ESSAY

The long road to Uluru

Walking together: truth before justice

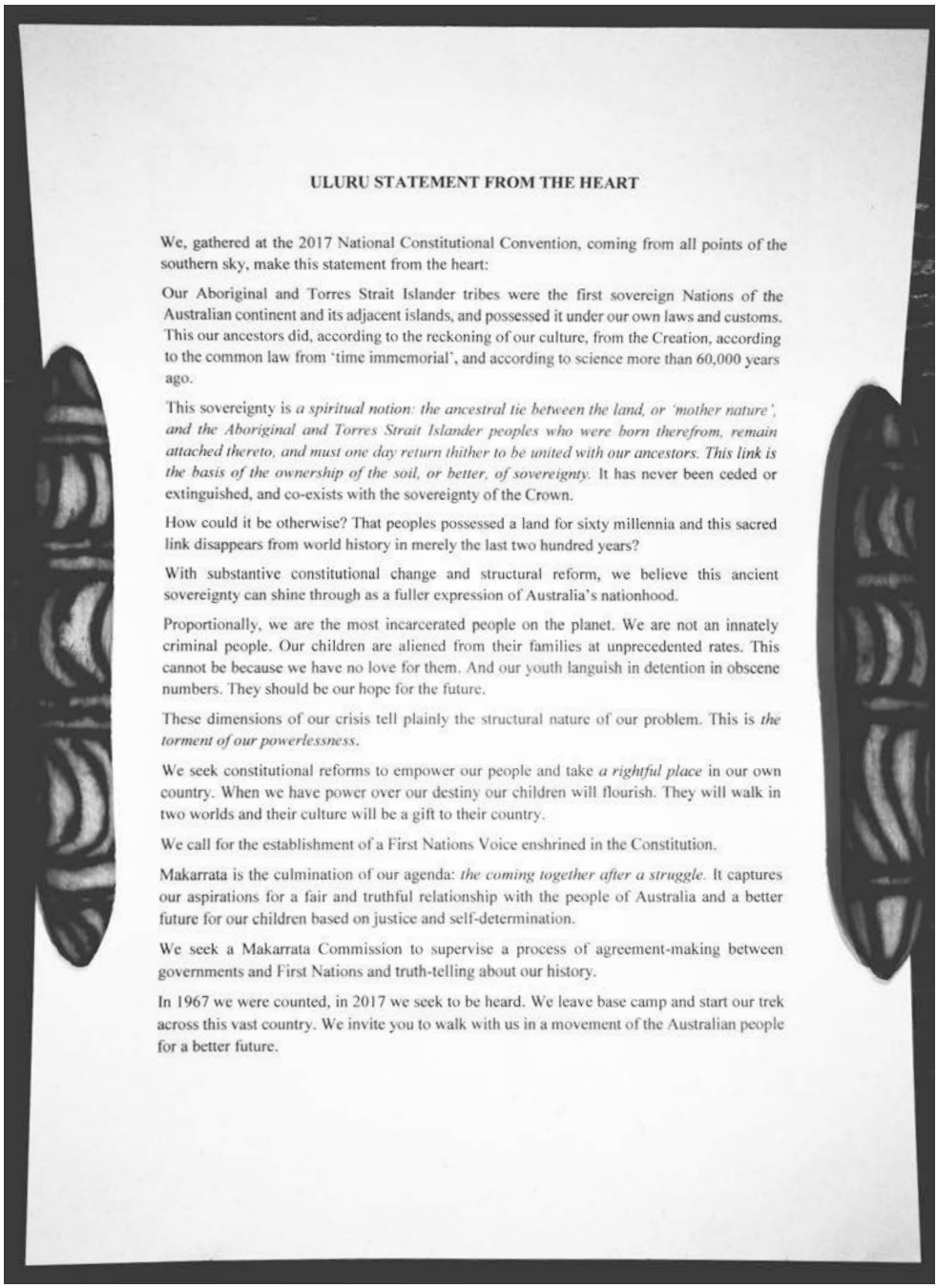
Megan Davis

IF THE ULURU Statement from the Heart was an example of the transformative potential of liberal democratic governance through civic engagement beyond the ballot box, the aftermath of Uluru revealed the limitations of Australian retail politics. The Uluru Statement from the Heart was a call for peace and the Referendum Council proposed reforms – a roadmap to peace. Yet Prime Minister Turnbull dismissed it four months later, inventing a fiction that the enhanced participation of First Peoples in Australian liberal democracy amounted to a 'third chamber' of the parliament.

For decades, uncourageous Australian prime ministers have cast aside Aboriginal aspirations for a better deal in this nation because of political expediency. The can is always kicked down the road. Journalists, mostly disinterested, shrug their shoulders, justifying it as a ruthless political decision, a cleaning of the deck as the short electoral cycle enters its final phase. Few journalists appreciate the importance of Aboriginal issues to Australia's nationhood in the way that Michael Gordon did. Uluru was something else.

The Uluru Statement from the Heart was tactically issued to the Australian people, not Australian politicians. It is the people who can unlock the Australian Constitution for Aboriginal people, as they did in 1967, and the descendants of the ancient polities can unlock what is sorely lacking in this country, a fuller expression of Australia's nationhood.

Every year Australia Day becomes more toxic. The Uluru road map that encapsulates the thinking of the First Peoples provides the leadership that



ULURU STATEMENT FROM THE HEART

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

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

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

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

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

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

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

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

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

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

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

the nation seeks. For far too long our aspirations have been received in the form of ritual art by politicians who return to Canberra and horde the spoils of these occasional forays into the Aboriginal domain. Wheeled out at their convenience, these historic documents serve as a reminder not of what the state has achieved, but of what the state has not done. Time and time again, participants in the dialogues that preceded and shaped the Uluru Statement spoke of this phenomenon; this country is one way, not two ways. This is a nation that takes and cannot bring itself to give back.

Until Uluru.

ULURU IS A game changer. The response of ordinary Australians to the Uluru Statement has been overwhelming. The statement is a rallying call to the Australian people to 'walk with us in a movement of the Australian people for a better future', so together we can shift the politicians who are paralysed by the short-term party politics that are so common in liberal democratic governance. Since the government's rejection of the constitutionally enshrined Voice to the Parliament on 26 October 2017 – insensitively, thirty-two years to the day that Uluru-Kata Tjuta was handed back to the Anangu people – it has decided to include it in the terms of reference of a new joint select parliamentary committee that will once again consider recognition of Aboriginal and Torres Strait Islander Peoples in the constitution. The decision to allow the Voice to Parliament and other Referendum Council reforms to be subject to robust scrutiny via a joint parliamentary committee. This is how liberal democracies should function.

The story of Uluru Statement from the Heart is an Australian story and an Aboriginal innovation. The starting point is 1999. At the last referendum to be held in Australia in that year, Prime Minister John Howard put to the Australian people a preamble to the constitution that included recognition of Aboriginal and Torres Strait Islander Peoples. This form of recognition was rejected by all of the cultural authority of Australia in its entirety, from land councils to the elected representatives of the Aboriginal and Torres Strait Islander Commission (ATSIC), to the electorate. Yet Howard proceeded with the agreement of a single Aboriginal champion of the reform.

This episode is a cautionary tale about the state doing things to us without us. The next step in the recognition project was John Howard's commitment, days from a federal election in 2007, to hold a referendum to recognise Aboriginal and Torres Strait Islander Peoples in the first hundred

days of what would have been his fifth term in office. Howard lost the federal election to Labor's Kevin Rudd.

A forensic analysis of the Rudd years reveals significant progress toward recognition. One of the key recommendations of the Council for Aboriginal Reconciliation and the statutory reconciliation process that had been conducted over a decade was that the state should pursue two things: structural reform – as in constitutional reform – and immediately tackling Aboriginal disadvantage. If Howard had successfully rendered reconciliation a binary concept, decoupling the symbolic from the practical, Rudd moved the nation forward on both fronts. A policy wonk, Rudd pioneered a co-ordinated intergovernmental agreement between the Commonwealth, states and territories aimed at 'closing the gap' on Indigenous disadvantage. The National Indigenous Reform Agreement, signed in 2007 by the Council of Australian Governments, had six specific targets to close the gap and improve outcomes in education, health, life expectancy, economic participation, healthy homes, safe communities, governance and leadership.

Prime Minister Rudd convened the Australia 2020 Summit on the weekend of 19–20 April 2008, and a thousand people from across Australia met at Parliament House in Canberra to generate ideas for building a modern Australia. Two groups considered Indigenous peoples issues in detail: 'Options for the Future of Indigenous Australia' and 'Governance'. The Indigenous stream called for a new national dialogue on reconciliation and the formal legal recognition of Indigenous peoples. Importantly, it foreshadowed a caveat on recognition that has been repeatedly revisited over the following decade: 'Aboriginal and Torres Strait Islander Peoples' rights need [sic] to be included in the body of the Constitution, not just in the preamble.' The Governance stream ranked Indigenous issues as number one, and recommended that a constitutional preamble formally recognise the traditional custodians of Australian land and waters, that the constitution be amended to remove any racially discriminatory language, and that a national process consider a compact of reconciliation between Indigenous and non-Indigenous Australians. Another stream, 'Towards a Creative Australia', also made the recognition of Aboriginal culture its first priority.

Not long after the 2020 summit, the Rudd government held a community Cabinet meeting in eastern Arnhem Land on 23 July 2008. The Prime Minister was presented with a communiqué on behalf of Yolgnu and Bininj clans living in Yirrkala, Gunyangara, Gapuwiyak, Maningrida, Galiwin'ku, Milingimbi,

Ramingining and Laynhapuy homelands. These homelands have repeatedly generated notable Aboriginal activism on constitutional reform. The communiqué represented the views of approximately eight thousand Indigenous people in Arnhem Land. *The Yolngu and Bininj Leaders Statement of Intent* called for constitutional protection for traditional land and cultural rights. The statement had been developed over the previous eighteen months and adopted following meetings at Maningrida in West Arnhem Land on 1 July 2007.

The Statement of Intent argued for the recognition of the Yolgnu and Bininj peoples' fundamental human right to live on their land and practice their culture, and asked the Australian government to 'work towards constitutional recognition of our prior ownership and rights'. The communiqué argued that this substantive recognition of rights is the precondition for economic and community development in remote communities, including the right to be recognised as committed to maintaining culture and identity and protection of land and sea estates. The statement argued that the Yolgnu and Bininj had been 'marginalised and demeaned over the past decade and have been denied real opportunity to have a say about our aspirations and futures'.

Prime Minister Rudd pledged his support for recognition of Indigenous peoples in the constitution, as did Opposition Leader Dr Brendan Nelson. But they were talking about symbolic recognition: an acknowledgement or a statement of fact, or what was commonly referred to at the time as Indigenous recognition, in a preamble.

This was not what the Statement of Intent called for. Rudd's response was a misreading. The Yolgnu and Bininj communiqué sought substantive constitutional rights, not symbolism. This misunderstanding was repeated routinely over the following decade-long recognition project. Indigenous peoples call for substantive constitutional recognition but the politicians hear 'symbolic' recognition. The inference that constitutional reform is synonymous with preambular recognition is continually repeated by politicians and media over the next decade, until it explodes at Uluru.

Rudd lost the prime ministership to Julia Gillard in mid 2010. After the election she retained power, but in a hung parliament. In her agreement with the Greens and Independent Rob Oakeshott, which gave her the prime ministership, she agreed to constitute an Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples.

THE EXPERT PANEL Gillard constituted was a diverse cross-section of Australians and included direct representation from all sides of politics: Labor, Liberal and Greens. The terms of reference require the panel to report to government on possible options for constitutional change to enable Indigenous constitutional recognition, including advice on the level of support from Indigenous people and the broader community for each option. The panel, like the Referendum Council that would commence its work barely four years later, built on a huge body of work.

Australia has amassed many reports on the exigency of structural reforms for Indigenous peoples, including a 1983 Senate Standing Committee on Constitutional and Legal Affairs, a 1988 Constitutional Commission, the post-Mabo Social Justice Package of 1992–95, the 1998 Constitutional Convention, the Council for Aboriginal Reconciliation in 2000 and the Senate Legal and Constitutional Affairs Committee in 2003, as well as a 2008 House of Representatives Standing Committee on Legal and Constitutional Affairs.

Unlike the Referendum Council, which almost exclusively focused on consulting the Aboriginal and Torres Strait Islander community, its predecessor Expert Panel was charged with leading a broad national consultation and community engagement program to seek the views of a wide spectrum of the community. The expert panel adopted several approaches to capturing this spectrum of views, including publishing a discussion paper and a formal public submissions process, producing a website and holding public consultations across the nation between May and October 2011. Also, acknowledging the language diversity of the Aboriginal and Torres Strait Islander community, a short film summarising the discussion paper was translated into fifteen Indigenous languages, and Aboriginal and Torres Strait Islander interpreters were engaged and present at consultations, as needed. The panel was also asked to seek advice from constitutional law experts to consider any unintended consequences of proposed changes. This was particularly important because the unintended legal consequences of the amendments to section 51(xxvi) of the constitution following the 1967 referendum left it open to the High Court to decide that the power could be used to support beneficial as well as adverse discriminatory legislation.

At the Expert Panel's second meeting in Melbourne in March 2011 it adopted four principles to guide its assessment of proposals for constitutional recognition of Aboriginal and Torres Strait Islander Peoples. These principles, also adopted later by the Referendum Council, were that any proposal must:

Contribute to a more unified and reconciled nation;
Be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
Be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
Be technically and legally sound.

Following its consultations, the Expert Panel made five recommendations. It recommended that section 25 – which contemplates state parliaments enacting discriminatory franchise laws that disqualify a people of a particular race from voting at state elections – be repealed. Deletion of this section has multi-party support. Six years later in 2017, participants in the First Nations Regional Dialogues, National Constitutional Convention and the Referendum Council adopted a very different approach to section 25.

Next, the panel recommended that the section 51(xxvi) be repealed. This section was amended in the 1967 referendum to remove the words '…other than the Aboriginal people in any state…'. The removal of these words gave the federal parliament the power to make laws with respect to Aboriginal and Torres Strait Islander Peoples. In 2011, the Expert Panel was persuaded by many community submissions and juridical writings that this section could be adversely applied. It is important to emphasise the word 'adversely' here because the section permits the parliament to also make beneficial laws that 'discriminate'. Many of these laws have been critical to the advancement of Indigenous rights, such as the Native Title Act and the Aboriginal and Torres Strait Islander Cultural Heritage Act. I make this point here because the participants in the First Nations constitutional dialogues later took a very different approach to addressing the challenges of this section.

The Expert Panel also recommended the replacement of the race power with a new section, 51A. This is designed to include the symbolic element of constitutional recognition, an acknowledgment of Indigenous peoples, and also includes a new head of legislative power, replacing section 51(xxvi).

It is important to explain the Expert Panel's thinking on a statement of recognition sitting within the head of power as a preambular introduction. The Expert Panel report has been in the public domain since January 2012, yet it has done little to change the prevailing discourse that constitutional recognition was about symbolism. Uluru achieved that in a most spectacular way – putting flesh on the bones of recognition. But even so, journalists and

politicians and other public commentators continue to refer to Indigenous constitutional recognition as acknowledgement in a preamble.

Since 1999, when a preamble was put to the Australian people as part of the republic referendum, legal thinking on the placement of a preamble has shifted. The unanimous view of the legal profession was that you cannot have a preamble to a UK Act (the current preamble sits within a UK Act, which created the Australian Constitution). Another barrier to a standalone preamble was the fact that many groups would legitimately seek recognition in a preamble and the Expert Panel's work was about Indigenous peoples. Legally, the panel was informed that there would likely be interpretation challenges if a preamble were simply placed at the beginning of the Australian Constitution.

Those Aboriginal and Torres Strait Islander Peoples consulted in this process almost universally did not want a preamble, especially if it were to contain a 'no-legal effect' clause, as with the state constitutions. In unrehearsed solidarity, the broader Australian community also rejected a no-legal effect clause; it was viewed as tokenistic and meaningless to recognise a group while saying it had no effect.

The Expert Panel's suggested section 51A on Recognition of Aboriginal and Torres Strait Islander Peoples reads:

> Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander Peoples;
> Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander Peoples with their traditional lands and waters;
> Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander Peoples;
> Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander Peoples;
> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander Peoples.

The initial major controversy following release of the Expert Panel's report was the use of the word 'advancement'. The panel was accused of using

paternalistic concepts, despite more than half of its experts being Aboriginal and Torres Strait Islander individuals. The word was chosen to qualify any new power to make laws, so that for lawmakers and the court the purpose was apparent. Other words were suggested such as 'benefit' and 'for the betterment'. Aboriginal submissions called for the insertion of 'free, prior and informed consent' in consulting on such legislation, consistent with the United Nations Declaration on the Rights of Indigenous Peoples.

In the end, the Expert Panel chose 'advancement' because it is used widely in legal contexts, including native title and trusts and testamentary provisions, and provided a familiar legal criterion for the courts. Six years later, the First Nations Constitutional Dialogues overwhelmingly rejected a statement of recognition anywhere in the constitution. This means that section 51A can no longer be considered. The dialogues also rejected change to the race power, considering it to be too risky.

The fourth proposal was for a substantive amendment to the constitution, the insertion of a prohibition of racial discrimination: section 116A. This section would be as follows:

> The Commonwealth, a state or a territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
> Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

Section 116A was the subject of considerable scrutiny. Almost immediately it was impugned as a 'back door' bill of rights and a 'one clause' bill of rights. Yet the logic for a non-discrimination clause is very simple: the principle of racial non-discrimination is already reflected in the Racial Discrimination Act 1975 (Cth) and accepted in legislation and policy in all Australian jurisdictions. The only practical impact of this insertion is that it would bind the federal parliament. The motivation for doing so was based on the experiences of discrimination from the Commonwealth, including the Northern Territory Emergency Response, Native Title Act and Wik amendments. The panel decided this was an appropriate recognition of Aboriginal and Torres Strait Islander Peoples because the racial discrimination was so severe; they were initially rendered invisible or subhuman and excluded from

the constitution. Eventually, Indigenous peoples were recognised in 1967 but the unintended consequences of that reform are that Commonwealth laws may not be required to be beneficial.

Finally, the fifth recommendation was for a new 'section 127A', the recognition of languages. It reads:

> The national language of the Commonwealth of Australia is English. The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

Predictably, the Expert Panel was accused of overreach, as was the Referendum Council in 2017.

Despite handing its report to Prime Minister Gillard on 12 January 2012, no formal response came from the federal government. As the hung parliament moved closer toward the next election, concerns were raised that an incoming Coalition government would shelve constitutional recognition. Consequently, Labor passed an Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 aimed at building the national consensus needed for constitutional change. It also funded a public campaign called Recognise to maintain momentum for a referendum.

FROM 2013 TO 2015, the Coalition government headed by Prime Minister Tony Abbott engaged former Deputy Prime Minister and National Party leader John Anderson to conduct a review into constitutional recognition. The government also formed a joint select parliamentary committee chaired by Indigenous members of parliament, Liberal Ken Wyatt from Western Australia and Northern Territory Labor Senator Nova Peris, to advance the work of the Expert Panel. The committee produced interim, progress and final reports, and settled on variations to the expert panel's recommendations. It did not bring the country any closer to a form of recognition that would suit all parties – the politicians and the to-be-recognised, the First Nations.

As I wrote in *Griffith Review 51: Fixing the System,* this was one of the worst eras of Commonwealth policy on Indigenous peoples. The relentless attack on the last vestiges of self-determination and control by Aboriginal organisations depleted the morale of people living in communities. Unemployment was exacerbated by dismantling the Aboriginal domain through the Indigenous Advancement Strategy (IAS), a radical approach

to the distribution of Aboriginal funding that in 2017 was found by the Australian National Audit Office to have fallen short of the government's own integrity processes.

The Australian Human Rights Commission's Social Justice Commissioner Mick Gooda damned this period of Commonwealth policy, saying that 'we are now witnessing one of the largest scale "upheavals" of Aboriginal and Torres Strait Islander affairs'. Gooda said there was 'scant consultation', and engagement with Indigenous communities was 'conspicuous in its absence'. According to Fred Chaney, a former Minister for Indigenous Affairs, '[the Department of the Prime Minister and Cabinet] is now widely considered to operate the most centralised administration of Indigenous affairs within the past thirty years'. The arbitrary decisions of the IAS disempowered Aboriginal organisations and privileged non-Indigenous non-government organisations and corporations with reconciliation action plans to access Aboriginal money. Meanwhile, the taxpayer-financed Recognise campaign was prominent and well funded. This set it on a collision course with the Indigenous community. The notion of recognition in the constitution, while disrespecting and gutting Indigenous communities, were at odds.

Legal and political literature is teeming with analysis of the concept of 'recognition'. Many times over the past six years I have observed that recognition is a difficult concept, because it can mean many things. The dictionary meaning of recognition – acknowledgement – dominated the public debate. This was unsettling for many in the Aboriginal and Torres Strait Islander community because, by and large, symbolism – like a statement of acknowledgment – is not an acceptable form of recognition. It can also mean something much more robust. It can be symbolic, something like a statement of acknowledgement inside a constitution, but it can also mean 'substantive reform to power relations' – as in reserved or designated seats, a treaty or agreement-making power, or an autonomous region. That it took until the national First Nations constitutional convention for this to take hold, seven years after the recognition project commenced, tells us a lot about the nature of legal and political debate on Indigenous affairs in Australia. A concrete model of recognition was needed to focus the nation's attention and move the project forward. Uluru eventually provided the model.

COUNTER-INTUITIVELY, BIPARTISANSHIP also worked against Indigenous peoples. While it is a legitimate point that bipartisanship is a

necessary ingredient to achieve reform, it does not always need to be the starting point. Western liberal democracies thrive on political tensions; parliaments are designed to mediate that tension. Without tension, government ideas cannot be tested. Post-ATSIC, bipartisanship has locked Aboriginal voices out of decision-making and the government and opposition have become accustomed to not consulting us. Bill Shorten's break with bipartisanship to endorse a treaty and then endorse the constitutionally enshrined Voice to the Parliament was a breakthrough for the recognition project. Finally, after fifteen years we have competing policy ideas in Indigenous affairs. This is a good thing.

The next step on the road to Uluru, however, was the anxiety and tension being generated by a recognition narrative that was at odds with Aboriginal aspirations and jarred with the facts on the ground. The backlash against the taxpayer-funded campaign Recognise, and the concept of recognition in general, became so worrying that Noel Pearson, Patrick Dodson, National Congress of Australia's First Peoples co-chair Kirstie Parker and myself visited Prime Minister Abbott to argue for a process that would, for the first time, comprehensively consult Aboriginal and Torres Strait Islander Peoples. The Prime Minister resolved to meet with key leaders to discuss recognition. Thirty-nine attended the meeting with the Prime Minister and Opposition Leader at Kirribilli in July 2015. The Kirribilli Statement issued after the meeting put a stake in the ground by removing minimalist reform from the agenda:

> [A]ny reform must involve substantive changes to the Australian Constitution. It must lay the foundation for the fair treatment of Aboriginal and Torres Strait Islander peoples into the future.
> A minimalist approach, that provides preambular recognition, removes section 25 and moderates the race power [section 51(xxvi)], does not go far enough and would not be acceptable to Aboriginal and Torres Strait Islander peoples.

Recognition is a transaction that requires Indigenous peoples to support the reform in its entirety, otherwise it cannot be called recognition. If politicians and political commentators took seriously the work of Aboriginal and Torres Strait Islander Peoples in the realm of law and policy reform then they

would not be surprised by outcomes that were utterly predictable to anyone who paid attention to the Aboriginal political domain.

Those present at Kirribilli understood the temperature of their communities because they live among their people. Minimalism was never going to be acceptable. By minimalism I refer to the deletion of section 25, deletion and replacement or moderation of the races power and a statement of recognition. This was the stake in the ground at Kirribilli: reform must be more. I often think back to the Kirribilli consensus when I hear that people were shocked about the Uluru outcome or infer that the Referendum Council 'overreached'. The Kirribilli leaders foreshadowed the decision-making of the dialogues and Uluru. The country is either concerned with the views of the to-be-recognised or it is not.

The Kirribilli leaders recommended that there be an ongoing dialogue between Aboriginal and Torres Strait Islander Peoples and the government to negotiate the proposal to be put to referendum, as well as engagement about the acceptability of the proposed question. This was why the Referendum Council was established, and Prime Minister Malcolm Turnbull made its establishment one of his priorities after toppling Tony Abbott in a leadership challenge.

The work of the council was almost immediately fenced in by the exigency of giving Aboriginal people a voice in a meaningful form of recognition that would be put before the Australian people in a referendum. Although it was a firm belief in government circles that our communities had been 'over consulted' it soon became plain to the council that this was not accurate. An Indigenous sub-committee of the Referendum Council was formed and met to decide what consultation would look like.

The first design meeting took place in Sydney and included Patrick Dodson, who was then co-chair of the Referendum Council. We spoke about the importance of engaging the cultural authority of the land and traditional owners, via land councils across the country. We worked out a formula for participation based on the importance of engaging a sample of representatives, given the budget for running the Indigenous dialogues was tight. We recognised that communities were suspicious of and sick of 'consultation' because it is done so superficially by bureaucrats. The word 'dialogue' and the process of dialogue was chosen as a more interactive and genuine way to engage participants, placing them and their views squarely at the centre of the discussion.

As a first step, the Aboriginal and Torres Strait Islander members of the council sought advice from leaders and traditional owners on the form of

the dialogue to be adopted in each region. The dialogue would be a structured deliberative decision-making process that involved intensive civics education, an explanation of the legal options that the Prime Minister and Opposition Leader had given us permission to consult on, and a preference matrix that would enable communities to assess reform proposals and rank them according to the interests of the region.

The pre-meetings to seek permission from traditional owners, peak bodies and leaders were held in Broome, Thursday Island and Melbourne. The Prime Minister and the Opposition Leader officially endorsed the council's plan for the series of First Nations Regional Dialogues culminating in a national constitutional convention at Uluru. The Referendum Council used the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) to manage the logistics. This included engaging local Aboriginal land councils to convene the dialogues on our behalf.

The First Nations Regional Dialogues were held in the following locations:

Hobart, hosted by Tasmanian Aboriginal Corporation (9–11 December 2016);
Broome, hosted by the Kimberley Land Council (10–12 February 2017);
Dubbo, hosted by the New South Wales Aboriginal Land Council (17–19 February 2017);
Darwin, hosted by the Northern Land Council (22–24 February 2017);
Perth, hosted by the South West Aboriginal Land and Sea Council (3–5 March 2017);
Sydney, hosted by the New South Wales Aboriginal Land Council (10–12 March 2017);
Melbourne, hosted by the Federation of Victorian Traditional Owners Corporation (17–19 March 2017);
Cairns, hosted by the North Queensland Land Council (24–27 March 2017);
Ross River, hosted by the Central Land Council (31 March – 2 April 2017);
Adelaide, hosted by the Aboriginal Legal Rights Movement Inc (7–9 April 2017);

Brisbane, (21–23 April 2017);
Thursday Island, hosted by Torres Shire Council and a number of Torres Strait regional organisations (5–7 May 2017).

In addition to the twelve dialogues, an information session hosted by the United Ngunnawal Elders Council was held in Canberra on 10 May 2017. The work of the dialogues was endorsed at the National Constitutional Convention held at Yulara and Mutitjulu near Uluru on 23–26 May 2017.

EACH OF THE constitutional dialogues was run in precisely the same way and took place over a three-day weekend to accommodate participants' employment. The method was a structured, deliberative decision-making process that engaged participants in a dialogue. The decision to have a 'dialogue' was deliberate. We were conducting our work in communities exhausted by the superficial consultation practices of the bureaucracy, particularly the Commonwealth bureaucracy. The tolerance for any process that looked 'top down' or 'tick a box' was very low. We took very seriously the importance of the process being bottom up and driven by the people themselves.

The invitations were prepared by the organisation auspiced by AIATSIS to convene each dialogue. The invitation list was based on a formula we created: 60 per cent of participants had to be drawn from First Nations traditional owners; 20 per cent from local Aboriginal community organisations; and 20 per cent from Indigenous leaders such as Elders, stolen generations, and significant figures in the struggle. It was important to us, for the legitimacy of the process, that the decision-making was led by the cultural authority of the country – the traditional owners of the First Nations.

Day One commenced by setting the scene with a historical movie produced by myself and Rachel Perkins. The clip was intended to track the historic trajectory of the Aboriginal struggle for structural reform. On the first day the dialogues involved a broad discussion of what meaningful recognition would look like in the region. We were trying to expand the notion of recognition which had – through Recognise and political and popular discourse – become synonymous with symbolism. Recognition is a complex legal and political term that can mean more; both acknowledgement and a treaty, for example.

Each Friday dialogue captured much rich and nuanced information about the situation in the regions. The primary target of complaint was the Commonwealth bureaucracy and Commonwealth policy. For example, the destructive impact of the decision-making by the public service under the Indigenous Advancement Strategy was laid bare. Much of what was raised in the dialogues was validated by the audit report on the Indigenous Advancement Strategy published in 2017 by the Australian National Audit Office. This report, and the Senate inquiry into the Indigenous Advancement Strategy, provides an important source of information for non-Indigenous Australians about the exigency of the Voice. Significant vitriol was aimed at Recognise, which many participants argued had endorsed a minimalist model and lacked legitimacy in Indigenous communities.

One of the most important issues raised on Day One, was unexpected: the need to know more about Australian and Aboriginal history. This was when the concept of truth and truth-telling emerged. Many participants felt that Reconciliation Australia was not focused on truth and justice, but aimed at galvanising citizenship rights and services, such as employment opportunities. Reconciliation however is squarely and solely about truth and justice. Before there can be justice there must be truth. Many people queried whether non-Indigenous Australia was interested in learning the truth about Aboriginal history. On page fourteen of the Referendum Council's report, there is a powerful section, 'Our Story', that captures the 'truth-telling' that occurred during the regional dialogues. Here is one example from Ross River:

> Participants expressed disgust about a statue of John McDouall Stuart being erected in Alice Springs following the 150th anniversary of his successful attempt to reach the Top End. This expedition led to the opening up of the 'South Australian frontier' which lead to massacres as the telegraph line was established and white settlers moved into the region. People feel sad whenever they see the statue; its presence and the fact that Stuart is holding a gun is disrespectful to the Aboriginal community who are descendants of the families slaughtered during the massacres throughout central Australia.

It is a moving account of the voices of the dialogues and should be read by all Australians alongside the Uluru Statement. It is important to note that

most regions asked: 'Do our fellow Australians want to know more about our experience in our own country?'

Day Two involved the commencement of the civics portion of the program and involved a civics DVD produced by Rachel Perkins and myself. This explained how the constitution worked; the role of the High Court of Australia; separation of powers; the two houses of parliament; and how legislation is made and passed, as well as referendum information. This was followed by a two- to three-hour lecture on the legal options for reform. The sequencing of the dialogue allowed for a comprehensive legal explanation of each of the proposals. Then the dialogue would break into separate working groups based on the options. The working groups were led by local leaders. It was a deliberate decision not to use any facilitators in this process. The local leaders had participated in the trial dialogue as participants themselves to understand how the process worked and were assisted by a constitutional lawyer. In the first group, the participants would dialogue about the proposal whether it be treaty, voice or a statement of recognition and then report back to the plenary. The second working groups were mixed up so there was a cross-pollination of information and the participants would dialogue about the options and the preferences in the region. At this point the dialogues canvassed legal and policy issues and political viability. The outcomes of Day One, the wide-ranging plenary discussion and the key elements of the working-group deliberations on options were then written up in a draft record of the meeting to be approved by the group on Day Three.

Every dialogue was run the same way. Not every dialogue went smoothly, but it was always structured the same. In regions such as Central Australia we used three interpreters from the Alice Springs Interpreter Service. The legal lecture there took six hours as opposed to two or three elsewhere. This meant the depth of understanding and nuance in terms of contemplation of options and ranking of options was richer. Generally the structure and design worked well and was sequenced so that by the end of the process participants could dialogue on the options and contemplate opposing insights with depth and nuance. As the Referendum Council report states:

> The integrity of the process is evidenced in the fact that the exhaustive deliberations and informed participation of participants in the First Nations Regional Dialogues led to consensus at Uluru. The

outcome captured in the Uluru Statement from the Heart was a testament to the efficacy of the structured process, which allowed the wisdom and intent of the representatives of the First Nations Regional Dialogues to coalesce in a common position.

THE REFERENDUM COUNCIL sought the approval of the Prime Minister and the Opposition Leader to implement the following six recommendations of the dialogues:

A statement of recognition;
Deletion of section 25;
Deletion and replacement or moderation of section 51 (xxvi), the race power;
A racial non-discrimination clause;
A constitutionally enshrined Voice to the Parliament;
Treaty or agreement-making.

The First Nations Regional Dialogues ranked the Voice to Parliament as the primary reform priority. The next priority was treaty or agreement-making. The third was truth-telling. A truth commission had not been an option during the previous ten years of the recognition project. It had not been contemplated by the Referendum Council and we had not sought permission from the Prime Minister or Opposition Leader to raise it. However, it was overwhelmingly the preference of the participants at each dialogue. This occurred organically and unprompted, and was accepted because we needed to be true to the principles of the dialogue.

Guiding principles were extrapolated from the dialogues to guide assessment of the reforms adopted at Uluru. These principles were elicited primarily from the participants in the dialogues, in addition to historical statements of aspiration by Aboriginal and Torres Strait Islander Peoples, including the Social Justice Package – the unimplemented third prong of the Mabo settlement with the Commonwealth Government. The statements the guiding principles were influenced by include the Bark Petitions of 1963, the Barunga Statement of 1988, the Eva Valley Statement of 1993, the Kalkaringi Statement of 1998, the report on the Social Justice Package by ATSIC in 1995 and the Kirribilli Statement of 2015, as well as the United

Nations Declaration on the Rights of Indigenous Peoples. A reform proposal could therefore only succeed at Uluru if it:

> Does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty.
> Involves substantive, structural reform.
> Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples.
> Recognises the status and rights of First Nations.
> Tells the truth of history.
> Does not foreclose on future advancement.
> Does not waste the opportunity of reform.
> Provides a mechanism for First Nations agreement-making.
> Has the support of First Nations.
> Does not interfere with positive legal arrangements.

THE REFORM PROPOSAL emerging from the dialogues and endorsed at Uluru diverged from the expert panel. While the panel chose the options for reform, and then consulted, the Referendum Council took an agreed group of proposals, endorsed by the Prime Minister and Opposition Leader, and conducted a deliberative decision-making process. Two very different processes. The guiding principles enabled the reforms to be determined according to fundamental values extolled by the dialogues.

The expert panel's proposal to delete section 25 did not emerge as a priority in any dialogue. The section was not directed at Aboriginal and Torres Strait Islander Peoples and is a dead letter that falls foul of the Racial Discrimination Act 1975. As the Referendum Council reports states, the removal of section 25 would confer no substantive benefit on Aboriginal and Torres Strait Islander peoples.

Fixing the race power also did not feature prominently. Dialogues were aware that the power was the achievement of 1967 and that mostly beneficial legislation had been empowered by it. But as no guarantee could be given that the options to amend, delete and replace the power could without qualification prevent adverse discriminatory legislation, the change was the same as the status quo. This was a sophisticated legal assessment on the basis of discussions about how the High Court interprets text and recent High Court

cases. The dialogues were particularly alarmed by an issue raised by the Wyatt Peris committee that the implications of altering or deleting section 51(xxvi) may place at risk beneficial legislation that had been passed, especially the Native Title Act.

Finally, while the dialogues discussed that 'race' is a social construct, removing the word 'race' and inserting 'Aboriginal and Torres Strait Islander Peoples' will not change the legal potential for the Commonwealth to pass racist legislation, despite its symbolic appeal. Again, the substantive legal change was regarded as no advance on the status quo.

THE PROPOSAL IS a sequenced reform known as 'Voice Treaty Truth'. The Voice to Parliament is an amendment to the Australian Constitution that sets up the function for parliament to create this new body in legislation. The decision on what the body looks like will be deferred until after the referendum. This is not dissimilar to the way the constitution was first enacted – the High Court of Australia, for example, was empowered by the constitution but the legislation to enact it was passed some years later. The decision to defer is a common constitutional amendment technique.

The Expert Panel's recommendation for section 116A, a non-discrimination clause, still featured highly in the ranking of reforms. There were many reasons why the Voice proposal was given priority over section 116A. One of the innovative decisions of the dialogues was that the Voice could provide a front-end political limit on the parliament's power to make laws for Indigenous peoples under section 51(xxvi) and section 122 by reviewing proposed legislation. Until the dialogues, no constitutional lawyer had contemplated this. It is a clever reform. Dialogues regarded section 116A as more passive than the Voice, because it could only be used when and if the government passed racially adverse discriminatory laws. Section 116A would then require litigation to test the law, with considerable financial and emotional costs. For example, some dialogues spoke about how they wanted to challenge the discriminatory practices of the Commonwealth under the Community Development Employment Projects laws, but the estimated cost of challenging such laws is prohibitive for small Aboriginal community organisations. Then there is the time it takes between litigation and High Court judgment. While a non-discrimination clause potentially acts like a shield to prevent such laws, the Voice was favoured as an institution that could provide both political empowerment and media traction on problematic matters.

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The other innovation of the Voice is that it is a First Nations traditional owners body, and means those selected or elected to represent communities must be drawn from the traditional-owner base. The way the representatives are drawn has not been determined definitively but the initial discussions and feedback from dialogues is that the process must be driven by the principle of self-determination; it is up to the First Nations to determine how they are represented. It may be through already existing mechanisms of statutory land rights or native title through prescribed body corporates, but that is not the only way to determine how First Nations are represented. Some groups may seek an Australian Electoral Commission-supervised ballot box election using a traditional Western liberal democratic governance model, while other First Nations can and will immediately identify who has the cultural authority to represent them on the Voice.

The idea is to ensure the Voice can accommodate the richness of the First Nations. This is about bringing back to the state the footprint of First Nations and imbuing the decision-making of the government and bureaucracy with the cultural authority and cultural legitimacy of the foundation of Indigenous culture, the land and its ancient polities:

> 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.

As the Referendum Council concluded:

> In consequence of the First Nations Regional Dialogues, the Council is of the view that the only option for a referendum proposal that accords with the wishes of Aboriginal and Torres Strait Islander Peoples is that which has been described as providing, in the Constitution, for a Voice to Parliament.
> In principle, the establishment by the Constitution of a body to be a Voice for First Peoples, with the structure and functions of the body to be defined by Parliament, may be seen as an appropriate form of

> recognition, of both substantive and symbolic value, of the unique place of Aboriginal and Torres Strait Islander peoples in Australian history and in contemporary Australian society.

This is important for two reasons. The robust dialogue process means this is the *only* option that accords with the wishes of the representatives of Indigenous communities who participated. The process provided clarity and certainty about a singular option for reform given the nation had been determining this question since 2011. This was the first process that comprehensively sought the views of the community. The Referendum Council decided that it could not be ignored. Second, the Voice to Parliament is what First Nations have decided is meaningful recognition to them.

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

This is substantive *and* symbolic recognition. This is how the Referendum Council report made its recommendation:

> That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51(xxvi) and section 122. The body will recognise the status of Aboriginal and Torres Strait Islander Peoples as the First Peoples of Australia.

The sequencing of the reform is that the Voice would supervise the process of agreement-making or treaty. One of the issues ventilated by the regions on Day One was the destruction wrought by the native title process. There was deep hurt that the native title process has torn communities and families apart. Many regions differed in terms of their land ownership and leverage to fairly enter into agreements. For that reason, it was thought many will need help and resources to even contemplate agreement-making. There is no one size fits all.

There is much healing to be done in many communities, and dispute-resolution services would be required before agreement-making is contemplated, and this in part is why Voice precedes Treaty. While negotiating a treaty is a long-time aspiration for Aboriginal people, there are political realities about living in a federation where, post-1967, the Commonwealth and the states have engaged in cost shifting and passing of blame. One of the drivers of our disadvantage is our structural powerlessness. As the Uluru Statement notes:

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

Treaty is a nation-to-nation process that requires leverage and resources. The state-based processes, and especially the territories, are extremely vulnerable to Commonwealth power in a variety of ways. The Voice is a structural reform that compels the state to listen to Aboriginal and Torres Strait Islander Peoples in policy- and decision-making.

I have referred to the process of truth-telling, which would be localised and grow out of the agreement-making process, or commence at any time. There was an overwhelming view in the dialogues that a nation cannot recognise people they do not know or understand. The Aboriginal experience in Australian history is critical to recognition. From pre-contact to invasion, from conciliation to the frontier wars and killings, from compulsory racial segregation to assimilation, from self-determination to the return to neo-paternalism, it is time now to make peace and the Uluru reforms are the road map to peace:

> 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.

THE ULURU STATEMENT from the Heart is a document that contains the proceedings of the First Nations constitutional dialogues. It is an unprecedented process in Australian history as Indigenous peoples were excluded entirely from the 1890s process that led to the Australian Constitution. The Referendum Council explains it thus:

> This process is unprecedented in our nation's history and is the first time a constitutional convention has been convened with and for First Peoples. The Dialogues engaged 1200 Aboriginal and Torres Strait Islander delegates – an average of 100 delegates from each Dialogue – out of a population of approximately 600,000 people nationally. This is the most proportionately significant consultation process that has ever been undertaken with First Peoples. Indeed, it engaged a greater proportion of the relevant population than the constitutional convention debates of the 1800s, from which First Peoples were excluded.

The Uluru Statement contains 'Our Story', which I have described, and the assessment of legal proposals and the guiding principles. And, most importantly, it contains the Statement from the Heart which we drafted to convey to the Australian people the exigency of the reforms.

Foremost in my mind was our children and young people in youth detention, and our children and young people in child protection. In 2016, as the dialogues were being designed and commenced, I was also a serving co-commissioner on a Queensland-government statutory Commission of Inquiry into Queensland's Youth Detention. In 2017, I was appointed by the NSW Government to conduct an independent review into Aboriginal children and young people in out-of-home care. As the Uluru Statement notes:

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

It is not acceptable that our young people feel no hope for the future. The Voice to Parliament is about our young people and children taking their rightful place in the nation. It will be they who negotiate our agreements and they who lead the truth-telling. But the reform is urgent.

Many were despondent after the government rejected the Voice – describing it wrongly as a 'third chamber'. This was a mischievous and erroneous characterisation. It was hard not to be despondent.

Yet I had spent a year urging those involved in the dialogues to suspend their disbelief that the system could not reform. Law reform, I said, was about imagination and imagining the world can be a better place. The law can oppress and the law can redeem. The participants in the dialogues put their faith in us to deliver a fair and robust reform proposal to government.

Now, the nation must put our faith in them, our traditional owners, our local community organisations and our interested, civic-minded individuals who gave up weekends with their families to participate in a civic process to deliberate on constitutional reform. It is they, the participants in the dialogues, who have delivered a robust road map to peace. They did so in good faith.

After centuries of what my people have endured since invasion, through the killing times and racial segregation, they are still generous enough and hopeful enough to imagine Australia can do better and be a better place. As Yolgnu leader Galarrwuy Yunupingu said of Uluru, the aggrieved party has called out the party they allege has done them wrong.

Uluru is the beginning of the process, *the coming together after a struggle*. And that, my friends, is the potential of the Uluru Statement from the Heart. It was deliberately issued to the Australian people, not politicians, because it is we, as a united people, who can unlock that potential in a referendum:

> 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.

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