Submission of the Treaty Council Worldwide to the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)
6 – 8 November 2023
San Jose, Costa Rica.

"Analysis of laws, legislation, policies, constitutions, judicial decisions, and other outcomes concerning how States have taken measures to achieve the ends of the UN Declaration consistent with Article 38 of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP")"

Index

Acknowledgments ***1***

Statement of Support for Palestine ***1***

Colonial constitutional reform: Australia's failed Referendum on a Voice to Parliament ***2***

The capacity for settler-colonial legislation to achieve the ends of UNDRIP ***4***

Legislated Colonial Construct: Local Aboriginal Land Councils ("LALCs") **5**

Legislated Colonial Construct: Native Title **6**

Proposed Colonial Construct: National Antiracism Framework **6**

Potential Legislation: A positive duty on employers to provide racism-free workplaces **6**

Reference list ***7***

Acknowledgments

The writers of this Submission are allodial sovereign peoples of the lands now known as Australia: Alex Wymarra, a Gudang/ Yadhaykenu man of the Wymarra Clan and bloodline, and Chairman of the Treaty Council Worldwide and Jayne Christian, of the Baramadagal Clan Dharug Nation, the Reid / Goldspink bloodline, and Advisor to the Treaty Council Worldwide.

We acknowledge and pay our respect to the traditional owners of the lands on which this submission is made; the Huetar, Maleku, Bribri, Cabecar, Brunka, Ngave, Broran and Chorotega peoples of lands known as Costa Rica.

We extend our gratitude to expert member, Ms Kym Hamilton attending from Aotearoa, who is facilitating our contribution to this sitting and studies focused on an analysis of the implementation of Article 38 of UNDRIP.

Statement of Support for Palestine

We wish to acknowledge this submission has been drafted during a time of extreme and continuous settler-colonial violence waged against the people of Palestine, perpetrated by Israel and the United States of America. We note an overwhelming number of civilians, particularly children, are being brutally martyred in what we see is a textbook case of genocide.

On 27 October 2023, the United Nations General Assembly called for an immediate humanitarian truce between Israel and Hamas and for aid to access Gaza. It should be highlighted and condemned that Australia was one of a minority of member-states to abstain from supporting this incredibly modest motion, in the interests of humanity, and in circumstances where 120 other member-states saw fit to support the proposed course of action.

The Treaty Council Worldwide stands in solidarity with First Nations peoples experiencing the ongoing onslaught of settler-colonialism in these times. We unequivocally stand with the people of Palestine and use this opportunity to join in international calls for an immediate ceasefire, for adequate humanitarian aid to access Gaza, and for the international community to assist in facilitating sustainable solutions that uphold the principles of UNDRIP in the time thereafter.

We also pay our respect to United Nations staff members, currently a figure of at least 60 people, who have been killed in this ongoing vile genocidal onslaught.

"*The world has stood by and watched as settler colonialism has encroached on every aspect of our lands and lives. Palestinian lands have been continuously stolen and colonised from 1948 until today. World powers aid our oppressors, shield them from scrutiny and turn away as our people are massacred in plain sight… we place our faith not in complicit governments, but in the global masses who refuse to accept the violence of settler colonialism"*

Palestinians of Moukhaym Shatilla in The Sunday Paper, 15 May 2022.

Colonial constitutional reform: Australia's failed Referendum on a Voice to Parliament

UNDRIP Article 38: *"States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of the Declaration."*

On 21 July 2023, Mr Alex Wymarra and Ms Jayne Christian were permitted to enter the United Nations headquarters, as allodial sovereigns but unregistered attendees to the EMRIP sittings held at the United Nations headquarters in Geneva, Switzerland. We were also permitted to submit statements on this occasion.

These statements raised concerns over the assimilationist nature of the Australian settler-government operating on the lands now known as Australia. We named some of the significant markers of ongoing modern-day genocide which Aboriginal and Torres Strait Islander peoples ("allodial sovereigns") remain subjected to.

We questioned the nature and tactics of the referendum process employed by the settler-government backed "yes campaign" for a proposed Voice to Parliament, which we considered breached numerous articles of UNDRIP, while purporting to fulfil the obligations of UNDRIP. Further, we called for specific investigations into Australia's conduct of the referendum.

While no formal response was given to us from the United Nations, on 5 October 2023 the United Nations issued a press release titled *"Australia: UN experts urge support for Indigenous 'Voice' vote"*, where all Australians were urged to unite in support of the creation of a Voice to Parliament body.

The press release stated:

> *"The First Peoples of Australia have a right under international human rights law to participate in decision-making that affects them… By voting 'yes' on 14 October 2023, Australians will help the Government fulfil it's human rights obligations*".

It is highly concerning to us as allodial sovereigns, that the United Nations would take the view that the implementation of a "First Nations voice to parliament" within a colonial system, to be

completely regulated by a parliament of the Colony, would constitute an adequate manifestation of a mechanism for self-determination, let alone the fulfillment of international obligations.

Further, we are concerned that Australia was supported by the United Nations in its attempt to recognise allodial sovereigns as "First Australians", as we believe the Australian settler-government holds an intent to limit treaty options which could seek to ensure accountability by the international community. Given that at least two sovereign parties are needed to form a treaty, Australia's commitment to 'only recognising the spiritual sovereignty' of allodial sovereigns and classifying our Indigenous identity as "Australian", being merely possessions of the Colony with no legal agency, was an insulting attempt to further perpetuate an erroneous belief that denies our true status as allodial sovereigns of our lands.

We say a proper fulfilment of international obligations would need to involve the Australian settler-government liaising with each tribal group pursuant to our laws, and in practice this should be done via treaties between individual tribal groups and the Crown and/or Australia. As it is our cultural way of being that individual tribal groups can only speak for themselves, especially where self-determination is purporting to be taking place, as we are not a homogenous Indigenous identity.

Every State and Territory (as the Colony defines lands) except the Australian Capital Territory, overwhelmingly voted against the proposed referendum question. While much discussion was had that the mainstream 'no position' was inherently racist, lesser discourse was had publicly which acknowledged the proposed legislative reforms underpinning the 'yes position' were also inherently racist as it sought to keep allodial sovereigns subjugated within a settler-colonial paradigm. The proposed legislation was crafted to satisfy outdated white imaginings of who allodial sovereigns are, not meet the reality of our existences. One architect of the proposed legislative change, Noel Pearson, confirmed this himself in an article published in The Guardian on 10 October 2023 stating: *"Frankly, the voice is a proposal so pathetically understated that I'm amazed most Indigenous people are settling for it. After all, I helped design it as something so modest that no reasonable non-Indigenous Australian could reject it."*

On 24 October 2023, a further United Nations press release titled *"Turk regrets Australia No vote as missed opportunity, urges inclusion & participation"*, the UN High Commissioner for Human Rights stated that he was *"deeply disappointed the referendum did not pass".* He then criticised the misinformation and disinformation prominent in the campaign against the vote, but failed call out the same behaviours that we, as allodial sovereigns, saw exhibited in the course of the settler-government backed "Yes campaign". One such example was the campaign's heavy reliance on a statistic that *"80% of Aboriginal and Torres Strait Islander peoples support the voice*". Yet, this "fact" was derived from there having been two studies conducted in January and March of 2023, the findings of which officially became outdated by August 2023. Over the two surveys, 1,038 people informed the findings and their Indigeneity was determined by their online self-identification only, which is not consistent with the criteria of how allodial sovereign communities determine who is a an allodial sovereign and who is not.

In any event, 1,038 people were surveyed in total, if we accept that all these people were allodial sovereigns and we look at that figure against the total population of allodial sovereigns in Australia, which the 2021 Census says was 983,700 people, then the only conclusion that could have been drawn from those studies is that infinitely less than 1% of allodial sovereigns were consulted on whether they supported the proposed legislative amendment, and of that -1% of the population, 80% indicated their support. The misinformation peddled that 80% of all allodial sovereigns wanted the proposed legislative amendment was manipulative, unevidenced propaganda.

We support the views of Dr Gregory Phillips (2023) in full as discussed in his paper, *Patterns Power and Place*, namely: (a) *an advisory voice does not equate to self-determination* and (b) *why would we want to be included in the colonial state apparatus if our own sovereignty is not recognised, guaranteed or accepted? Sovereignty to us is not merely a spiritual or cultural notion. Ignoring one's*

own sovereignty and asking to be included in someone else's sovereignty (based on theft of the land, no less!) is the very definition of giving our power away.

As allodial sovereigns writing this submission, we say that our Tribal and Clan groups were not consulted at any stage of the referendum process which put forward the Voice proposal, nor were many Tribes and Clans whom we are aware of. It was not an "invitation that we issued to Australia". While we respect that many allodial sovereigns, including members of our own Tribal groups / families, may have ultimately decided to support the Voice proposal, this does not mitigate the gross power-imbalance between allodial sovereigns and the settler-colonial government that positioned the dynamics in which people were left to make their (limited) choices.

We respectfully ask that the United Nations (EMRIP and the Special Rapporteur on the rights of indigenous peoples) consider:

- That in settler-colonial states, the United Nations should refrain from giving unequivocal support to the position of settler-governments, especially in circumstances where First Nations peoples have sought the attention and assistance of the United Nations to highlight the wrongdoings of the settler-government on their lands.

- The shared protocols First Nations peoples adhere to, and how an Indigenous worldview as opposed to a colonial one, would inform what the fulfilment of Indigenous rights and obligations would look like on the lands now known as Australia. Given the nature of settler-colonialism, settlers frequently try to 'become Indigenous people' in place of the allodial sovereign population and create 'Indigenous bodies', as the Voice to Parliament would have become, which are ultimately controlled and regulated by the settler-Government.

- The solutions already being pursued by First Nations peoples, businesses and foundations who are invested in First Nations-led, evidence-based solutions and pathways to pursing treaties and self-determination mechanisms which foreground our rights based in allodial sovereignty.

The capacity for settler-colonial legislation to achieve the ends of UNDRIP

As outlined above, allodial sovereigns and settler-colonial worldviews and objectives are diabolically opposed. We say that unless or until treaties with allodial sovereigns are entered, we remain subjugated on our own lands and unable to truly make progress in the spirit of the principles set out by UNDRIP.

It is not the role of settler-colonial society to make decisions about First Nations peoples merely based on our non-binding advice, if that. Rather allodial sovereigns need to be allowed and empowered to make self-determining decisions for ourselves and our lands. Settler-colonial legislation needs to (a) be implemented to enforce and constrain certain behaviours among the settler population, that would otherwise disrupt allodial sovereigns from living in the spirit of UNDRIP, (b) at the very least be reformed where appropriate and (c) be repealed, in order to not hinder or prohibit the course of allodial sovereigns.

Australia has regarded UNDRIP as merely aspirational, failing to develop State and Federal action plans as to how it will implement UNDRIP since 2009. However, we say that it is impossible to action the implementation of UNDRIP in colonial laws alone, unless or until allodial sovereigns are 'recognised' by the Colony in a legal sense, as allodial sovereigns with whom independent joint venture relationships are pursued.

Legislative measures seeking to deal with allodial sovereigns, while being perceived to fulfil international obligations, remain largely ineffective in producing just outcomes for allodial sovereigns, because legislation of the Colony ultimately seeks to maintain our subjugated position within the Colony. Of course, there will always be allodial sovereigns who choose to assimilate

and/or align and enable certain interests of the Colony in preference to maintaining a stance that foregrounds their own allodial sovereignty without exception, but this must be expected at this point in time, given the prolonged period of 'survival mode' allodial sovereigns have been forced to endure under the ongoing political subjugation of the Crown and the Australian settler-government.

The following examples are but a few instances of settler-colonial legislation that are in need of abolition, as they are laws which are problematic and harmful to the progress, rights and aspirations of allodial sovereigns, but nonetheless are purported to be appropriate measures that meet the ends of UNDRIP by the Australian settler-government.

Legislated Colonial Construct: Local Aboriginal Land Councils ("LALCs")

States and Territories in the colonial system of land identification, have Local Aboriginal Land Councils ("LALCs") created by state-based legislation.

To look at the State of New South Wales ("NSW") for example, the legislation is particularly problematic as it was developed on the colonial premise that '*there were no Aboriginal peoples surviving in NSW who could prove a continuing connection with laws and customs'*. This is not true. This assumption does not consider the trauma-trajectory of attempted genocide on allodial sovereigns which continues to be perpetrated, especially on East Coast tribal groups, who have long been the doorstep of invasion and doormat of settlers, nor does it consider the nation re-building efforts that many allodial sovereigns are actively engaged in today.

Therefore, the LALC model was developed on the basis that any surviving Aboriginal person can join a LALC and speak for the Country that LALC is based on, whether they have cultural authority to speak for that Country or not in accordance with allodial sovereign laws and shared protocols. The colonial legislation encourages and enables the erosion of our ways of being, knowing and doing, while meeting its colonial objectives of delivering a mechanism for 'land back', without actually providing land back justice.

The legislation creates a situation where Traditional Owners are frequently denied membership by LALCs sitting on the lands to which their bloodlines belong, especially on lands that are deemed lucrative i.e. Tribal lands of the Dharug language group now known as Sydney, and therefore significant numbers of allodial sovereign communities derive no benefit from this legislation in terms of being able to exercise cultural responsibilities over their lands via this mechanism. Further to this, it causes harm to many allodial sovereigns when white-institutions favour engagement with the colonial constructs being LALCs, to meet their own consultation objectives, in preference to engagement with and supporting Traditional Owners, whose being is otherwise erased on their own lands.

We note that a review of the LALCs conducted in 2021 by the Minister for Aboriginal Affairs which produced a report to the NSW Parliament. The review process confirmed the *"policy objectives of the legislation remain valid and remain functional and appropriate for securing its policy objectives…"*. It is this very system of checks and balances that we say is a reason that reform alone will not correct the fundamentally flawed premise this colonial legislation is built on, nor will it achieve the objectives of allodial sovereigns. Rather, such legislation needs to be abolished in favour of an allodial sovereign led approach, consistent and accountable with allodial sovereign laws.

We respectfully ask that the United Nations studies:

- Investigate the relationship between settler-colonialism objectives and the objectives of legislative mechanisms that purport to fulfil the settler-government's international human rights obligations on the lands now known as Australia.

- Explore the evidence supporting the proposition that allodial sovereign notions of justice can ultimately only be achieved through allodial sovereign governance structures, which must exist independent of the Colony in order to independently interact with the Colony in a healthy power-sharing dynamic.

Legislated Colonial Construct: Native Title

"Native title highlights a pattern of not only divide and rule but also inclusion masquerading as justice"
Michel Foucault (1982)

We refer you to Dr Gregory Phillips' essay, *Patterns Power and Place,* pages 2 and 3, for discussion on the flaws of, and harm inflicted on allodial sovereigns by Native Title legislation. We support this commentary.

We reject the position of the Special Rapporteur on the rights of indigenous peoples in 2017, to encourage reform of the Native Title system and use of allodial sovereign lawyers in furthering its agenda. We say it must be abolished in favour of an allodial sovereign led solution to land justice.

We offer that the Allodial Land Use Register (ALUR) being developed by the Treaty Council Worldwide and Land Equity International, offers a superior system to meet land back objectives in the spirit of UNDRIP.

Proposed Colonial Construct: National Antiracism Framework

"In its current form, the proposed strategy marks a continuation of the war of race rather than a turning point"
ICRR and Sisters Inside (2022)

With the failed referendum, 'reconciliation' has finally been declared dead. In public discourse, Ben Abbatangelo, predicted that a failed referendum would usher in a regenerative period, one where Australians should pursue something that actually "gives us our rights".

In the absence of the Voice to Parliament continuing to dominate public conversation, the public narrative has already turned to doing the work of anti-racism, which arguably should have always been the initial step in any long-term strategy of moving forward, especially in approaching a referendum focused on the rights and recognition of allodial sovereigns.

The Australian Human Rights Commission ("AHRC") launched a plan to develop a National Anti-Racism framework in 2021. We share the concerns articulated by ICRR and Sisters Inside (2022) in their submission response to the proposed National Anti-Racism Framework, namely that it will only produce 'more of the same' unless or until action is taken from a premise that foregrounds Indigenous sovereignty (allodial sovereignty).

Potential Legislation: A positive duty on employers to provide racism-free workplaces

We say that colonial legislation should use the act of reform to better manage the behaviour of settlers in this settler-colonial society. We now live in times where the violence of the Colony has moved from the frontier into the systemic structures that we all engage with. A recent statistic from the Australian Bureau of Statistics (September 2023) says that 64.4% of Australians engage in employment, making workplaces an ideal setting where settlers' behaviour can and should meet minimum standards that ensure allodial sovereigns can engage in meaningful employment without constant threat of racism and discrimination. This would go some way to ensuring safety standards that must exist in order for UNDRIP to be fulfilled by allowing allodial sovereigns to enjoy the pursuit of economic development without fear of discrimination and harm.

Due to failure of current Federal and State legislation to grasp the serious and multifaceted nature of racism perpetrated both systemically and directly by settlers, we say it is most urgent that anti-racist behaviour thresholds and accountability measures be enforced via Federal and State anti-discrimination and employment laws that aim to set community standards, which are proportionate to the extent of Australia's racism problem.

Racism is a serious and pervasive public health and occupational health and safety issue in the workplace (Ahpra 2020). Racism contributes to causing or exacerbating the gaps in health and social outcomes for Aboriginal and Torres Strait Islander peoples (Markwick et al 2019; Bond 2021). Being highly educated does not inoculate one from racism, it often intensifies it (AIDA 2016; IAHA 2021).

Racism in workplaces is rife with the Jumbunna Institute, *Gari Yala* (2020) study making findings such as:

> *"38% of participants reported being treated unfairly because of their Indigenous background sometimes, often or all the time… 44% reported hearing racial slurs sometimes, often or all the time… and 59% reported experiencing appearance racism – receiving comments about the way they look or 'should' look as an Aboriginal or Torres Strait Islander person."*

In December 2022, a new positive duty was introduced under Federal legislation known as the *Sex Discrimination Act* 1984, to impose a legal obligation on organisations and businesses to take proactive and meaningful action to prevent sexual harassment conduct from occurring in the workplace or in connection to work.

In light of conclusions drawn about the failed referendum being a reflection of Australia's racism problem, and the increase of reported racist incidents in light of the referendum process, if Australia is seriously seeking to drive cultural change within its settler-colonial society, a similar style of positive duty is urgently required in colonial legislation to tackle racism. It is important that allodial sovereign led research, experiences and demands, inform how colonial legislative reforms occur in order to implement a positive duty that enforces consequences on employers and settlers who perpetrate and allow the perpetration of racism in workplaces.

We respectfully ask that the United Nations:

- Encourage, advise and assist the Australian member-state to immediately implement a positive duty to provide racism free workplaces as a measure within its power, that would contribute to creating environments safe and conducive to supporting the rights of allodial sovereigns to exist, in alignment with the principles of UNDRIP.

Reference list

1. Aboriginal Land Rights Act 1983 Statutory Review Report (2021).
2. Dr Gregory Phillips (2023) 'Essay: Power, Pattern Power and Place'.
3. ICRR and Sisters Inside (2022) 'We demand a ceasefire: responding to Australia's Anti-Racism Framework'.

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