup>15</sup> Therefore, Brennan, Gunn, and Williams conclude that recognising Indigenous sovereignty in Australia through the understandings of the concept available in international law is possible, as Treaties in settler nations refer to ‘internal’ sovereignty, rather than ‘external’ sovereignty, which means a nation is internationally recognised as a sovereign political entity. This is underlined by the practice of Australian sovereignty, which is not absolute, but divisible, as the arrangements between the Commonwealth and the States demonstrate. Thus, ‘internal’ sovereignty is already operating, and extending the concept to Indigenous political entities is technically possible in Constitutional law. However, as Stephen Cornell has noted in his 2015 article, ‘Wolves have a Constitution’, in Australia, Indigenous efforts to negotiate ‘substantive’ forms of self-government proceed ‘under conditions that are significantly more hostile’ than in other jurisdictions.<sup>16</sup> Accordingly, Cornell concludes that Indigenous people must actively

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<sup>13</sup> See Galarrwuy Yunupingu, ‘From the Bark Petition to Native Title’, *Our Land is Our Life: Land Rights, Past, Present and Future* edited by Galarrwuy Yunupingu (Brisbane: University of Queensland Press, 1997) 1-17.

<sup>14</sup> Cited in Sean Brennan, Brenda Gunn, and George Williams, ‘[Sovereignty and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments](#)’, *Sydney Law Review* (26.3 2004) 307-352. Howard stated this in an interview on 29 May 2000, in the year that the formal Reconciliation process was to have ended (308).

<sup>15</sup> Sean Brennan, Brenda Gunn and George Williams, ‘Treaty – What’s sovereignty got to do with it?’, *Issues paper* No. 2, (Gilbert and Tobin Centre of Public Law, University of New South Wales, 2004) 4-5, available: [http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/Issues\\_Paper2.pdf](http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/Issues_Paper2.pdf)

<sup>16</sup> Stephen Cornell, ‘Wolves have a Constitution: Continuities in Indigenous self-government’, *The International Indigenous Policy Journal*, 6.1 (2015) 1-20, 12. Available:

participate in, and work towards, reform of the national Constitution, because Indigenous support will be vital to effect durable change in Indigenous capacity. As he points out:

policies that not only recognize Indigenous aspirations for self-governing power but encourage Indigenous efforts to build capable governments that express Indigenous values and purposes are more likely, in turn, to win Indigenous support. In the effort to address long-standing grievances and difficult socioeconomic problems, such support will be crucial; the record of top-down policy-making designed to improve the welfare of Indigenous peoples is largely a record of failure.<sup>17</sup>

The texture of Constitutional reform, and the opportunities it affords to bring about a change in the colonial architecture of law and policy that shapes the relationship between the settler nation and the Indigenous communities drawn into that framework, are not without legal and technical challenges, or indeed, objectors. Many of the contributors to *It's Our Country* take up these legal and technical issues to argue that Constitutional recognition and Treaty go hand in hand, notably Warren Mundine, Patrick Dodson, Noel Pearson, and Megan Davis. As Pearson argues in 'There's no such thing as minimal recognition – there is only *recognition*' any 'meaningful' recognition can only occur through a combination of 'rights, representation and treaties/agreements' that requires 'constitutional, institutional or legislative reforms' (IOC 172). He further contends that Australia should follow Canada's model, and bring in a suite of practical reforms that 'involve an increase in power' through increased participation in decision-making power – a say as well as a seat at the negotiating table – as well as an 'increase in freedom', such as freedom from racial discrimination (IOC 168). Together, Pearson argues, Constitutional recognition, a Bill of Rights, and treaty mechanisms would offer an opportunity to 'perfect our constitutional union and make ours a more complete Commonwealth' (IOC 179). By contrast, Labor Senator and architect of Reconciliation, Patrick Dodson, argues in 'Navigating a path towards meaningful change and recognition' that any improvement in the relations between Indigenous Australians and the nation state must 'address the structural inequalities' that have produced the widening gap between Indigenous and non-Indigenous Australians (IOC 180). He distinguishes between a treaty, which could 'acknowledge the dispossession that occurred and establish a settlement process to redress and resolve historical grievances' (IOC 181), noting that Constitutional amendment is not a pre-condition for such a process. Rather, this 'is a political act that could be achieved legislatively' (IOC 182). Constitutional recognition alone cannot adequately address these historical injustices, but could instead provide a platform for 'how parliaments see and deal with us when they make laws that affect us as a people' (IOC 184). Dodson warns that Indigenous Australians 'have little cause to trust governments and the democratic parliamentary process' in the wake of the NT Intervention and the handling of Native

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<http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1243&context=iipj>

<sup>17</sup> Cornell 13.

Title after *Mabo* and *Wik* (IOC 184). In addition, because the process to bring Constitutional recognition to the people has been left to ‘drift’ since 2012, public support has subsided, and ‘disillusion’ has set in (IOC 185). Echoing Cornell, he contends that both broad-based and Indigenous support for Constitutional recognition is ‘essential’, but that Indigenous Australia should not settle for minimalist reform if the referendum proposition does not get up in what is an ‘inherently conservative political and institutional landscape’ (IOC 186).

### **Towards a Treaty, or Makaratta**

Echoing these sentiments, Megan Davis writes in ‘Ships that Pass in the Night’, that rather than agreeing to accept minimalist reform to the Constitution, many Indigenous leaders are arguing for ‘hardheaded reform’ that would encompass a ‘settlement’ of ‘unfinished business’ (IOC 90). Davis points out that steps towards a settlement are already in place through the commitment to ‘structural reform by Indigenous communities, parliamentary inquiries, commissions and university scholars’, so that both the ‘substance’ and ‘design’ of a settlement can occur even without Constitutional change. However, she notes that although the parliament sought to bring in a three-prong response to the *Mabo* decision, with the aim to provide a statutory framework to negotiate native title claims, a land fund to provide compensation to communities whose native title was extinguished, and a Social Justice Package to settle other unresolved matters, ‘the third prong of the *Mabo* settlement was never implemented’ (IOC 90). Another blueprint for structural reform leading to a just settlement resides in the work of the Council for Aboriginal Reconciliation (CAR). Both the ATSIC-drafted Social Justice package and CAR’s initiatives contain an ‘artful mix of policy, statute and constitutional amendment’, that far from being ‘ambitious’, are ‘common’ in democracies with Indigenous populations, comprising a ‘run-of-the-mill’, ‘unremarkable and sensible’ negotiated settlement (IOC 90). However, she also warns that the call for a just settlement remains a ‘source of disquiet’ for the settler state, as this requires a recognition that Aboriginal sovereignty was never ‘ceded’, and it is this fundamental ‘grievance’ that substantive reform must address (IOC 92-93). Therefore, Davis concludes, the hardheaded reform that is needed should be in the form of the Yolngu notion of *Makaratta*,<sup>18</sup> which the National Aboriginal Committee adopted at its second conference in 1979. *Makaratta* refers to ‘coming together after conflict’ (IOC 94), and increasingly frames Indigenous calls for Treaty and recognition. The adoption of a *Makaratta* would offer guidelines and principles for how the state engages with ‘first nation polities’, and provide a ‘way forward’ in the process of Reconciliation (IOC 94-95). This, ‘in itself will not overcome the historical injustices’ that shape contemporary inequalities between Indigenous and non-Indigenous peoples, but would be a ‘useful, productive, and collaborative starting point’ (IOC 96).

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<sup>18</sup>National Aboriginal Conference, Treaty’ Institute for Aboriginal and Torres Strait Islander Studies, <http://aiatsis.gov.au/collections/collections-online/digitised-collections/treaty/national-aboriginal-conference>

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This is particularly important because Australia is the only settler nation not yet to have entered into some form of negotiation or settlement process with Indigenous people. Calls to recognise Indigenous sovereignty through such mechanisms as a Treaty tend to be divisive, with the Expert Panel concluding that:

any proposal relating to constitutional recognition of the sovereign status of Aboriginal and Torres Strait Islander peoples would be highly contested by many Australians, and likely to jeopardise broad public support for the Panel's recommendations. Such a proposal would not therefore satisfy at least two of the Panel's principles for assessment of proposals, namely 'contribute to a more unified and reconciled nation', and 'be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'.<sup>19</sup>

With many states now embarking on a Treaty process, Adelaide Constitutional Reform Dialogue Co-convenor Klynton Wanganeen has noted that the tenor of the relationship between Indigenous Australia and the state is 'not just about Aboriginal people – it's a nation-building exercise'.<sup>20</sup>

### **A Settlement of Terms, or a Threat to the Nation?**

It is against this backdrop that another key player from the Culture Wars 1.0 has resurfaced, this time seeking to dissuade Australians from supporting Constitutional recognition. Enter Keith Windschuttle, strident opponent of the political and cultural Left, and a long-term denier of the Stolen Generations.<sup>21</sup> Windschuttle has just published a series of extracts from his latest book, *The Break-Up of Australia: The Real Agenda behind Aboriginal Recognition* in the journal *Quadrant*,<sup>22</sup> while an extract entitled 'Separation, not integration, will result from recognition', was published in the *Weekend Australian's* Inquirer section last October.<sup>23</sup> Windschuttle's extract forms part of a wider series of articles in the national broadsheet exploring the obstacles, likely impacts, and challenges posed by a Referendum on Constitutional Recognition. It is the arguments presented in *It's Our Country* that have prompted Windschuttle's cynical attempt to re-ignite the Culture Wars of the 1990s, as he objects to the use of *our* in its title.<sup>24</sup> Windschuttle

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<sup>19</sup> Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012) xvi, available: <https://www.referendumcouncil.org.au/resource/recognising-aboriginal-and-torres-strait-islander-peoples-in-the-constitution-report-of-the-expert-panel>

<sup>20</sup> Stephen Fitzpatrick, 'Minimal constitutional reform'.

<sup>21</sup> See for example, Keith Windschuttle, *The Fabrication of Aboriginal History* (Sydney: Macleay Press, 2002) and 'Why there were no stolen generations', *Quadrant* 54.1-2 (Jan-Feb 2010) 8-21.

<sup>22</sup> Extracts of the book were published in *Quadrant* as two articles in Nov and Dec 2016.

<sup>23</sup> Keith Windschuttle, 'Separation, not integration, will result from recognition', *Weekend Australian Inquirer*, October 2016, 21-22.

<sup>24</sup> Keith Windschuttle, 'The Break-Up of Australia: Part 1 *Quadrant*, 1 November 2016, available:



argues that the move to recognise Indigenous Australians conceals a more sinister agenda that will lead to the establishment of a separate Indigenous state within Australia, and worse, the ‘potential breakup of Australia’.<sup>25</sup> Indeed, in ‘The Break-Up of Australia, Part 1’, he claims that Indigenous Australians ‘do not regard the Australian nation as their true country’, but rather ‘grudgingly endure’ the ‘recently arrived’ settler state.<sup>26</sup> Furthermore, he characterises the ‘motives and objectives’ of the Recognition movement as a move towards the establishment of ‘a separate state’, effectively ‘a nation within a nation’, in which Aboriginal sovereignty would prevail. The concept of Aboriginal sovereignty, he reasons, is ‘conspicuously absent’ from Indigenous affairs reporting, but has ‘long been the objective of the Aboriginal political class’: any recognition of Aboriginal sovereignty would, he claims, ‘irreparably divide the Australian nation’, and should be considered a move towards ‘partition’ (BUA 4). He suggests that calls for a Treaty or treaties conferring local or regional sovereignty on Indigenous nations move well beyond principles of self-determination enshrined in Australia’s ratification of the UN Declaration of the Rights of Indigenous Peoples, and should be interpreted as the mounting of a case to establish a separate Indigenous state (BUA 6). Here, Windschuttle refers to Michael Mansell’s 2014 proposal for a seventh state, which would be a political and geographical entity located in the North of Australia that would comprise the bulk of Aboriginal controlled lands.<sup>27</sup> As Windschuttle and others have noted, the problem with such a proposal is how a geographical location can provide for the diversity of several hundred separate Indigenous nations. Therefore, calls for treaties have become much more localised, with Indigenous leader Noel Pearson advocating agreements between Indigenous nations and both State and Commonwealth governments to recognise traditional owners and fast-track outstanding Native Title claims (BUA 6). Pearson is not alone in such calls, as several essays in *It’s Our Country* make clear.

It is therefore Native Title, or the proprietary interests of settlers in land itself, that is at stake in Windschuttle’s formulation of the problem. In ‘The Break-Up of Australia, Part 1’, and the extract published in the *Australian*, he calculates the amount of land under Native Title as comprising 2.3 million square kilometres, or ‘30.4 percent’ of all the land in Australia, with a further 31.7 percent of Australian land yet to be determined by the Native Title tribunal. All up, he argues, ‘Native Title will soon amount to more than 60 percent of the Australian continent’ (BUA 6). This is excessive, he states, given that Aboriginal people comprise only about three percent of the population, and most Indigenous Australians live in metropolitan and regional areas (BUA 7). Giving land rights to such a small segment of the population is ‘at odds’ with ‘any notion of rational public policy’, and ‘must appear a gross moral indulgence’ (BUA 7). Indeed, he constructs Indigenous calls for land rights and agreement-making with the settler state

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<http://quadrant.org.au/magazine/2016/11/break-australia-part/>

<sup>25</sup> Windschuttle, ‘Separation’, 22

<sup>26</sup> Windschuttle, ‘The Break-Up of Australia: Part 1’, 2.

<sup>27</sup> Michael Mansell, ‘Is Aboriginal Sovereignty Compromised by the 7<sup>th</sup> State?’, *APG Publication* (2014)

<http://www.apg.org.au/articles.php>

as a form of ‘rent-seeking’ that will simply ‘reproduce all the devastating social problems of passive welfare’ articulated by Cape York Institute leader, Noel Pearson (BUA 8). In addition, he argues, citing Marcia Langton, a Constitutional amendment would ‘entrench’ agreements or treaties with First Nations peoples, and provide them with ‘constitutional force’ (BUA 8-9). This is particularly worrying for Windschuttle, as recent polling suggests as many as three-quarters of the Australian population would support a Referendum recognising Indigenous Australians as traditional owners or original inhabitants – the wording, of course, is not yet agreed. For Windschuttle, such an outcome would mean ‘that those of us descended from the more recent settlers would need to renegotiate our right to be here’ (BUA 10). Even more worryingly, ‘the Australian people would have little say in the establishment of a sovereign Aboriginal state, in the internal operation of its government, in the compensation due to it, or in the precise status of its relationship with the Commonwealth’ (BUA 11). Thus, what most Australians would regard as a ‘courteous symbolic gesture with no real consequences’ could risk ‘the establishment of a politically separate race of people, and the potential break-up of Australia’ (BUA 12). These ‘long-term risks for Australian sovereignty’ are simultaneously ‘slender’ and yet so risky that they are ‘not worth running’ (BUA 12).

Yet, in constructing Indigenous Australians as a separate ‘race’, Windschuttle invokes some of the objections made by Recognition opponents such as commentator Andrew Bolt, and the Institute of Public Affairs (IPA), who consider Preambular recognition, or any other Constitutional recognition mechanism, to be racist, because it gives ‘special’ recognition to one group of Australians on the basis of their cultural heritage. Conservative Indigenous leader Noel Pearson takes this group of opponents to task, noting that the IPA’s construction of any measures to recognise Indigenous Australians in the Constitution as ‘inherently racist and contrary to liberal democratic values and equality before the law’ are both internally inconsistent and baffling (IOC 175). Given that the IPA is so keen to ensure that equality means that *all* Australians are treated the *same* way, it is particularly baffling that it should so stridently reject the Expert Panel’s proposal to include a Section banning racial discrimination by government in the Constitution. Such a provision would entrench the principle of ‘equality’ the IPA is so keen to protect. As Marcia Langton notes in her essay in *It’s Our Country*, ‘Finding a resolution to constitutional recognition of Indigenous Australians’, the very problem that the proposal to amend the Constitution would address is, in fact, the problem of ‘race’. She has commented elsewhere that amending the Constitution to recognise Indigenous Australians is not ‘racist’, indeed it is not even about ‘race’,<sup>28</sup> but rather, about the Constitution’s fundamental silence on Indigenous Australians, or racial exclusion. In ‘Finding a Resolution’, Langton argues that:

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<sup>28</sup> Marcia Langton, ‘Indigenous Exceptionalism and the Constitutional Race Power’, *Space, Place and Culture* (Albert Park, Vic.: Future Leaders, 2013) 3, available: [http://www.futureleaders.com.au/book\\_chapters/pdf/Space-Place-Culture/Marcia-Langton.pdf](http://www.futureleaders.com.au/book_chapters/pdf/Space-Place-Culture/Marcia-Langton.pdf)

any idea of race and the ability of the parliament to use race in its law making should be removed from our Constitution. Because of the way that ‘race’ has been historically applied to Indigenous peoples in Australia, our rights to peoplehood have been undermined ... defining Aboriginal people as a ‘race’, as the Constitution does, sets up the conditions for Indigenous people to be treated not just as different, but also exceptional and inherently incapable of joining the Australian polity and society. (IOC 31)

Langton goes on to name the Northern Territory Intervention as an example of the ‘exceptional initiatives that have isolated the Aboriginal world from Australian economic and social life’ (IOC 31). This can be considered racially discriminatory because the ‘special’ measures employed under the *Northern Territory Emergency Response* legislation included suspending the *Racial Discrimination Act*. However, she also asserts that the discourse of exceptionalism has created a ‘sense of entitlement’ among Indigenous Australians that they should enjoy ‘special treatment on the grounds of race’ (IOC 31). Against this, it is important to note how Indigenous legal scholars such as Larissa Behrendt criticise legal measures that promote notions of equality as sameness. As Behrendt points out in ‘The 1967 Referendum: forty years on’, the expectation that the parliament would use the ‘race power’ contained in Section 51 ‘benevolently’ to make laws ‘for the benefit of Aboriginal people’ has not been met. Indeed, she argues that legislation, particularly in the area of Native Title, shows that government ‘cannot be relied upon to act in a way that is beneficial to Indigenous people.’<sup>29</sup> In the post-*Mabo* environment, the native title regime treats the interests of claimants ‘as secondary to the proprietary interests of all other Australians’, concluding that:

when Aboriginal people gain recognition of a right, they are seen as getting something for nothing rather than getting protection of something that already exists. Native title is seen as an example of ‘special rights’; ... when Aboriginal people have a right recognised, it is seen as threatening the interests of non-Aboriginal property owners in a way that means that the two interests cannot co-exist. In this context, native title is often portrayed as being ‘unAustralian’.<sup>30</sup>

Accordingly, as Indigenous Land Use Agreements actually extinguish native title,<sup>31</sup> Windschuttle’s claim that exclusive and non-exclusive Native Title will cover 60 percent of the continent seems a radical over-statement of the issues. It is *his* claims that are excessive, bearing little relation to the contemporary realities and limitations of the Native Title regime. Indeed, as

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<sup>29</sup> Larissa Behrendt, ‘The 1967 Referendum: forty years on’, *Australian Indigenous Law Review*, Vol 11, No. 4 (2007) 12-16; 14. See also Lisa Strelein, ‘The jurisprudence of native title “recognition” and “protection” *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press: Canberra, 2009) 126-150.

<sup>30</sup> Behrendt 14.

<sup>31</sup> The National Native Title Tribunal factsheet ‘About Indigenous Land Use Agreements’ states: ‘any surrender [agreement between native title holders and other parties] consented to extinguishes native title rights and interests’, available <http://www.nntt.gov.au/Information%20Publications/1.About%20Indigenous%20Land%20Use%20Agreements.pdf>

Cape York Institute senior policy adviser Shereen Morris pointed out in her reply to Windschuttle's article one week later in the *Australian*, Windschuttle's argument 'is an example of an attempt to whip up irrational fear', as he conflates constitutional 'separatism' with 'constitutional inclusion'.<sup>32</sup>

### **Postcolonial Justice?**

By reading Windschuttle's arguments against some of the essays presented in *It's Our Country*, and against Indigenous scholarship in areas such as Native Title, it is clear that Windschuttle, along with other sectors of the right-wing commentariat, frames Indigenous claims for recognition, whether in the form of a Treaty or a Constitutional amendment, as a threat to the nation. The reframing of the proposed Referendum to recognise Indigenous Australians as a call for a separate autonomous Indigenous state-within-the-state is wilfully divisive. Further, Windschuttle either misreads, or ignores, the recognition of Indigenous sovereignty in other settler nations such as the United States or Canada, where the sovereignty of the nation-state has not been diminished or fragmented by the recognition of Indigenous sovereignty. To put this into perspective, it has been important to note what, actually, is being suggested by Indigenous proponents of Constitutional change. This prompts the question: what has provoked Windschuttle's reaction? Is his reaction reasonable, or might it be an hysterical over-reaction to Indigenous claims for recognition and Constitutional status? It would seem that he is trying to build opposition to the referendum proposition. However, a 'No' case has already been drafted by Indigenous Constitutional experts, in order to sketch out the grounds for the debate.

As Marcia Langton notes in 'Finding a resolution', the 'No' case might recognise that Constitutional change is inadequate to solve the historical injustices it seeks to address. Furthermore, in setting out the No case, Indigenous legal scholars Megan Davis and George Williams note that opponents to Constitutional change would tend to argue that: 'There are more important issues to address. Rather than changing the Constitution, Australia's politicians should focus on ending Indigenous disadvantage by way of health and education reforms' (IOC 33). This, of course, reverts the debate to a Close the Gap type of agenda. Windschuttle also objects to these initiatives in 'The Break-Up of Australia: Part 1', arguing that Indigenous Australians receive 'more than twice as much money per head as any other Australian', a total of \$30 billion, which shows 'no sign of ever decreasing' (BUA 7). He further contends that much of this government expenditure funds 'the lifestyles' of the 21 percent of Indigenous Australians who live in remote communities 'as unassimilated people' plagued by problems of 'alcoholism, drug taking, homicide, suicide, domestic violence, and sexual abuse of children' (BUA 7). While it is true that remote communities do have problems of suicide, substance abuse, and violence, it is surely not the case that the rest of Australia is a social-problem-free zone. In addition, while

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<sup>32</sup> Shereen Morris, "'Separatism' through recognition an irrational fear', *Weekend Australian Inquirer*, 29-30 October 2016, 22.

Windschuttle bases his figures on the Productivity Commission's 2014 calculations,<sup>33</sup> he neglects to mention that most (81 percent) of this spending is on mainstream services such as health and education, with direct spending on Indigenous-specific services accounting for only 18.6 percent of expenditure. While Windschuttle constructs the problems of remote communities as problems of 'lifestyle', Sarah Maddison observes in her analysis 'Indigenous autonomy matters: what's wrong with the Australian Government's 'intervention' in Aboriginal communities' that social problems and welfare dependency have their 'roots in Australia's colonial history and [are] perpetuated by a present-day sense of powerlessness and lack of control by Aboriginal people over their own lives',<sup>34</sup> a proposition that commentators like Windschuttle are unwilling to accept. Dispossession, she argues, is the key problem from which poverty, welfare dependency, violence, and substance abuse emanate. In addition, requirements for Aboriginal communities to be self-determining when Protection and Assimilation policies were abolished in the 1970s did not recognise differences in community capacity, so that 'government policies of self-determination have been more concerned with organisational and community management than with placing meaningful political and economic power in Aboriginal hands'.<sup>35</sup> Consequently, it is white bureaucrats who manage and administer Indigenous communities. Unlike Noel Pearson, who claims that the rights enshrined in the 1967 Referendum brought alcohol and welfare (or 'sit-down' money) to Indigenous communities, entrenching 'passivity' and institutionalising 'dependency',<sup>36</sup> Maddison does not advocate the quarantining of welfare payments for behavioural breaches, a measure that is now routine for welfare recipients in the mutual-obligation environment in which income support now operates. Rather, she argues, Pearson's 'blame the victim' approach, and his 'influential neoliberal arguments' will only reinforce Indigenous dependency and passivity in response to 'paternalistic policies' such as the NT Intervention, and spin-off policies such as Stronger Futures.<sup>37</sup> It is clear that Windschuttle draws upon the sorts of neo-liberal arguments mounted by Pearson, whose influence extends to regular columns in the *Weekend Australian*, where he preaches to the already converted. The problems that Windschuttle and Pearson identify concern 'responsibility',<sup>38</sup> but it is unlikely that policy responses framed in coercion and neo-paternalism will produce the genuine autonomy that Indigenous leaders advocate to overcome Indigenous disadvantage.

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<sup>33</sup> Productivity Commission Indigenous Expenditure Report 2014, p. 1, available: <http://www.pc.gov.au/research/ongoing/indigenous-expenditure-report/indigenous-expenditure-report-2014/indigenous-expenditure-report-2014.pdf>

<sup>34</sup> Sarah Maddison, 'Indigenous autonomy matters: what's wrong with the Australian Government's "intervention" in Aboriginal communities', *Australian Journal of Human Rights* 14.1 (2008) 41-61; 49.

<sup>35</sup> Maddison 49.

<sup>36</sup> Noel Pearson, 'White guilt, victimhood and the quest for a radical centre', *Griffith Review* 16 (2007) 3-58.

<sup>37</sup> Maddison 51.

<sup>38</sup> See for example, Noel Pearson, *Our Right to Take Responsibility* (Cairns, Qld: Noel Pearson and Associates, 2000).

This is nowhere more evident than in the policy framework of Close the Gap, which consistently fails to reach its targets, with six of seven targets to close the inequality gap currently not on track.<sup>39</sup> As John Altman has demonstrated, the problems with welfare spending and spending on services under Close the Gap funding occur because of its ‘top-down’ and ‘dated’ design in a ‘monolithic modernisation paradigm’ that is ‘deeply flawed both conceptually and empirically’. He goes on to argue that the policy overlooks colonial history in producing the problems of Indigenous disadvantage, by looking for ‘mainstream solutions’ to non-mainstream problems, and ignoring Indigenous diversity.<sup>40</sup> Further, he contends:

There is a clear logic for the settler-colonial state in rendering Aboriginal disadvantage a technical problem with no history, and rendering cultural difference either invisible or too visible and something to be eliminated. Such an approach allows the state to ignore politico-economic relations and the distribution of property and power, and to instead reframe difficult political questions as technical – to close the gap.<sup>41</sup>

By reading Windschuttle’s campaign against the proposals for meaningful recognition and reform outlined in *It’s Our Country*, this essay has sought to place these debates in their proper context: in the campaign for a postcolonial settlement of terms, or conciliation, between the settler state and Indigenous peoples of Australia. For Indigenous Australia, these are matters of postcolonial justice, in which the unfinished business of Re/conciliation requires a coming to terms between the settler state and First Australians. Debates have arisen both between Indigenous and non-Indigenous Australians, and among Indigenous Australians, about the character of postcolonial justice. For non-Indigenous Australia, the matter of who rightfully owns the land, and whether Indigenous Australians might claim a greater share of it, is again at stake, as witnessed through Windschuttle’s calculations of the square kilometres at risk of being ‘lost’ to Native Title. The tenor of his contribution to Constitutional Recognition debates mark an attempt to institute Culture Wars 2.0, but the fear-mongering that worked in the 1990s seems to be failing to ignite the over-reaction it is intended to provoke. Whether the Referendum goes ahead at some point in the future, and whether it has any prospect of succeeding if it does, remain important matters in the vexed question of how Australia reconciles with its Indigenous peoples. The next few months will answer some of these questions. What remains startlingly familiar is that the spectre of formal recognition of Indigenous Australians’ prior occupation of Australia continues to haunt the nation.

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<sup>39</sup> Australian Government Department of Prime Minister and Cabinet, *Closing the Gap Prime Minister’s Report* (2017) available: [closingthegap.pmc.gov.au/sites/default/files/ctg-report-2017.pdf](http://closingthegap.pmc.gov.au/sites/default/files/ctg-report-2017.pdf)

<sup>40</sup> John Altman, ‘Beyond Closing the Gap: Valuing Diversity in Indigenous Australia’, *Centre for Aboriginal Economic Policy Research Working Paper* 54/2009, 1.

<sup>41</sup> Altman 14.

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