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## The Long Road to Uluru and Beyond

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# THE LONG ROAD TO ULURU AND BEYOND<sup>1</sup>

HON FRED CHANEY AO\* AND GREG CARNE\*\*

## ABSTRACT

This paper explores the significance of the Uluru Statement from The Heart and its place in the post settlement Indigenous journey. It is also relevant to the nation's journey towards reconciliation. The initial rejection of the Uluru Statement by the Government was a blow to indigenous Australians, and an examination of the reasons for opposing a constitutional enshrined Voice to Parliament is needed. It is argued that the Voice to Parliament is of value both symbolically and practically. Understanding the reasons why some sections of the Australian community find any constitutional recognition proposition difficult is a key to successfully achieving such recognition.

## I INTRODUCTION

I thank the University for the invitation to deliver this lecture and for its acknowledgment of the Traditional Owners of Armidale, the Anaiwan and Kamilaroi people. Thank you, Uncle Colin, for your welcome, it has been good for us to catch up again. Consistent with my wish to be positive in this lecture can I say that the new normalcy of welcomes to country on most public occasions is a reminder of how far we have advanced from the Great Australian Silence<sup>2</sup> about our First Nations. These welcomes reflect the legal reality in this post Mabo era and why Constitutional recognition should not be contentious

This lecture honours a distinguished Counsel, High Court Justice and long serving Chancellor of the University of New England, Sir Frank Kitto. For those not familiar with his distinguished

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\*Sir Frank Kitto 2019 Lecturer, School of Law, University of New England, New South Wales, Australia. Senator for Western Australia (1974-1990), MHR for Pearce (1990-1993) Minister for Aboriginal Affairs (1978-1980) Minister for Social Security (1980-1983) Leader of the Opposition in the Senate (1983-1990), Deputy Party Leader (1989-1990), Member and then Deputy President Native Title Tribunal (1994- 2007), Chancellor of Murdoch University (1995 to 2002), Co-Chair of Reconciliation Australia (2000 to 2005), Chair of Consultation Committee on a Human Rights Act for Western Australia (2007) Sir Ronald Wilson Leadership Award for 'exceptional leadership in the fields of social justice, human rights, equality and anti-racism'(2008) and Senior Australian of the Year (2014).

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<sup>1</sup> This is an edited academic version of the Sir Frank Kitto Annual Lecture text delivered on 8 September 2019 for the School of Law, University of New England, Armidale, New South Wales by Hon Fred Chaney AO. Associate Professor Greg Carne has researched and added all the academic footnotes and references, and made various approved alterations and updates to the text of the original lecture. A podcast of the 2019 Sir Frank Kitto lecture is available at <<https://www.une.edu.au/about-une/faculty-of-science-agriculture-business-and-law/school-of-law/public-events-and-seminars/sir-frank-kitto-lectures>>.

<sup>2</sup> A term coined by the anthropologist WEH Stanner in his 1968 Australian Broadcasting Commission *Boyer Lectures: WEH Stanner, The Boyer Lectures 1968 – After The Dreaming* (Australian Broadcasting Commission, Sydney, 1968); WEH Stanner *The Dreaming and Other Essays* (with an Introduction by Robert Manne (Black Inc, Agenda, Melbourne, 2011). See also Anna Clark, 'Friday Essay: The "great Australian silence" 50 Years On' *The Conversation* (3 August 2018) <<http://theconversation.com/friday-essay-the-great-australian-silence-50-years-on-100737>>.

career, I commend the lecture delivered last year by the Hon Michael Kirby AC CMG. On his delivering the 2018 Kitto lecture, Michael described the man and his life and work in some detail<sup>3</sup> that I will not try to repeat here tonight. It is enough to say that he served his profession with distinction, was a member of Australia's High Court and on his retirement from the Court rendered distinguished service to this University as its Chancellor.

It is an honour to be asked to deliver the lecture and I thank the University for giving me this opportunity. In the past it has been delivered in the main by judges, many from our highest Court, and other distinguished lawyers addressing serious legal issues. I acknowledge them and their distinguished contributions to law and scholarship including through these lectures.

I have never been a judge, practised law for only 10 years from 1964 to 1974, and although handy enough as a practitioner would never have been described as a distinguished lawyer. Wisely or not the University asked me, a sometime lawyer, politician, statutory office holder and active citizen, to address you, and I quote, 'on an Indigenous topic with which you are so familiar'.<sup>4</sup>

A problem with public lectures is that it is necessary to set a topic well in advance of delivery and we agreed to settle on 'The Long Road to Uluru and Beyond.' The *Uluru Statement From the Heart*<sup>5</sup> is at the core of what current Indigenous Affairs is about, the relationship between the nation and its first nations, as well as the way forward in closing the well-known economic and social gaps. But the more I think and fret about the slow progress we are making in constitutional recognition the more it seems to me that slow progress is endemic in social and

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<sup>3</sup> Sir Frank Kitto was Chancellor of the University of New England from 1970 to 1981 and a Justice of the High Court of Australia from 1950 to 1970. See Hon Michael Kirby AC CMG 2018 Sir Frank Kitto Lecture, 'Dual Nationality and the Constitution – Do We Need to Amend the Constitution?' (Public Lecture, University of New England, 18 May 2018) < <https://www.une.edu.au/about-une/faculty-of-science-agriculture-business-and-law/school-of-law/public-events-and-seminars/sir-frank-kitto-lectures>>. See also Michael Kirby, 'Kitto and The High Court of Australia' (1999) 27 *Federal Law Review* 131; Michael Kirby, 'Kitto, Frank Walters' in Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court* (online version) (OUP, Melbourne, 2007) <<https://www.oxfordreference.com/view/10.1093/acref/9780195540222.001.0001/acref-9780195540222-e-230?rskey=qBhXNI&result=231>> and Fiona Wheeler and Brian Wimborne 'Kitto, Sir Frank Walters (1903-1994)' in *Australian Dictionary of Biography* (2018) < <http://adb.anu.edu.au/biography/kitto-sir-frank-walters-27185>>

<sup>4</sup> E-mail invitation for 2019 Kitto Lecture from University of New England School of Law, 2 April 2019.

<sup>5</sup> See Australia, Referendum Council, *Final Report of the Referendum Council* (Final Report, Department of Prime Minister and Cabinet, 30 June 2017), i, *Uluru Statement From The Heart* (facing page of the *Final Report*) < <https://www.referendumcouncil.org.au/final-report.html>>.

economic reform and that the lesson to be drawn is to be a persistent advocate because real change always takes time.

So, my topic slewed towards The Long Road to any Reform and Improvement. Changing what is wrong has always been an abiding interest of mine and explains why I left the law for politics. My preference for politics can be understood by reference to something said by Justice Kitto. Kitto stated that a judge's role 'is not to be defined as a duty to decide fairly, but as a duty to decide correctly'<sup>6</sup> This reflects a famous quotation from Justice Holmes of the United States Supreme Court who replying to a judicial colleague's parting comment that he should do justice<sup>7</sup> responded that his job was not to do justice but to apply the law.<sup>8</sup>

I agree with Sir Frank's and Justice Holmes' views. That is the rule of law. That is what ensures we live in a free society. We have a government of laws and not of men.<sup>9</sup> In practice I understood my own role as a lawyer as ensuring that my client got his or her rights according to law. But often it pained me that I could not necessarily get a fair answer or a right answer for my client, just the best outcome the law would allow. And sometimes the law was oppressive and unfair.

What is attractive about political life, and you would all know there's a lot about it that is not attractive, is that you can try for the right answer, the fair answer. If the law is not delivering what seems to be the right answer for the citizen, then you can try to change the law. In my political life I liked the search for the right answers. I thought that legislation like the *Racial Discrimination Act*,<sup>10</sup> the *Land Rights Act*,<sup>11</sup> and the *Native Title Act*,<sup>12</sup> and laws expanding the rights of the citizen against the State were contributions to getting better answers than the previous law provided.

There might be some undergraduate law students in the audience who might not anticipate reaching the level of learning required for the High Court. I can sympathise with that amount of self-doubt. When I was achieving promotion in politics I remember resolving that I would

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<sup>6</sup> Frank Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787, 793.

<sup>7</sup> Judge Learned Hand.

<sup>8</sup> See Michael Hertz, "'Do Justice!' Variations of A Thrice Told Tale' (1996) 82 *Virginia Law Review* 111, citing Judge Robert Bork, *The Tempting of America* (Free Press, 1990), 6, which recounts a discussion between Justices Holmes and Learned Hand.

<sup>9</sup> Cf John Toohey, 'A Government of Laws, and not of Men?' (1993) 4 (3) *Public Law Review* 158.

<sup>10</sup> *Racial Discrimination Act 1975* (Cth).

<sup>11</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

<sup>12</sup> *Native Title Act 1993* (Cth).

never accept the position of Attorney General because that role required legal talent of a higher order that I could command.

Yet one of the pluses of my working life is that I've had the privilege of working in various ways with three Western Australians who have been High Court judges.<sup>13</sup> I did not earn that privilege by being a top lawyer but rather because each of those lawyers also looked beyond their careers in the law as it stood and understood the need for change. They welcomed collaborators in their non-judicial efforts. Sir Ronald Wilson,<sup>14</sup> whom I succeeded as Chancellor of Murdoch University, was heavily involved in human rights and Indigenous issues after his departure from the High Court. That work brought us together. John Toohey<sup>15</sup> taught me at the Law School of the University of Western Australia. John was also a leader of the Western Australian Bar when I was a young practitioner. For a year he left his practice at the Bar to work in the Pilbara for the Aboriginal Legal Service. Later he was the first Land Commissioner under the NT Land Rights Act,<sup>16</sup> and then a High Court judge and was one of the *Mabo*<sup>17</sup> judges. After his departure from High Court he assumed the chairmanship of a foundation I had helped establish to assist Aboriginal students to succeed through education, the Graham (Polly) Farmer Foundation. Robert French<sup>18</sup> I met as a student at the University of Western Australia when I was young practitioner. He chaired the committee which was the forerunner to the Aboriginal Legal Service in Western Australia and enlisted support from Ronald Wilson, then State Solicitor General, Aboriginal students, later to be Premier Peter Dowding, myself and others to support that endeavour. He was appointed from the Federal Court as the first President of the National Native Title Tribunal on which I served as a Member and Deputy President. Since retirement from the High Court he also has become the President of the Graham (Polly) Farmer Foundation.

To those law students in the audience unlikely to be High Court material I offer these stories as consolation. There are a lot of ways to use a legal career to pursue fair solutions, just solutions.

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<sup>13</sup> Subsequently, two additional persons of Western Australian origin and educated in law at the University of Western Australia have been appointed to the High Court of Australia: Justice Michelle Gordon AC in 2015, and Justice James Edelman in 2017.

<sup>14</sup> Sir Ronald Darling Wilson AC KBE CMG QC, Justice of High Court of Australia 1979-1989

<sup>15</sup> John Leslie Toohey, AC QC, Justice of the High Court of Australia 1987-1998. He was Senior Lecturer in Law at the University of Western Australia from 1957 to 1958, as well as a Visiting Lecturer from 1953 to 1965: see Michael Blakeney, 'The University of Western Australia Law Review: The First Seventy Years' (2018) 43 *University of Western Australia Law Review* 1, 4.

<sup>16</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

<sup>17</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

<sup>18</sup> Robert Shenton French AC, Chief Justice of the High Court of Australia 2008-2017.

The extensive pro bono practices of Australian law firms are one opportunity. Beyond that my experience is that our greatest lawyers spend some of their lives pursuing right answers outside the law and they welcome collaboration.

You will be surprised how much aid and comfort you will get from working with the best lawyers you can find who share your concerns about right answers. I acknowledge individual lawyers such as Hal Wootten, Danny Gilbert, Mark Leibler, Bob Ellicott and the three High Court Justices I have mentioned, all of whom have enriched various facets my working life as a lawyer, politician, Minister, Tribunal Member and perhaps most important as an active citizen. I am sure Justice Kitto would have left a trail of individuals whose work in and beyond the law was uplifted by his high order skills.

## II REFORM IS POSSIBLE HOWEVER DIFFICULT IT SEEMS

All of us who engage in the pursuit of social and economic reform can be at risk of despair. Progress can seem so slow and even non-existent. Think of today's difficult policy concerns and the apparent lack of movement: think climate change, stagnant wages, the balance between security and liberty, refugee issues, official corruption, homelessness, drug abuse and addiction, domestic violence, child abuse.

In this our genuinely lucky country there are no shortage of issues for reform and improvement. Any of you struggling with any one of these issues might ask the question, are we making progress and is progress possible? Indigenous Australians, aghast at the time it has taken to achieve constitutional recognition, might ask the same question.

I recommend to my fellow strugglers an amusing but accurate testament to our national progress over recent decades, *The Land before Avocado*.<sup>19</sup> It examines Australia over a substantial part of my working lifetime. It records some of the changes that have occurred over that time. It reminds us we have made extraordinary progress. In areas as varied as the status of women, the legal position of gays, our approach to the environment, the position of Indigenous Australians, even in our eating and drinking habits it reminds us that the past was comparatively bleak.

In areas like these the past is indeed a foreign country. Older members of this audience will have their own examples, but my schoolteacher sister was required to resign her teaching position in the State education system on her marriage in the early 1960s. Gay friends and

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<sup>19</sup> Richard Glover, *The Land Before Avocado* (Harper Collins Australia, 2018).

relations lived in fear of prosecution and random violence. We were casually careless about the environment. And in the area of my close interest, Indigenous Affairs, I remember a brutally segregated society, segregated de facto and de jure.

My teenage memories of the position of the Aboriginal people in my state of Western Australia in the 1950s and 60s remain sharp. It is of people:

Excluded from the normal benefits of being Australian.  
Denied the vote and other civil liberties afforded generally to others.  
Confined to reserves living in humpies tin sheds and car bodies.  
Casually prostituted and abused.  
Denied education and employment.  
Treated with overt contempt beyond the racism still see today.

The recent films<sup>20</sup> about the treatment of the great AFL footballer and Australian of the Year, Adam Goodes, are painful reminders of the persistence of racism, much as we hate having it drawn to our attention.

We were supposed to be decent and to believe in the equality of our fellow Australians. But for some strange reason our egalitarianism and mateship did not apply to Indigenous people. What I saw as a school student in the 1950s then as university student was the frequent denial of decent treatment and equality of citizenship for Indigenous people. I particularly mention the idea we are all equal, the equality of citizenship, because that important idea is part of why constitutional recognition is contentious to some of our fellow Australians yet it was also the principle that drove many of the positive changes in the legal position of Aboriginals.

Australia today is a much better place for Indigenous Australians than the Australia of my youth. Even a partial list of the changes is a reminder change is possible. Voting rights were legislated in 1962,<sup>21</sup> the overwhelming vote for the 1967 referendum<sup>22</sup> which whatever its technical achievements was really about the nation agreeing to equal citizenship. The Commonwealth acceptance of the need to support Indigenous culture and connection to land and the need for special services in the 1972 (pre Whitlam) budget, the exposure of the unique

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<sup>20</sup> *The Final Quarter* (Shark Island Productions 2019) and *The Australian Dream* (Good Thing Products Company Pty Ltd, Passion Products and Goodes Train Pty Ltd 2019)

<sup>21</sup> *Commonwealth Electoral Act 1962* (Cth) Act No 31 of 1962, date of commencement 18 June 1962 with subtitle 'An Act to give to Aboriginal Natives of Australia the right to Enrol and Vote as Electors of the Commonwealth and to provide for Certain Offences in relation thereto'.

<sup>22</sup> See George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory Commentary and Materials* (Federation Press, 7<sup>th</sup> ed, 2018), 1409.

Aboriginal connection to land in the *Gove Land case*<sup>23</sup> leading to the Woodward Inquiries<sup>24</sup> and all Party support for Land Rights legislation in 1976,<sup>25</sup> all party support for the *Racial Discrimination Act* in 1975,<sup>26</sup> implementation of Land Rights legislation in South Australia and New South Wales, more modestly in Queensland and Victoria during the 1980s.

So while today I share the current concerns about the continuing gaps in life expectancy, education, and employment, the horrific rates of imprisonment and family separation and the shameful neglect and oppression of remote communities, history tells us that if we want to change these things we can.

The really big breakthrough was the High Court *Mabo* decision in 1992<sup>27</sup> which also aroused hostility. It recognised the unique and different status of Indigenous Australians as holders of native title. Their connection to land through their law and culture, now recognised in the Common Law and the *Native Title Act*,<sup>28</sup> is a connection uniquely different from the connection the rest of us can have however much we love our country or our piece of it.

This particular difference, of Indigenous collective identities having identified rights at law sits alongside the now equal citizenship of the individual members of those culturally based collectives. In that important way Australians are not all the same. Only Indigenous Australians – Aboriginal peoples or Torres Strait Islanders- can have land rights or native title.<sup>29</sup> Only they can own and maintain the world’s oldest living cultures. Indigenous Australians are not just another ethnic minority but a distinct and continuing part of our nation.

Coincident with the recognition of the collective identities of First Nations through legislation, agreement making and native title we have also seen a huge growth in an Indigenous middle

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<sup>23</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 *Federal Law Reports* 141 (Supreme Court of the Northern Territory, Blackburn J)

<sup>24</sup> Commonwealth of Australia, Aboriginal Land Rights Commission, *Australian Aboriginal Land Rights Commission First Report* (July 1973) *Second Report* (April 1974) Justice Edward Woodward Commissioner (known as the *Woodward Royal Commission*)

<sup>25</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

<sup>26</sup> *Racial Discrimination Act 1975* (Cth).

<sup>27</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

<sup>28</sup> *Native Title Act 1993* (Cth).

<sup>29</sup> See *Native Title Act 1993* (Cth) Part 15 Division 12 s.223 (1) ‘The expression native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where: (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and (c) the rights and interests are recognised by the common law of Australia.’ See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 187 CLR 1.



class. There are now lawyers, judges, academics, doctors, nurses, business people, tradespeople and public servants, which was not even dreamed of in my youth.

These slowly won changes have had varying degrees opposition depending on whether they affirm sameness or difference. Australians voted almost unanimously in 1967<sup>30</sup> for some ill-defined but generally understood idea of equal citizenship. Almost every Australian wants the social and economic gaps closed. For changes based on pursuit of equality there is general goodwill. Issues like land rights, native title, and constitutional recognition all have excited passionate opposition from some in the community. Why the difference between a 90 per cent yes vote in 1967 and perhaps a current 65 per cent favourable response to recognition in the Constitution?

I think that is easily explained. The notion of equal citizenship fits the Australian instinct, the spirit of Australia. We like to say we are all equal and to oppose differential treatment. It is the idea that someone can claim enduring difference that some cannot accept.

So along with others fighting today for gender equality, for decisive action on climate change and all the other things we are trying to deal with as a society it is important to stop occasionally, take a pause, and note that change is possible— even inevitable — it just takes time and consistent effort. In the world of Google and the web we expect instant results. Societies are not like that.

### III CONSTITUTIONAL RECOGNITION AND THE *ULURU STATEMENT FROM THE HEART*

It has been a long road to Constitutional recognition with as yet no definite end in sight. There is not time this evening to describe the whole journey but demands for and promises of various forms of recognition flow through the Prime Ministerships of Whitlam, Fraser, Hawke, Keating, Howard, Gillard, Abbott, and Turnbull to Morrison.

For those of you who want or need to better understand the history the Referendum Council (established by Turnbull and Shorten in December 2015) reported in 2017 and its final report neatly brings together the history and the outcomes of earlier work.<sup>31</sup>

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<sup>30</sup> Williams (n 22). All six states recorded s 128 *Commonwealth Constitution* referendum majorities, with a 90.77 per cent overall national Yes vote.

<sup>31</sup> Australia, Referendum Council, *Final Report of the Referendum Council* (Final Report, Department of Prime Minister and Cabinet, 30 June 2017), 92-108 Appendix H Discussion Paper. This earlier work includes the Parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2015): Australia, Commonwealth Parliament, Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples *Final Report* (June 2015); the Aboriginal and Torres Strait Islander

In the course of the journey proposals have included a possible Preamble (which was Howard's approach), a constitutional prohibition of racial discrimination, removal and replacement of section 51 (xxvi) of the *Constitution*, and removal of section 23 of the *Constitution*. Constitutional conservatives, some of whom were supportive of some form of recognition, were concerned about the constitutional risks in specific proposals. They saw a risk of unintended consequences such as disturbing the balance between Parliament and the Courts, and how a future activist High Court might interpret rewording the race power or the reach of a new Preamble.

The Co-Chairs of the Referendum Council<sup>32</sup> in the foreword to the Report stated:<sup>33</sup>

This report builds on the work of the Expert Panel and the Joint Select Committee. It takes into account the political and legal responses to the earlier reports, as well as the views of Aboriginal and Torres Strait Islander peoples and the general public.

We were required to consult specifically with Aboriginal and Torres Strait Islander peoples on their views of meaningful recognition. The 12 First Nations Regional Dialogues, which culminated in the National Constitutional Convention at Uluru in May 2017, empowered First Peoples from across the country to form a consensus position on the form constitutional recognition should take.

This is the first time in Australia's history that such a process has been undertaken. It is a significant response to the historical exclusion of First Peoples from the original process that led to the adoption of the Australian Constitution. The outcomes of the First Nations Regional Dialogues and the National Constitutional Convention are articulated in the Uluru Statement from the Heart.

The findings of our broader community consultation supported the findings of the First Nations Regional Dialogues. This strengthens our conviction that the Voice to the Parliament proposal and an extra-constitutional Declaration of Recognition will be acceptable to Aboriginal and Torres Strait Islander peoples and to the broader Australian community. We propose these reforms because they conform to the weight of views of First Peoples expressed in the First Nations Regional Dialogues as well as those of the wider community. With focussed political leadership and continued multiparty support for meaningful recognition, the Voice to the Parliament proposal can succeed at a referendum.

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Peoples Act of Recognition Review Panel (2014): Australia, Aboriginal and Torres Strait Islander Act of Recognition Review Panel, Hon John Anderson AO, Ms Tanya Hosch and Mr Richard Eccles *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel* (Department of Prime Minister and Cabinet September 2014); and the Expert Panel on the Constitutional Recognition of Indigenous Australians (2012): Australia, Expert Panel on Constitutional Recognition of Indigenous Australians *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution Report of the Expert Panel* (Department of Families, Housing, Community Services and Indigenous Affairs January 2012).

<sup>32</sup> The Co-Chairs of the Referendum Council were Pat Anderson and Mark Leibler.

<sup>33</sup> Referendum Council, *Final Report of the Referendum Council* (n 31) iv (italics added).

The consensus view of the Referendum Council is that these recommendations for constitutional and extra-constitutional recognition are modest, reasonable, unifying and capable of attracting the necessary support of the Australian people.

So, what did the *Uluru Statement* actually say? I think it should be seen and heard rather than just commented upon. It eloquently and movingly states:

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 alienated 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.

This is a heartfelt plea to the people of Australia. It is a profound act of Indigenous leadership that tells us how to reset our relationship and points the way to how we can more effectively close the social and economic gaps. It is in accord with all we have learned over the last fifty years and consistent with current government policies with respect to closing the gap.

From a constitutional viewpoint it strips out all the genuine constitutional issues that have been raised with respect to previous proposals for constitutional recognition. It removes the risk of unintended consequences such as disturbing the balance between Parliament and the Courts, and how a future activist High Court might interpret rewording the race power or the reach of a new Preamble. The previous reform proposals were set aside by the Uluru statement and all of the concerns of conservative constitutionalists were thereby met.

My sense is that the participants in the Uluru convention or at least some of them expected to be greeted with thanks for eliminating what could genuinely concern constitutional conservatives. However instead of the *Uluru Statement from the Heart* being greeted with acclaim it was met by an absurd misinterpretation led by Barnaby Joyce that Uluru was proposing a third chamber of Parliament, words which were then followed by the Prime Minister of the time and many others. Barnaby has since apologised but the straw man was created, the well of public discussion was poisoned.

The formal reply by the Turnbull Government<sup>34</sup> was dismissive of the Voice to Parliament on the basis (contrary to the view of the Reconciliation Council) that it was not capable of winning acceptance in a referendum, that all citizens have equal civil rights and can be elected to Parliament and the Voice is inconsistent with this principle. It further queried how the diversity of Indigenous circumstances and experience could be fairly or democratically represented. More encouragingly it said:

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<sup>34</sup> Malcolm Turnbull, George Brandis and Nigel Scullion, 'Response to Referendum Council's Report on Constitutional Recognition' (Joint Media Release, Prime Minister, Attorney General and Minister for Indigenous Affairs, Department of Prime Minister and Cabinet, 26 October 2017) <<https://ministers.pmc.gov.au/scullion/2017/response-referendum-councils-report-constitutional-recognition>>. See further the subsequent work of the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, established by a resolution of appointment passing the House of Representatives on 1 March 2018 and the Senate on 19 March 2018: Australia, Commonwealth Parliament, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (Canberra, July 2018) and *Final Report* (Canberra, November 2018).

We have listened to the arguments put forward by proponents of the Voice, and both understand and recognise the desire for Aboriginal and Torres Strait Islander Australians to have a greater say in their own affairs.

We acknowledge the values and the aspirations which lie at the heart of the Uluru Statement. People who ask for a voice feel voiceless or feel like they're not being heard. We remain committed to finding effective ways to develop stronger local voices and empowerment of local people.

Our goal should be to see more Aboriginal and Torres Strait Islander Australians serving in the House and the Senate - members of a Parliament which is elected by all Australians.<sup>35</sup>

This last point is an admirable goal but does not go to a Voice for Indigenous Australians. It is yet another straw man designed to confuse rather than illuminate. There are now Indigenous Australians serving in both chambers of the federal Parliament and serving on the front bench of both the major parties. Of course, they bring an Indigenous perspective to the Parliament but they are elected to represent their electorates and political parties not the Indigenous peoples. In Cabinet and Shadow Cabinet they are bound by strict rules of cabinet solidarity and cannot be the voice for First Nations peoples.

#### IV THE COUNCIL OF AUSTRALIAN GOVERNMENTS, THE CO-DESIGN PROCESS AND BEYOND

Commendably the Morrison Government has shown it is committed to ongoing consideration of how Indigenous people achieve a voice and empowerment. Funds have been allocated for a co-design process,<sup>36</sup> while currently stepping back from a constitutionally enshrined voice. That element of Uluru remains unfinished business.

Most significantly, in December 2018 the Commonwealth responded positively to requests by National Indigenous Peak bodies that all governments move away from the traditional top down governments- know-best approach of the COAG with respect to closing the gap and to work in partnership instead. This is a remarkable development of historic significance and it occurred on the current Prime Minister's watch and with his active involvement.

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<sup>35</sup> Ibid 'Response to Referendum Council's Report on Constitutional Recognition' (Italics added).

<sup>36</sup> Nigel Scullion, '2019-20 Budget Delivers Record Funding for Indigenous Australians' (Media Release Department of Prime Minister and Cabinet, 4 April 2019), '\$7.3 million to undertake a co-design process with Aboriginal and Torres Strait Islander Australians to detail options for Constitutional Recognition and a Voice to Parliament'; Commonwealth, *Parliamentary Debates* House of Representatives, 19 September 2019, 91 (Ben Morton).

In December 2018 all the governments of Australia agreed to be guided by the principles of empowerment and self-determination.<sup>37</sup> They recognised:

that in order to effect real change, governments must work collaboratively and in genuine formal partnership with Aboriginal and Torres Strait Islander peoples as *they are the essential agents of change...Aboriginal and Torres Strait Islander peoples must play an integral part in the making of the decisions that affect their lives – this is critical to closing the gap.*<sup>38</sup>

COAG committed to the establishment of a formal partnership with Aboriginal and Torres Strait Islander peoples, through their representatives, by the end of February 2019.<sup>39</sup> They also committed to place-based responses and regional decision making.<sup>40</sup>

A partnership agreement was signed by Australian governments in March 2019.<sup>41</sup> As is always the case implementation of what has been agreed will be the challenge. For governments to act in true partnership requires them to put aside their traditional top down approaches and to have legal and administrative frameworks that permit genuine partnerships.

But on this occasion, there is ample room for optimism about implementation, big as that challenge is. The Hon Ken Wyatt AM<sup>42</sup> is the first Indigenous Federal Minister for Indigenous Affairs. We can take additional comfort from the fact that at least two Ministers, The Hon Ken Wyatt AM and his cousin the Hon Ben Wyatt<sup>43</sup> are on the governments' side of the table. But even more important the Partnership Agreement establishes a Ministerial Council to be known as the Joint Council on Closing the Gap.<sup>44</sup> It has Ministers from each jurisdiction and an equal number of representatives from Peak Indigenous organisations. The Council will have two co-chairs, one ministerial representative and one representative agreed by the Peaks. With the

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<sup>37</sup> Council of Australian Governments (COAG), Meeting of the Council of Australian Governments, *Communique* (Adelaide, 12 December 2018), paragraph titled 'Closing the Gap'; 'COAG Statement On The Closing The Gap Refresh' (12 December 2018).

<sup>38</sup> 'COAG Statement On The Closing The Gap Refresh' *ibid.* Paragraph titled 'Partnerships With Aboriginal And Torres Strait Islander Australia'.

<sup>39</sup> *Ibid.* Paragraph titled 'Where We Are Going From Here'

<sup>40</sup> *Ibid.* 'Where We Are Going From Here' – 'Place-based Responses and Regional Decision Making'.

<sup>41</sup> See COAG 'Closing the Gap – Partnership' < <https://closingthegap.niaa.gov.au/partnership> > 'In March 2019, COAG Parties entered into a formal partnership between the Commonwealth, state and territory governments, the National Coalition of Aboriginal and Torres Strait Islander Peak Organisations, and the Australian Local Government Association, *Partnership Agreement on Closing The Gap 2019-2029* (22 March 2019) < <https://www.coag.gov.au/about-coag/agreements/closing-gap-partnership-agreement> >.

<sup>42</sup> Minister for Indigenous Australians, Liberal Member for the House of Representatives electorate of Hasluck, Western Australia.

<sup>43</sup> Treasurer and Minister for Finance, Energy and Aboriginal Affairs, Labor Member for Western Australian Legislative Assembly electorate of Victoria Park.

<sup>44</sup> *Partnership Agreement on Closing The Gap 2019-2029* (n 41) 6. 'This Ministerial Council will be known as the Joint Council on Closing the Gap'.

Federal Minister now being an Indigenous, Ken Wyatt, both chairs will be Indigenous. Pat Turner, the leader of the National Aboriginal Community Controlled Health Organisation (NACCHO) is the Peak nominated chair.

However even if Australian governments live up to the partnerships to which they have publicly and formally committed one of the major concerns is whether it is possible to structure a national voice that allows for the real desire of the multitude of diverse local voices to be heard could be met.

It is of course for Indigenous Australians to say how their voice is to be structured. What I hear the Indigenous people with whom I work say is they want their local say in the decisions that affect their lives and acceptance that without their active involvement in policy and administration nothing will change.

That means having a say in the design and delivery of policies affecting them.

Some see the commitment to a multiplicity of local voices as a barrier to being able to design a national voice. I see it as enabling. Local voices must be heard. There are huge regional differences across Australia. Different regions have different histories, economies, social conditions including in education, employment, housing and access to services. There is no one size fits all so local partnerships involving the community and all levels of government are essential. If the partnerships promised by COAG are put in place the local voices demanding to be heard will be able to be heard on all the issues affecting their communities. A commitment to a multiplicity of local voices will in fact enable a national voice, rather than impede it.

What will be needed nationally, in addition to those place-based partnerships, is an authentic Indigenous accepted national Voice that talks to the Parliament on the national as against regional and local issues. Issues like native title, racial discrimination, heritage protection, legislation directed at Indigenous people AND whether all governments are living up to their common commitment to partnership are matters of national rather than just local concern.

There are no real constitutional reasons for not accepting constitutional recognition of the sort requested by the *Uluru Statement from the Heart*.

Two retired Chief Justices of the High Court, Murray Gleeson<sup>45</sup> and Robert French<sup>46</sup> have confirmed that there are no constitutional problems inherent in a constitutionally entrenched voice to Parliament.<sup>47</sup> They are supported in that by other lawyers, including Professor Anne Twomey<sup>48</sup> and leading legal practitioners including Danny Gilbert<sup>49</sup> and Mark Leibler.<sup>50</sup>

A Voice to Parliament can be mandated in the Constitution while Parliamentary supremacy is preserved as well as the balance between the High Court and the Parliament. The form of the Voice remains within the legislative power of Parliament and the process of co design is to ensure that what is acceptable to Parliament is also seen as legitimate by Aboriginal and Torres Strait Islander peoples. After all it is their Voice.

The equal citizenship of all Australians will be preserved as will the present and future reality that the collective identities of our first nations continue to exist and to have a unique place in our nation. That reality has not gone away in New Zealand, the United States, Canada and Scandinavia. Indigenous recognition has not destroyed equal citizenship in those successful nations.

## V CONCLUSION

I titled this address the *Long Road to Uluru and Beyond* because we are now temporally past the delivery of the *Uluru Statement* to us. There is much to be done. Recognition through a Voice to Parliament, a Makarrata<sup>51</sup> Commission and truth telling are all on the agenda and in various ways being pursued. But a firm foundation has been laid for the future in the commitments by all-governments at COAG to the principles of partnership.

One cannot have a partnership where one of the partners cannot be heard. Once it is accepted by governments that Aboriginal and Torres Strait Islander peoples are the key players in closing

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<sup>45</sup> Murray Gleeson AC QC, Chief Justice of the High Court of Australia 1998 to 2008.

<sup>46</sup> Robert Shenton French AC, Chief Justice of the High Court of Australia 2008-2017.

<sup>47</sup> Murray Gleeson, *Recognition in Keeping with the Constitution A Worthwhile Project* Pamphlet *Uphold and Recognise* Monograph Series (2019); Robert French 'Voice of Reason not beyond Us', *The Australian* (Sydney, 31 July 2019); Gabrielle Appleby, 'A Worthwhile Project': Why Two Chief Justices Support the Voice to Parliament, and why that Matters', *The Conversation* (online 1 August 2019) <<http://theconversation.com/a-worthwhile-project-why-two-chief-justices-support-the-voice-to-parliament-and-why-that-matters-120971>>; 'Former chief justice Robert French Speaks up for Indigenous Voice' *The Australian* (Sydney, 31 July 2019).

<sup>48</sup> Professor of Constitutional Law, University of Sydney Law School. See Anne Twomey, 'Why an Indigenous Voice would not be 'third chamber' of Parliament', *Sydney Morning Herald* (Sydney, 28 May 2019).

<sup>49</sup> Danny Gilbert AM, Co-Founder and Managing Partner Gilbert and Tobin lawyers.

<sup>50</sup> Mark Leibler AC, Senior Partner, Arnold Bloch Leibler lawyers and Co- Chair, Referendum Council.

<sup>51</sup> See Galarrwuy Yunupingu, 'Rom Watangu' *The Monthly* (July 2016), 18, reprinted as Appendix D to *Final Report of the Referendum Council* (n 30) – Makarrata is the coming together after a struggle.



the gap the need for them to have voices and to be heard is beyond argument. In COAG practical matters are trumping ideology about recognition. To achieve the practical outcomes governments and Aboriginal and Torres Strait Islander wants requires first peoples to be heard and listened to. There is a practical need for the voice. Why then is there still resistance to the *Uluru Statement*?

It seems me that there is a minority of Australians who still cleave to the notion of Terra Nullius, who want Indigenous Australians to forget their unique identities, to forego the world's oldest living cultures, to meet the 1930s idea of disappearing into the wider (white) communities. They hold to the notion of assimilation rather than integration. It is that attitude that underlies the objection to any form of constitutional recognition and is why there will never be a perfect consensus on the way ahead.

That assimilationist attitude ignores history and reality. History shows that the Indigenous peoples displaced do not give up their identities however kindly or brutally we demand that of them. History shows that from settlement we have differentiated them and legislated about them. History shows that whatever we have done they have survived. Now, post *Mabo*, their collective identities are part of the legal framework of our shared country. They are not going to go away. They are not going to give up their identities. It is time for us the listen to the message from Uluru and to act on it.