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First Nations Constitutional Recognition in Australia

Addressing Foundational Failures of Rule of Law

GABRIELLE APPLEBY AND MEGAN DAVIS

This chapter explores the complexity of the relationship between Australia's rule of law claims and the treatment of First Nations. This has been described by scholars as a 'paradox at [the] heart' of the Australian state,[1] giving rise to a 'crisis of constitutional legitimacy' caused by 'disagreement ... about the authority of the constitutional order itself'.[2] We argue that this crisis has two historical roots. First is the basis for the assertion of English sovereignty over the lands that would become Australia in 1788, the 'original grievance'.[3] Second is the imposition of a legal system and the evolution of 'rule of law' machinery and principles that were designed to curtail the arbitrary exercise of government power in the Australian colonies, while simultaneously denying access to the rule of law for the Aboriginal population of those lands. In both of these cases the rule of law was not neutral, but rather weaponised: to assess the Aboriginal people and their political and legal structures as being 'unworthy'.[4]

We place these two strands of Australia's rule-of-law history in a broader context of rule-of-law debates and failures in the Australian

[1] M. Krygier, 'The Grammar of Colonial Legality: Subjects, Objects, and the Australian Rule of Law', in G. Brennan and F. G. Castles (eds.), *Australia Reshaped: 200 Years of Institutional Transformation* (Cambridge, 2002), 220–60.

[2] G. Appleby, R. Levy, and H. Whalan, 'Voice versus Rights: A First Nations Voice and the Australian Constitutional Crisis of Legitimacy', *University of New South Wales Law Journal*, 46 (2023), 761, 765.

[3] See M. Davis, 'Ships That Pass in the Night', in M. Davis and M. Langton (eds.), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne, 2016), 86–96, 93.

[4] We develop this position from an argument initially made in a narrower context by D. Manderson, 'The Law of the Image and the Image of the Law: Colonial Representations of the Rule of Law', *New York Law School Law Review*, 57 (2012), 153.

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state. Aboriginal and Torres Strait Islander people's experience of the law and the Australian state intersect in myriad and complex ways with these debates. Their experience, and the rule-of-law architecture that developed to deal with them as a separate group, an 'other' within the Australian legal system, persist in the Australian legal system. We develop an argument that it is the foundational incoherencies that have continued to plague the Australian state and its claim to the rule of law.

In the final part of this chapter, we explore this continued crisis in light of the failed referendum to 'recognise' the unique status of First Nations people in the constitutional system. We consider the extent to which different structural reform proposals for recognition of First Nations – in particular proposals for constitutional rights protection and a constitutionally enshrined Voice (a representative advisory body) – address these incoherencies and their consequences. The proposals speak varyingly to history. The only reform that speaks to First Nations rights to a self-determined political status and to political participation, and provides a unique structural governance response to rule-of-law grievances, is a constitutionally enshrined Voice. The Voice proposal sought a new understanding of the rule of law that incorporates the status, laws and experiences of First Nations.

The rule of law frames this discussion for two key reasons. The first is its now well-accepted use in the discourse on the constitutional state in Australia. It is the touchstone against which the evolution of the legal system from a penal colony to a modern state has been assessed.[5] In the landmark and much-celebrated High Court of Australia decision in *Australian Communist Party v. Commonwealth* (1950), Dixon J referred to the rule of law as forming an assumption on which the Australian constitutional text was based.[6] In subsequent celebrated decisions relating to the rule of law, it has been used to explain the basis of constitutional guarantees to access the courts,[7] and to prevent the development of 'islands of power', immune from judicial oversight.[8] Following the

[5] D. Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge, 1991); V. Windeyer, 'A Birthright and Inheritance – The Establishment of the Rule of Law in Australia', *Tasmanian University Law Review*, 1 (1962), 635.

[6] *Australian Community Party v. Commonwealth* (1950) 83 CLR 1.

[7] Through section 75(v) and the guarantee of original jurisdiction to seek writs against officers of the Commonwealth: *Plaintiff S157/2002 v. Commonwealth* (2003) 211 CLR 476.

[8] *Kirk v. Industrial Court of NSW* (2010) 239 CLR 531.

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Mason–Brennan eras in the High Court,[9] in which a series of rulings established new foundational and constitutional doctrine (for instance, in relation to native title, the implied freedom of political communication and separation of powers-based limitations on executive power of detention), conservative High Court justices invoked 'the rule of law' to defend a return to a more formalist and legalistic approach to constitutional interpretation.[10] The 'rule of law' is thus deployed, defended and celebrated as foundational: an assumption and a defence of Australia's entire constitutional ethos and the legitimacy of Australia's highest court.

The second reason is that claims and appeals to, and contests over, 'rule of law' that might be perceived to be occurring entirely separate to, and dislocated from, the rule-of-law issues experienced by First Nations, do affect First Nations people and intersect with their experience of the Australian state in a myriad of complicated and pervasive ways. Equal application of the law is explicitly disregarded in our constitutional system with Aboriginal people, the only 'race' against which the Commonwealth's power to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws' has been used.[11] They are also the only race for which the operation – and protections – of the Racial Discrimination Act 1975 (Cth) have been suspended. When the High Court handed down its ground-breaking decision in *Mabo v. Queensland* (No. 2) (1992), finding the common law of Australia recognised pre-existing native title claims of Aboriginal and Torres Strait Islander people, the court and its interpretative approach was attacked as 'activist' and 'political'.[12] Much of the critique and the attempted swing against the High Court's progressive interpretative trends were made by conservative jurists under the guise of protecting the court's legitimacy and 'the rule of law'.[13] The formalist, legalistic approach for which these judges advocated left Aboriginal and

[9] See further discussion of these eras in R. Dixon and G. Williams (eds.), *The High Court, the Constitution and Australian Politics* (Cambridge, 2015).

[10] M. Gleeson, *The Rule of Law and the Constitution* (Australian Broadcasting Corporation, Boyer Lectures, Sydney, 2020); D. Heydon, 'Judicial Activism and the Death of the Rule of Law', *Quadrant*, 47 (2003), 9.

[11] Section 51(xxvi) of the *Australian Constitution*.

[12] *Mabo v. Queensland (No. 2)* [1992] HCA 23; 175 CLR 1. See further T. Josev, 'The Persistent Pejorative: Judicial Activism', in G. Appleby and A. Lynch (eds.), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge, 2021), 163–86.

[13] See Heydon, 'Judicial Activism'.

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Torres Strait Islander people in a number of cases without the substantive protection of the law, and at the whim of political agendas.[14]

Initial Claims and Evolution of Rule of Law

This section sets out two dimensions of the claims to the rule of law that have dominated the Australian historical discourse. The first is the initial legal foundation for the assertion of sovereignty on which the colonial and then federal legal system and 'rule of law' would be built. The second is the development of that legal system and evolution of the rule of law in accordance with English legal thought. In both instances, these historiographies have intersected with the experience of Aboriginal and Torres Strait Islanders of the rule of law in deeply troubling ways.

Initial Claims to Sovereignty

There is a well-recited mantra in Australia that the British assertion of sovereignty for its first colony in New South Wales was made not as a conquest, not through cession: it was 'settled'. And with 'settlement' came the peaceful acquisition of British sovereignty over the colonies, and the importation of the British common law, or at least as much of that law as could be applicable to the circumstances of a penal settlement. This was all juridically explained on the basis of an asserted legal fact: the land over which they were laying claim to sovereignty belonged to no one, termed *terra nullius* in more contemporary scholarship and cases. The basis of the claim lay in statements of international law, as enunciated by Sir William Blackstone (1765)[15] and Emmerich de Vattel (1758).[16] As Blackstone explained:

> Plantations, or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, *by finding them desart and uncultivated*, and peopling them from the mother country; or where, already cultivated, they have been either gained by conquest, or ceded

[14] For instance, in *Kartinyeri v. Commonwealth* (1998) 195 CLR 337, in relation to the interpretation of section 51(xxvi), and *Maloney v. The Queen* (2013) 252 CLR 168, interpreting special measures under the Racial Discrimination Act 1975 (Cth).

[15] W. Blackstone, *Commentaries on the Laws of England* (Oxford, 1765–69): we have used the 17th edition of 1830 (hereafter, Bl.Comm.).

[16] E. de Vattel, *Law of Nations or the Principles of Natural Law: Applied to the Conduct and the Affairs of Nations and Sovereigns*, trans. C. G. Fenwick (Washington, DC, 1916), Book 1, Chapter CVIII.

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> to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations.[17]

The claim that the land was 'desart and uncultivated' was evidenced and determined, ultimately, by the observations and conclusions of the British themselves. In Captain James Cook's language, the inhabitants had 'no fix'd habitation but move on from place to place like Wild Beasts in search of food' and live 'wholy by fishing and hunting, but mostly by the former for we never saw one Inch of Cultivated Land in the Whole Country'.[18] Sir Joseph Banks wrote in his journal that when he went ashore at Botany Bay, he had seen 'nothing like people',[19] and that '[t]his immense tract of Land [is] thinly inhabited even to admiration'.[20] He would later testify to the House of Commons select committee looking at the establishment of the colony for transportation of convicts that:

> he apprehended that there would be little probability of any opposition from the natives, as during his stay there, in the year 1770, he saw very few, and did not think there would be above fifty in all the neighbourhood, . . . and those he saw were naked, treacherous, and armed with lances, but extremely cowardly, and constantly retired from our people when they made the appearance of resistance.[21]

Terri Libesman describes these statements as reflecting 'presumptions with respect to Aboriginal societies rather than evidence'.[22] In the 1889 Privy Council decision of *Cooper v. Stuart*,[23] in determining the application of the English law of perpetuities to a New South Wales land dispute, Lord Watson provided his own interpretation of Blackstone, and the position of the New South Wales colony. Lord Watson was even

[17] 1 Bl.Comm. 4 (emphasis added).
[18] J. Cook, *Journal of HMS Endeavour (1768–1771)* (first published in 1773, now available at www.nma.gov.au/exhibitions/endeavour-voyage/cooks-journal/new-holland-description), 86. See also *Cooper v. Stuart* (1889) 14 App. Cas. 286, 291 (Lord Watson).
[19] J. Banks, *The Endeavour Journal of Sir Joseph Banks* (25 August 1768–12 July 1771, available at https://gutenberg.net.au/ebooks05/0501141h.html#apr1770), entry for 29 April 1770.
[20] Ibid.
[21] Bunbury Committee on Transportation: Journal of the House of Commons, 10 April 1779, vol. 37, 311.
[22] T. Libesman, 'Dispossession and Colonisation', in L. Behrendt, C. Cuneen, T. Libesman and N. Watson (eds.), *Aboriginal and Torres Strait Islander Legal Relations*, 2nd ed. (Oxford, 2019), 3–19, 7.
[23] (1889) 14 App. Cas. 286.

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more favourable to the British than the original text, and accorded closely with the observations of Cook and Banks:

> There is a great difference between the case of a Colony acquired by conquest or cession, which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.[24]

Watson's extension of Blackstone has been described by Eddie Synot and Roshan de Silva-Wijeyeratne:

> The problem . . . is that Lord Watson took liberties with the definitions of 'practically unoccupied' and 'settled', resulting in an expansion of the applicability of occupation and settlement to lands legitimately occupied and possessed by peoples that colonial authorities otherwise characterised as being incapable of occupation and possession.[25]

As Ann Curthoys, Ann Genovese and Alexander Reilly have written: '[a]fter *Cooper*, a territory was understood to be *terra nullius* not only if it were uninhabited, but also if it had inhabitants but those inhabitants were without a recognisable law'.[26] To be recognisable as a legal system would likely then require the minimum pillars of a legal system that were dictated by the minimum characteristics of the rule of law: a set of laws, centrally promulgated, and enforceable by an independent arbiter. As Kristen Rundle has written, the rule of law is theoretically and conceptually underdeveloped to identify and describe Indigenous political and legal orders. That is 'not because indigenous traditions contain no idea of law-governed political order', but that 'indigenous conceptions of law-governed political order are organised around patterns of thought that run in very different directions'.[27]

Through a 'rule of law' lens, then, the initial sovereignty claims are deeply troubling at a number of levels. The assertion that these norms described by Blackstone and de Vattel are the law of nations, or even natural law, is the assertion by imperial powers of a normative position that justifies and facilitates the desired colonial expansion. Even if one

[24] Ibid., 291.
[25] E. Synot and R. de Silva-Wijeyeratne, '*Cooper* v. *Stuart*', in N. Watson and H. Douglas, (eds.), *Indigenous Legal Judgments* (Abingdon, 2021), 36–53, 38.
[26] A. Curthoys, A. Genovese and A. Reilly, *Rights and Redemption: History, Law and Indigenous People* (Sydney, 2008), 55.
[27] K. Rundle, *The Rule of Law Revisited* (Cambridge, 2023), 66.

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were to accept the legitimacy of the normative justification, how would Indigenous populations contest the assertions by an imperial power that land was uncultivated? This was a legal system that they did not understand or operate within; and one which provided no ready forum for contesting the assertions of one party: the colonising state. It was an assertion that was very much in the imperial interests of the British: the British penal system was in crisis, and Britain was in desperate need of a solution to accommodate the increasing numbers of prisoners produced by its justice system. A simple claim to land would provide a parking place for the growing convict population and would, eventually, in the words of Brennan J in *Mabo (No. 2)*, underwrite 'the development of the Australian nation'.[28] Thus, the claim of sovereignty was a self-interested, unaccountable assertion of British state power, the very antithesis of the rule of law.

The claim was directly incoherent with the facts, including those known to the British at the time. First, there is now a large body of work, including judicial findings, that has developed to argue the inappropriateness of the claim that the land that became Australia was uninhabited, or uninhabited by those with a recognisable system of social governance and dispute resolution.[29] The extent to which this was understood by the British is revealed by the second fact. Settlement was not peaceful but occurred through ongoing, fatal and organised violence, including killings and massacres of entire Aboriginal families, communities and society. These were the result of the expansion of the colonial enterprise, and Aboriginal inhabitants of those lands fighting to protect their country and societies from invasion by a foreign state.

The incoherency of this position was finally accepted by the High Court in *Mabo v. Queensland (No. 2)*, but not in the complete way that might be thought, given the celebration of the case. Indeed, Daniel Lavery

[28] *Mabo (No. 2)*, 69.

[29] See e.g. *Milirrpum v. Nabalco* (1971) 17 *Federal Law Reports* 141, 267–9 (Blackburn J) (*Gove Land Rights Case*); N. L. Wallace-Bruce, 'Two Hundred Years On: A Re-examination of the Acquisition of Australia', *Georgia Journal of International & Comparative Law*, 19 (1989), 87; G. Simpson, '*Mabo*, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence', *Melbourne University Law Review*, 19 (1993), 195; D. Ritter, 'The "Rejection of *Terra Nullius*" in *Mabo*: A Critical Analysis', *Sydney Law Review*, 18 (1996), 5; S. Hepburn, 'Disinterested Truth: Legitimation of the Doctrine of Tenure Post-*Mabo*', *Melbourne University Law Review*, 29 (2005), 1; A. Fitzmaurice, 'The Genealogy of *Terra Nullius*', *Australian Historical Studies*, 38 (2007), 1.

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has described the decision, which condemned the notion of *terra nullius* as unjust, discriminatory and ahistorical, as nonetheless exposing 'a troubling doctrinal paradox'.[30] The decision, particularly the judgment of Brennan J, accepts the position that the Aboriginal and Torres Strait Islander inhabitants of the land lived in accordance with recognisable legal systems, but leaves the acquisition of sovereignty untouched. Indeed, quoting the statement by Gibbs CJ (a subsequent critic of the *Mabo* decision) in *Seas and Submerged Lands Case*,[31] Brennan J accepts that '[t]he acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state'.[32] The recognition of sovereignty, Brennan J explained, 'is accorded simply on the footing that such a prerogative act is an act of state the validity of which is not justiciable in the municipal courts'.[33] The *Mabo (No. 2)* decision was one that looked at the consequence of acquisition of territory, not that act itself. Brennan J's position, by necessity, left the foundations of the assertion of sovereignty as resting on a peaceful settlement, resting on *terra nullius*, which itself rested on the idea that Aboriginal people had no recognisable legal system.

The conclusion in *Mabo (No. 2)*, ultimately, is that the Australian common law legal system recognises that there were pre-existing – and ongoing – legal systems that governed and govern Aboriginal and Torres Strait Islander communities. The existence of these legal systems, however, has an extremely limited effect: they may, if the circumstances are right, give rise to a common law claim to native title. In 2020, the Australian High Court recognised that the common law's recognition of the rights and interests drawn from Aboriginal law and custom, and connection to the land that would become Australia, gave rise to a constitutional limitation on the application of the 'aliens power' to members of the Aboriginal and Torres Strait Islander community.[34] The High Court's now embrace of the recognition of the status of traditional laws and custom of Aboriginal people sits directly in contradiction to the legal basis for the claim of English sovereignty over the land in 1788. But this consequence of recognition is simply left as

[30] D. Lavery, 'No Decorous Veil: The Continuing Reliance on an Enlarged *Terra Nullius* Notion in Mabo (No. 2)', *Melbourne University Law Review*, 43 (2019), 233.
[31] (1975) 135 CLR 388.
[32] *Mabo (No. 2)*, 31.
[33] Ibid.
[34] *Love v. Commonwealth; Thoms v. Commonwealth* [2020] HCA 3.

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unresolvable: a political fact, an artefact of the arbitrary exercise of force and violence by the British state against the Aboriginal nations.

This position is unsatisfactory. As we explore in the final section of this chapter, it is unsatisfactory because it leaves unresolved the status of claims to sovereignty by First Nations.[35] These claims span the legal, political and spiritual. While they have been consistently denied in their legal form by the High Court, since *Mabo (No. 2)* they been given legal footholds. This is because assertions of First Nations sovereignty rests on the idea that 'it was never validly taken or given away'.[36] The incoherency of the legal position in regard to the basis of British sovereignty, coupled with the strength of advocacy and argument for ongoing First Nations sovereignty, represents an ongoing crisis for the legitimacy of the rule of law in the Australian state. As we have shown here, it is one that has not been able to be resolved by the courts. In the final section of the chapter we return to how other avenues of reform might offer solutions to this issue.

Evolution of Rule of Law

The second claim we seek to interrogate in the Australian myth-making with respect to rule of law is the remarkable evolution of the legal system that was imposed by the British on colonisation, from a penal state in which there was largely unfettered executive and legislative power bestowed on the Governor, to one in which the institutions and principles associated with the rule of law were developed. This is a view of colonisation as creating a legacy of rule of law. The development of 'free institutions' of the rule of law and democratic ideals included the introduction of independent courts, a crown prosecutor, trial by jury, a representative legislature with an expanded franchise, and eventually an accountable executive.[37] This massive transformation of institutions was, however, only for the colony and for the men and women who had come

[35] See, for instance, M. Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Annandale, NSW, 2016), chapter 5.

[36] S. Brennan, L. Behrendt, L. Strelein and G. Williams, *Treaty* (Annandale, NSW, 2005), 72, and at 73, other political objectives and claims to sovereignty as the basis for political advocacy for rights and governance. See also L. Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Annandale, NSW, 2003), 99.

[37] See further, e.g., Windeyer, 'A Birthright and an Inheritance'; B. Kircher, *An Unruly Child: A History of Law in Australia* (Abingdon, 1995); Neal, *Rule of Law in a Penal Colony*.

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to Australia or been born under the colonial government. The status of Aboriginal people within this developing system of rule of law was ambiguous, arbitrary and violent: the antithesis of the rule of law. The expectations of the colonists and convicts might have been that they had natural-born rights to the liberal institutions and expectations of the rule of law. As David Neal argues, '[a] cluster of ideas known as the rule of law provided the major institutions, arguments, vocabulary and symbols with which the convicts forged the transformation'.[38] But this was not the expectation, or experience, of the Aboriginal populations. So, as Martin Krygier has asked, how do you come to terms with 'what happened to Australia's Aborigines while these remarkable achievements were underway'?[39]

The experience of colonisation, and the evolution of the rule of law in the colonial system for Aboriginal populations across the Australian colonies were diverse. That diversity was marked, however, by a number of shared experiences that demonstrate not just a vacuum of rule of law but an active denial of it and, as we have argued above, the weaponisation of the rule of law against Aboriginal people. The starting point for those exploring this juxtaposition is usually the Royal Instructions issued to the early Governors, and, in some cases, their own public proclamations, as to the treatment of Aboriginal people. The most famous of these instruments were those issued to Governor Philip:

> You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give the unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought into punishment according to the degree of the offence.[40]

The status of Aboriginal people in the newly imposed legal system was not clear. Governor Philip's Instructions imply that they were *distinct* from the subjects of the colony. Did this mean they were subject to the laws of the colony, or their own laws? If they were subject to the laws of the colony, were they competent to give evidence in a colonial court so as to actually make use of those laws? This was a matter of great public and

[38] Neal, *Rule of Law in a Penal Colony*, 62.
[39] Krygier, 'Grammar of Colonial Legality', 220.
[40] Governor Philip's Instructions, 25 April 1787.

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legal debate.[41] Legally, it would remain unsettled for decades, only being resolved in the 1836 decision in *R. v. Murrell*.[42] There, Burton J of the New South Wales Supreme Court found that Aboriginal people were subject to colonial laws. Aboriginal people had, in his words, 'not attained at the first settlement of the English people amongst them to such a position in point of numbers *and civilisation, and to such a form of Government and laws*, as to be entitled to be recognised as so many sovereign states governed by law of their own'.[43] This was explained, then, using the same justification for 'settlement'. Here, though, we see the language of 'civilisation', language that was often used, to deny not just the status of Aboriginal society and laws but their spiritual and religious lives.

The official role of the state in the frontier violence of dispossession was complex and multifaceted. There were instances of Governors involved in the legally sanctioned, armed (violent) 'pacification' of Aboriginal people.[44] There were many instances of state officers engaged in extensive, arbitrary massacres of Aboriginal people, which, while they were not sanctioned by the Governor or law, were tolerated and these individuals were not brought before the justice system for their violations.[45] There were other examples of Governors giving legal permission to settlers and the military to use force against Aboriginal people,[46] and in particular to defend themselves against violence as they pushed further into Aboriginal lands. 'Defend' in this situation was often the result of proactive incursions into Aboriginal land, resulting in armed resistance.[47] In this respect, the position of the colonial government in relation to this violence was consistent with

[41] As evidenced in the letters to the editor of various provincial newspapers; see e.g. those extracted in H. Reynolds, *This Whispering in Our Hearts Revisited* (Sydney, 2018).

[42] [1836] NSWSupC 35; although see also *R. v. Ballard (or Barrett)* [1829] NSWSupC 26; and *R. v. Bonjon* [1841] NSWSupC 92.

[43] *R. v. Murrell* [1836] NSWSupC 35 (emphasis added).

[44] See Governor Hunter, letter to the Duke of Portland, 20 June 1797, *Historical Records of Australia*, vol. 2, 24 (hereafter *HRA*).

[45] For instance, Major James Nunn, considered responsible for the massacre of potentially hundreds of Gamilaraay People at Waterloo Creek in 1836. See further *HRA* (22 July 1839), vol. 20, depositions at an inquiry into this encounter.

[46] See e.g. the instructions of Governor Macquarie in 1816: M. Organ, 'Secret Service: Governor Macquarie's Aboriginal War of 1816', *Proceedings of the National Conference of the Royal Australian Historical Society* (Mittagong, 25–26 October 2014).

[47] See e.g. H. Reynolds, *The Question of Genocide in Australia's History: An Indelible Stain* (Ringwood, Victoria, 2001), 56.

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the English colonising mindset: that they were laying claim to a land occupied not by people that they or their law could recognise, but by 'savages'. To the British, Aboriginal people had no legal system or systems under which they might have a legitimate claim to land, that they might legitimately defend through force. Rather, for the British, the 'law' (their law) was on the one side of this conflict: the side of the colonists (their side).

Desmond Manderson has argued that not only was the rule of law not *for* Aboriginal people, its standards were weaponised in this context *against* Aboriginal people to deny them its protections.[48] This is a slightly different thesis from another which is undoubtedly true: that *law* was used against Aboriginal people. Some of the violence against the Aboriginal people was sanctioned by law. Later, law would provide the foundation for many of the policies of the protection era, the restrictions on liberty, the removal of children without consent, forced slavery. In these cases, 'law', and the mechanisms of the rule of law to enforce that law, was used against Aboriginal people. Manderson, however, claims that the standards of the 'rule of law' were also actively used against Aboriginal people in this context. This resonates with our argument, above, that the rule of law created a standard against which the Aboriginal legal systems were assessed, found wanting, and subjected to claims of British sovereignty.

Manderson states that the denial of rule of law to Aboriginal people is not 'subsidiary to its glorification but brought about by it'. This was because Aboriginal people were assessed as not 'worthy' of the rule of law: 'their own "savage spirit" ... prevented their attaining it'. The British, in order to bring them to a point of civilisation that would mean they could benefit from the rule of law, had to suspend the rule of law in relation to them. Manderson goes on:

> The very belief in the rule of law highlighted the apparent inadequacy of the Tasmanian Aborigines to benefit from it, and this in turn justified any and all measures to impose legal and social order on them. The more beautiful the ideal, the more inadequate the present state of the natives seemed. The more sincere the British commitment to our universal sameness, the more Aboriginal difference and resistance seemed a 'wanton' 'fierceness' to be subjugated or a 'weakness' to be fixed.[49]

[48] Manderson, 'Law of the Image'.
[49] Ibid., 164.

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The experience of Aboriginal people of the 'remarkable' transformation of the Australian penal colonies into bastions of the rule of law is not just a paradox: its existence actively undermines the claims of 'rule of law' achievement in the colony. Indeed, the exceptionalism of the status of Aboriginal people, the suspension of the principles of the rule of law in relation to them, the impunity with which violence could be dealt out to them to achieve rule-of-law objectives for the colony, has created a set of culturally acceptable practices and exceptions – or rule-of-law 'machinery' – within Australia's rule-of-law system that continue to be felt.

This history demonstrates that Australia's rule-of-law system was developed alongside an acceptance that there were groups of 'others' who were not worthy of the rule of law, for whom the protections of the rule of law could be suspended, for their benefit, or the benefit of the state, or some combination of the two. This rule-of-law machinery has never stopped being used against Aboriginal people in ways that continue to undermine claims of the Australian state's rule-of-law achievements. Since the period of colonisation that we have outlined in this chapter, these have included an array of policies: the legal targeting and authorisation of the removal of Aboriginal children from their families; the almost unlimited discretion of the Protector of the Aborigines to dictate the lives of Aboriginal people – where they may live, whether they may travel, access to their children, what jobs they may hold; the suspension of racial discrimination statutes for Aboriginal people so as to implement targeted restrictions on their welfare.

The rule-of-law exceptions that have been created for First Nations people have become accepted – and acceptable – within the Australian state. They were initially deployed against Aboriginal people, but they have become part of the discretions and exceptions in the White Australia Policy, and the government's contemporary policy framework for processing asylum seekers. They have been used against those seen as undeserving of the rule of law: vulnerable or publicly reviled minorities, from asylum seekers to members of organised criminal gangs. Legal frameworks established to govern these groups often fall short of rule-of-law expectations of the rest of the community. These frameworks contain, for instance, altered court procedures and rules of evidence, almost unlimited ministerial discretion, attempts to remove the ability of refugees to appeal the government's decisions to the courts, the detention of children, limited access to work and welfare. These incursions are justified to *uphold* the rule of law, on the basis that somehow these people represent a threat to the rule of law, and the targeted

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suspension of the rule of law against them is required. The Australian state thus recognises and accepts as necessary certain rule-of-law incursions that can be traced back to the first denials of rule of law to Aboriginal people.

The Contemporary Movement for Constitutional Recognition of Aboriginal and Torres Strait Islander People in Australia

In this section, we move to consider the contemporary movement for recognition of Aboriginal and Torres Strait Islander people in the Australian constitutional system,[50] and the extent to which proposed reforms address the rule-of-law crises that flow from original claims and development of the Australian state and its relationship to First Nations.

The objectives of 'recognition' and structural reform are numerous, interrelated, contested and, needless to say, complicated. They have included a desire – one held almost always by non-Indigenous Australians and rejected by First Nations[51] – to recognise the historical fact of pre-colonial occupation by Aboriginal and Torres Strait Islanders. This has become known as 'minimalist' recognition. Recognition includes recognising the cultural sovereignty of Aboriginal and Torres Strait Islanders within the monolithic legal sovereignty of the Australian constitutional system, which would extend to recognition through rights of self-determination and political empowerment. Recognition includes addressing the possibility of negatively racially discriminatory government action. Setting aside minimalist recognition, these objectives have manifested as three ideas for change:

1. A modern agreement-making process, or treaty, which might be constitutional or extra-constitutional, and would include settlement of matters such as land and water rights, reparations and future self-government;
2. A constitutionally entrenched protection against racially discriminatory laws that would bind the federal and state governments and legislatures; and

[50] This contemporary discussion is not in ignorance of the long history for reforms that can be seen as amounting to recognition: D. Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Annandale, NSW, 2018), particularly chapter 2.

[51] See Kirribilli Statement (Sydney, 2015).

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3. Some sort of constitutionally enshrined political empowerment, such as the creation of a representative body engaged in the policy-making and legislative process.

In the lead-up to the 2007 election, Prime Minister John Howard on the eve of likely election defeat, promised to pursue recognition if re-elected.[52] He was not. In 2010, when the federal election returned a hung parliament, Prime Minister Julia Gillard made an agreement with independent MPs to undertake an inquiry into constitutional recognition. In 2012, the Expert Panel on Constitutional Recognition of Indigenous Australians reported,[53] making a number of recommendations that combined removal of outdated and racist provisions in the Constitution, symbolic recognition of cultural heritage and connection to land, and a new clause that would constitutionally guarantee protection against racially discriminatory laws. It was this last proposal that formed the substantive reform idea of the report.

The 2012 Expert Panel proposal was addressed to what was seen as a deficiency in the constitutional position, demonstrated by the history of adversely discriminatory laws. It was addressed, in many senses, to the rule of law: to the potential in Australia's constitutional system through section 51(xxvi) for negatively racially discriminatory laws to be enacted against groups, including Aboriginal and Torres Strait Islander people, who, historically, had been the target of these laws. The proposal for a non-discrimination clause would apply equally to all state actors in the Australian system: state and federal governments and parliaments would be bound by it. It relied on an independent court system for its enforcement. But while it was addressed to a rule-of-law failure, the anti-discrimination proposal did not provide any answer to the initial rule-of-law grievance of Aboriginal people, on which the legal institutions are built. It retained the legal and political institutions, and, indeed, retained confidence in their legitimacy and the final authority of the courts over Aboriginal people.

The Expert Panel's recommendations proved politically controversial in Australia, with pushback from the Conservative Party on the basis that it shifted power from the legislature to the courts. This reflects a long

[52] S. Brennan and M. Davis, 'First Peoples', in C. Saunders and A. Stone (eds.), *The Oxford Handbook of the Australian Constitution* (Oxford, 2018), 27–55, 31.

[53] *Expert Panel on Constitutional Recognition of Indigenous Australians*, Final Report (Canberra, 2012).

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history in Australia of political protection of rights rather than constitutionalised and juridified rights protection. The Australian Labour Party never engaged with or responded to the 2012 report; rather, the issue was left to languish politically. This led to a group of Aboriginal and Torres Strait Islander leaders lobbying the government and opposition and demanding a new approach to recognition. This became known as the Kirribilli Statement (2015), requiring that the question be resolved through a greater level of *engagement* or 'dialogue' with the Aboriginal and Torres Strait Islander communities, to determine what sort of *substantive* – not minimalist – change was desired. The demands made in the Kirribilli Statement led to the creation by the Prime Minister (with the agreement of the Opposition Leader) of the Referendum Council, that oversaw the process that delivered the Uluru Statement from the Heart.

The Uluru Statement from the Heart

Within the Referendum Council, an Indigenous Steering Committee was developed which was responsible for the first Indigenous-designed and Indigenous-led series of civics-informed dialogues with Aboriginal and Torres Strait Islander people across Australia. These dialogues were designed to be culturally legitimate, as well as culturally sensitive, and responsive to Aboriginal and Torres Strait Islander needs. The purpose of these dialogues was to try to understand what form of recognition would meet the expectations of First Nations. The process was a historic, never-before-attempted exercise in self-determined political reform work, that has been well-documented elsewhere.[54] It culminated in the First Nations National Constitutional Convention at Uluru, which synthesised the recognition priorities from the dialogues conducted across the country and delivered the Uluru Statement from the Heart to the Australian people on 26 May 2017.

The Regional Dialogues process that led to the Uluru Statement pioneered a model of genuine deliberative consultation with Aboriginal and Torres Strait Islander communities on technical, sophisticated and highly contested issues of public policy and law. Aboriginal and Torres Strait Islander people were involved in the development of law reform proposals in a way that recognised their right to self-determination and

[54] See e.g. M. Davis and G. Williams, *Everything You Need to Know about the Uluru Statement from the Heart* (Sydney, 2021), 128.

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their right to be involved in a culturally specific process. The process achieved an unprecedented national consensus within the Aboriginal and Torres Strait Islander community on constitutional and structural reform. The substantive changes that the Uluru Statement called for were, first, the constitutional entrenchment of a 'First Nations Voice'. While there was little detail provided in the Statement as to what the structure of Voice might look like, the dialogues cumulatively explicitly indicated that a body ought to be culturally representative of Aboriginal and Torres Strait Islander peoples, and, importantly, would represent First Nations, in recognition of their status not as a homogenous social group, but as distinct nations with distinct laws, customs and experiences. This body would have input into legislation passed by Parliament. In this way, the dialogue process not only modelled inclusive and deliberative self-determination but also ongoing self-determination. The second call was for the creation of a Makarrata commission to oversee a process of agreement-making, that is, treaty-making, at a national level, and also to be responsible for overseeing a process of truth-telling.

The proposed reforms of the Uluru Statement are pragmatic and forward-thinking; they speak to structural reforms to the place of Aboriginal people in the constitutional institutions of the state. This is a place that has previously been denied to them as a group of 'others' who could be excluded at will. The new constitutional position proposed under the Uluru Statement would recognise Aboriginal and Torres Strait Islander people as having a unique claim, and so incapable of being excluded in the future. The establishment of a First Nations Voice would be an acceptance of the previous denial of the position of Aboriginal and Torres Strait Islander people, and denial to them of law, through its attempt at structural redress. The establishment of a First Nations Voice would be a political act of recognition of the assertions of sovereignty on which Aboriginal and Torres Strait Islander people base their claims. It would not change the High Court's legal position on sovereignty, but the document that lays the foundations for the constitutional state would recognise a group of people with a unique claim on the state. This unique claim speaks to the currently unresolved foundation of the legal system. The Voice might not be a complete or direct response to that incoherency, but it would operate as a recognition of its existence, and, more than that, an attempt to redress it through structural changes that are designed to address the particular rule-of-law failures that have become regularised for First Nations people.

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The Voice was intended to be a vehicle through which there is an explicit constitutional recognition of the systems of laws and customs that govern First Nations communities – not simply as a historical matter, but as ongoing, vibrant, evolving societies. The Voice was intended to be comprised of representatives selected by First Nations in accordance with their own laws and customs. Further, the work of the Voice, and ultimately its advice to government, was predicated not just on the fact that First Nations have different life experiences, but also in recognition that there are different cultural norms and practices that should inform the development of policy. Implicitly recognised in the establishment of the Voice, then, was the recognition of the contemporary cultural, political and legal systems of First Nations, a constitutional acknowledgement of a plurality of legal systems.

A constitutionally guaranteed voice in the political process would allow First Nations to be at the table when decisions are made as to whether to suspend the law as it affects them. It would allow First Nations a voice at the table when decisions are made about what is in their 'best interests', and what 'special measures' might need to be enacted, directed at them, to address these. It would allow First Nations people a voice at the table in designing systems where government power is wielded over them: how much discretion is granted in these frameworks, and how will it be accountable? In this way, it would offer a way to break the cycle of rule-of-law machinery that was created at a time when the status of Aboriginal and Torres Strait Islander people in the state was ambiguous, arbitrary and violent. The Voice offered recognition of First Nations in the Constitution and a way forward from the initial grievance. It was intended to provide a new understanding of the relationship between Aboriginal and Torres Strait Islander people and the rule of law. Aboriginal people are not only subjects of the law, but they are constitutionally guaranteed voices in the future design – and remedying – of the institutions and processes of the rule of law. Up until this point, the ongoing evolution of the rule of law had been one in which the differentiated treatment of Aboriginal people was tolerated. It had always been thus. But it does not have to always be thus.

Conclusion

On 14 October 2023, the Australian people voted 'no' in a constitutional referendum to recognise First Nations people through the Voice. This means that any constitutional recognition of First Nations people is likely

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to be delayed for decades, much like the referendum for an Australian republic. It means that the racist elements of the Constitution are retained.

The reasons for the loss are complex, and will no doubt be the subject of ongoing analysis as Australians grapple with what this means for their constitutional future. The primary reason can be traced back to the lack of bipartisan support and the nature of the political campaign that was run by the Opposition.[55] The successful 'no' campaign was based on the argument that race does not belong in the Constitution and that Australia's Constitution and concomitant institutions are all imbued with formal equality. The failure of the Voice referendum maintains the status quo not only in policy but the crisis of constitutional legitimacy and the 'disagreement . . . about the authority of the constitutional order itself'.[56] The Voice was aimed at mitigating the impact of a legal system and 'rule of law' machinery and principles imbued with racism and the deliberate denial of access to the rule of law for the Aboriginal and Torres Strait Islander population. The failure of the Voice referendum and a twelve-year process of recognition means that the foundational incoherencies of Australia will continue. It is a bitter irony that it was these foundational incoherencies that were the drivers of the 'no' campaign.

[55] See S. Nakata, 'The Political Subjugation of First Nations Peoples Is No Longer Historical Legacy', *The Conversation*, 14 October 2023. See further exploration of the loss in G. Appleby and M. Davis (eds.), The Failure of the Voice Referendum and the Future of Australian Democracy (London, 2025).

[56] Appleby, Levy and Whalan, 'Voice versus Rights', 765.

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