Bond Law Review

Volume 30 | Issue 1 Article 2

2018

Aboriginal Recognition: Treaties and Colonial Constitutions, 'We Have Been Here Forever ...'

Irene Watson
University of South Australia

Aboriginal Recognition: Treaties and Colonial Constitutions, 'We Have Been Here Forever ... '

Abstract
Excerpt:

I have been asked by the editors of this special edition of the *Bond Law Review*, themed 'The Law and Politics of Control and Power', to reflect upon the significance and legacy of the Commonwealth of Australia's 1967 referendum. I will do this from a critical First Nations stand point. In doing this I acknowledge the efforts of those people who worked on bringing about the 1967 referendum, in the hope that it would provide relief to the critical position of First Nations peoples at the time. The approach I take, or the stand point from which I speak, is centred by and in relationship to the ruwe of my ancestors: the Tanganekald, Meintangk and Boandik Peoples of the South-East of South Australia.

Keywords
first nations, first peoples

Aboriginal Recognition: Treaties and Colonial Constitutions, 'We Have Been Here Forever ... '

IRENE WATSON*

Acknowledgements

I acknowledge the land or the ruwe which sustains us, and that I have the good fortune to visit. I acknowledge the First Nations Peoples of the land on which we met when this project was first conceived, and elders past and present. I acknowledge First Nations from across this continent we now call Australia.

I Introduction

I have been asked by the editors of this special edition of the *Bond Law Review*, themed 'The Law and Politics of Control and Power', to reflect upon the significance and legacy of the Commonwealth of Australia's 1967 referendum. I will do this from a critical First Nations stand point. In doing this I acknowledge the efforts of those people who worked on bringing about the 1967 referendum, in the hope that it would provide relief to the critical position of First Nations peoples at the time.[1] The approach I take, or the stand point from which I speak, is centred by and in relationship to the ruwe of my ancestors:[2] the Tanganekald, Meintangk and Boandik Peoples of the South-East of South Australia.

Our old peoples have cared for the ruwe laws since the time our ways began. The ancient relationships we have to ruwe are relationships which have ensured a future for all of humanity. They are relationships which have taught us to know that the law is in the land. Our laws are in the DNA of the land and our bodies. This is what we mean when we say that we are related and connected to land and law.[3] It is time, as it has always been, to

* Pro Vice Chancellor: Aboriginal Leadership and Strategy, David Unaipon Chair and Professor of Law at the University of South Australia. This paper was presented to the *50th Anniversary of the 1967 Referendum* event hosted by the Faculty of Law and the Nyombil Centre at Bond University on 25 May 2017.

1 At that time across Australia many First Nations Peoples were detained on reserve lands under the *Aborigines Acts*.

2 'Ruwe' in the language of the Tanganekald means 'land'.

3 Dani Cooper, 'DNA confirms Aboriginal People have a long lasting connection to country', *ABC News* (online), 9th March 2017 <http://www.abc.net.au/news/science/2017-03-09/dna-confirms-aboriginals-have-long-lasting-connection-to-country/8336284>; see also Ray Tobler et al., 'Aboriginal mitogenomes reveal 50,000 years of regionalism in Australia' (2017) 544 *Nature International Journal of Science* 180, 184 <https://www.nature.com/articles/nature21416>. I provide these references to illustrate how the connection of Aboriginal Peoples to country is being evidenced through science; it should be noted that research on the human genome of Aboriginal Peoples has been criticised for its potential to exploit Aboriginal

live proper sustainable lives, and it has always been time, for every wave of boat peoples who came to the lands of First Nations, to be in relationship to law, country and the First Peoples. It has always been time to fully reject the construction that there were no people here when Captain Cook arrived. It is now time to de-centre colonial power and to re-centre Aboriginal Peoples' laws and authority over place.

It is from this stand point that I ask: what has been the effect of the 1967 Referendum on Aboriginal lives? The referendum enabled the census counting of Aboriginal and Torres Strait Islander people and mandated the Australian Government the power to make laws for and about us. But what effect did those changes have on Aboriginal lives? And what authority to do this passed between First Nations and the colonial settler society to make up this mandate?

II The Australian Constitution

The Commonwealth of Australia came into existence on 1 January 1901, following the British Parliament's enactment of the *Commonwealth of Australia Constitution Act 1900* (Imp). The *Constitution* enabled the British colonies of Australia to become constituted as the Australian states. The newly established Commonwealth Parliament divided power between the Commonwealth and the states and incorporated a federal court system.

The *Constitution* did not discontinue the colonial construction of terra nullius and native savagery. Rather, those constructs are and remain the foundation upon which the *Constitution* was established. The reference to Aboriginal Peoples in the *Constitution* enabled the new states of the Commonwealth of Australia to legislate in relation to 'the aboriginal race.'[4] The *Constitution* also excluded 'aboriginal natives' from the national census count.[5] These provisions were about constructing jurisdiction, that is, the states deemed themselves to have jurisdiction over Aboriginal Peoples whose lives were not counted or included in the national census. Aboriginal Peoples thus became unilaterally constituted as having a special excluded status in law. First Nations did not consent to this newly constructed and constituted status.

Prior to 1901, the colonies of Australia controlled First Nations through a series of laws known as the '*Aborigines Acts*' and, under the *Constitution*, the *Aborigines Acts* continued to control and manage the lives of

---

Peoples and this concern was raised in the 1990s in respect of what was known as the Vampire Project. The gene disputes are discussed in Debra Harry, 'Indigenous Peoples and Gene Disputes' (2009) 84 *Chi.-Kent Law Review* 147. Science has confirmed what we have always said: we have been here forever.

4 Section 51(xxvi) of the *Constitution* as originally enacted provided that the Commonwealth Parliament could legislate with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'.

5 Section 127 of the *Constitution* as originally enacted stated that '[i]n reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'.

Aboriginal Peoples.[6] Some of the *Aborigines Acts* remained in force until the 1970s. For example, the *Queensland Aborigines Act* survived into the 1970s, while the *South Australian Aborigines Act* remained in force until the 1960s. Under the *Aborigines Acts*, Aboriginal lives were managed, controlled and confined according to the powers held by the state, including the power to determine identity.

III Post 1967 Referendum

Since the repeal of the *Aborigines Acts*, to what extent has Australia 'recognised'[7] Aboriginal and Torres Strait Islander Peoples? One outcome of the 1967 Referendum was that it empowered the Commonwealth Parliament to enact laws for and about Aboriginal Peoples. An early example is the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which followed the Northern Territory Supreme Court decision in *Millirrpum v Nabalco Pty Ltd* ('*Millirrpum*'),[8] in which the court decided that Aboriginal title was not known to Australian law.

> On the foundation of New South Wales, every square inch of territory in the colony became the property of the Crown. All titles, rights, and interests whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown. The plaintiffs, who cannot point to any grant from the Crown as the basis of the title which they claim, cannot succeed.[9]

In response to the outcome in *Millirrpum*, the Whitlam federal government established the Aboriginal Land Rights Commission in 1973,[10] which in turn led to the introduction of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The *Aboriginal Land Rights Act* established a land claim process for First Nations across the Northern Territory.[11]

---

6 *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) (the '*Queensland Aborigines Act*'); *Aborigines Protection Act 1886* (Vic); *Aborigines Act 1890* (Vic); *Aborigines Protection Act 1890* (WA); and following 1901, *Aborigines Protection Act 1909* (NSW); *Northern Territory Aboriginals Act 1910* (SA); *Aborigines Act 1911* (SA) ('*South Australian Aborigines Act*').

7 I have written on the trickery of 'recognition' and its power to conceal the ongoing colonial project in Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2nd ed, 2015) 18–20, 94. ('*Raw Law*')

8 (1971) 17 FLR 141.

9 Ibid 245.

10 The Aboriginal Land Rights Commission (also known as the Woodward Royal Commission) produced two reports: Commonwealth, Aboriginal Land Rights Commission, *First Report* (1973); Commonwealth, Aboriginal Land Rights Commission, *Second Report* (1974).

11 Prior to the 1967 Referendum, the *Constitution* provided in s 51 for the Commonwealth Parliament power to legislate with respect to: '(xxvi) The people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws' (emphasis added). The italicised words were removed as a result of the referendum of 1967.

IV The 'Recognition' Narrative

More than twenty years later, *Mabo v Queensland (No 2)* ('*Mabo*')[12] overturned *Millirrpum* when it 'recognised' an Aboriginal title to land. In response to 'recognition', the Commonwealth enacted the *Native Title Act 1993* (Cth). This Act has effectively limited the already limited 'recognition' of Aboriginal title established in *Mabo.*[13] It is akin to the game of giving in one hand and taking away with the other.

The 'recognition' of Native Title has attracted controversy from Aboriginal and non-Aboriginal Peoples. Aboriginal critics have claimed that native title is not about the recognition of land rights,[14] while some non-Aboriginal interests, often comprising powerful industry groups, have lobbied government and the public in arguing that native title claims place the backyards of Australians under threat.[15] Along with the fact of native title recognition, the idea that non-Aboriginal property interests were no longer protected by Australian property law was much put about. However, nothing could have been further from the truth; the guarantees of protection of non-Aboriginal property rights were well secured and were not threatened by the High Court in the decision of *Mabo.* Brennan J made this particularly clear, his judgement ensuring that the 'skeletal' foundation of the Australian state would remain intact and undisturbed by the recognition of Aboriginal title.[16]

What might we make of this bygone era of the 1990s and the recognition of Aboriginal title? Why was 'native title' represented as something it never was and never could be — that is, land rights and self-determination for First Nations Peoples? The simple response is that the progress agenda of business must as usual prevail, just as the paradigm of progress continues to determine Aboriginal rights in accordance with state recognition policies of the day.

Caring for country and fulfilling our obligations to sustain country for the benefit of future generations is an obligation we still carry, often under duress and in difficult circumstances. The Australian states continue to determine the future and balance of Aboriginal interests against development and industry, which often threaten the futures we stand to uphold and protect. Fracking for natural gas, uranium mining[17] and coal

---

12 (1992) 175 CLR 1.

13 For further discussion, see Watson, *Raw Law,* above n 7, 30–31, 88–9, 130–2, 156.

14 Ibid.

15 Australian Mining Industry Council, Advertisement, *The Age*, (Melbourne), 14 August 1993; *The Weekend Australian* (Sydney), 21–2 August 1993.

16 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42.

17 The largest uranium mine in the world is at Roxby Downs, South Australia. The mine and processing plant have degraded the surrounding natural environment and relies upon the Great Artesian Basin underground waters around Lake Eyre, the land of the Arabunna People. While the state advises that they have obtained consent, Arabunna elder Kevin Buzzacott has protested the development since the 1980s, insisting that no consent to the destruction around the mine could ever be given from an Aboriginal standpoint. The processing plant uses millions of litres of water per day. The water is drawn from ancient underground water reserves which connect us all in our future needs and dependencies, and should not be squandered on concentrating heavy metal ores. A new mine is being proposed on the lands of

mining[18] all pose wide-scale threats to the territories of First Nations across Australia. Australian law is weak in its environmental protection powers.[19]

More recently, critics have claimed that Indigenous Land Usage Agreements (ILUA), artefacts of Native Title law, are causes of conflict between First Nations Peoples. Issues between consenting and non-consenting First Nations Peoples are often at the core of native title negotiations and result in conflict.[20] This potential for conflict is a major concern of Aboriginal Peoples across Australia, and for First Nations who have an obligation to protect country against the odds of potentially destructive environmental developments. The Adani coal mining development proposed for central Queensland is one of many developments which have been progressed through native title Indigenous Land Usage Agreements,[21] without the agreement of many in the local community. At present a number of actions are before the courts, seeking determinations as to the legitimacy of ILUA agreements.[22]

In summary, then, the recognition of Aboriginal people by Australia since 1967 is a bit of a mixed bag, the quality and extent of which waxes

---

the Martu Peoples in Western Australia by the Canadian company Cameco. Many of the Martu First Nation claim they have not agreed to the process. In June 2016 the Martu continued their protest against the mine being developed: Angus Sargent, 'Martu People Leave on 110km March in Protest Against Pilbara Uranium Mine', *ABC News* (online), 5 June 2016 <http://www.abc.net.au/news/2016-06-04/martu-people-in-the-pilbara-protest-a-uranium-mine/7476440>.

18 The Queensland government's approval of the Adani coal mine is subject to several legal challenges.

19 For discussion on the weakness of Australian environmental laws to care for country, see Irene Watson, 'Aboriginal laws of the land: surviving fracking, golf courses and drains among other extractive industries' in Nicole Rogers and Michelle Maloney (eds), *Law as if the Earth Really Mattered: The Wild Law Judgment Project* (Routledge 2017) 209.

20 Joshua Robertson, 'Leading Indigenous lawyer hits back at Marcia Langton over Adani', *The Guardian* (online), 9 June 2017 <https://www.theguardian.com/profile/joshua-robertson>. On the capacity of Australian law to protect country, native title does not provide First Nations with capacity to care for country in the ways in which we are obliged to, but are rather laws intended to assimilate First Nations into the Australian property law system. Under these laws land constitutes property, which contradicts our traditional relationships to our territories. See *Native Title Act 1993* (Cth); *Native Title Amendment Act 1998* (Cth).

21 Indigenous Land Usage Agreements (ILUA) may be negotiated pursuant to *Native Title Act 1993* (Cth) s 24BA. Developments on country are frequently negotiated within an ILUA framework. For example, most large-scale developments, including the Roxby Downs uranium mine, involve an ILUA, note the confidential character of this agreement: Barry FitzGerald and Sarah Martin, '$900m Olympic Dam Windfall to Indigenous Groups', *The Australian*, 5 May 2012. <http://www.theaustralian.com.au/business/m-olympic-dam-windfall-to-indigenous-groups/story-e6frg8zx-1226347243652>. The Cameco Corporation uranium mine at Kintyre in the Pilbara region of WA on the lands of the Martu People was also negotiated as an ILUA in 2012: Cameco Australia, 'Kintyre' (5 August 2017) Cameco Australia Projects <https://www.camecoaustralia.com/projects/kintyre>.

22 In On 22 June 2017 the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth) came into force, amending the Commonwealth *Native Title Act 1993*. This was to remove uncertainty around the validity of registered Indigenous Land Use Agreements, following *McGlade v Native Title Register* (2017) FCA 10 (2 February 2017). The amendment confirms the validity of ILUAs currently on the Native Title Register and provides validity for those agreements where the majority of the registered native title applicants have signed.

and wanes with the politics of 'recognition' and the power agenda of 'progress at any cost', including the cost to the environment and future generations.

V If First Nations Have Been Here Forever, Why Should We Be Born Again onto the Birth Certificate of the Australian Nation?

If we have been here forever and we have an ancient constitution through our ancient connections to law and country, why would we want to be born again? Why be reborn when our claims to our country have been confirmed forever and, indeed, acknowledged in non-Aboriginal discourses as extending for more than 65,000 years? Why be reborn on the certificate of the Australian state, which initially excluded our very existence as Peoples and, when it did include reference to us, made sure to limit our own being as Aboriginal?

Who might we become in this act of rebirth? Will our ancient laws and connections to country continue to sing up the life of this continent in the ways that song lines have done since the beginning of time? If the act of being reborn does not enable us to be whom we have always been, then what is the point of this act of 'recognition' in the birth certificate of 'Australia'? For we are already human, we are of the land and the flora and the fauna, we are Aboriginal. Why would we need to be reborn as legitimate beings of the *Australian Constitution* if the outcome were to journey with all other Australians to a place of disconnect from our land and laws and songs?

The argument for being reborn as 'Aboriginal' in the *Constitution* is so that we can assimilate with all peoples referenced by the *Constitution*. How might we then continue to live as Aboriginal Peoples and to continue to uphold our obligations in relationship to country? Moreover, what constitutes recognition of Aboriginality in the narrative of constitutional law? How much say will Aboriginal Peoples have in the determination of that which constitutes recognition? Will recognition continue to be framed by the colonial laws and policies, as it always has since the coming of Captain Cook?

Constitutional recognition — what does it mean? What does it guarantee? What will be the mechanisms employed to produce the guarantees? Can we expect any acknowledgement of Aboriginal relationships to land and law?

Importantly, who has the most to gain from constitutional recognition, in view of the little which has been gained so far? Indeed, are Aboriginal Peoples a necessary part of the push for the legitimization of the Australian state?

Established as an unlawful foundation, will the 'skeleton' to which Brennan J referred to in *Mabo* be left undisturbed?[23] Will the incorporation

[23] (1992) 175 CLR 1, 29, 30, 45.

of the Aboriginal person recognize and legitimize a constitution founded on de facto power and violence and not law and authority? The question is: who really needs recognition, the Australian State or the First Nations?[24]

If constitutional recognition is problematic, what then of the talk of a treaty?

VI Treaty

Do concerns like those raised above arise when we consider a treaty as a mechanism for settling relationships between First Nations and the Australian state? First Nations are many, so would there be one universal treaty or many? Who would represent the Nation(s) in treaty negotiations? Who would determine representation, the state or First Nations? And what is up for negotiation? Could we agree to our separation from and the destruction of our lands? Can the state accept 'no'? If we say NO, how will it roll? It is becoming clearer to me that the idea of consent is itself a white colonial construct; First Nations had no process which could enable consent to our own demise and or extinguishment.

In the process of negotiating a treaty would we consider the meaning of a treaty? What would be its status in law? Would it stand as a treaty in international law or would it be of a domestic character, a mere contract or agreement? What would an international treaty, as opposed to a domestic treaty, guarantee? What mechanisms exist or might come into existence, which might produce guarantees and protections within treaty negotiations? What kinds of treaty negotiations will occur regarding land rights and self-determination? Would it be international or domestic; what difference would it make?[25] What about the United Nations Declaration on the Rights of Indigenous Peoples? [26] Who will police and enforce any agreements which are entered into?

The United States made treaty-making with Indigenous Peoples routine in the 18th and 19th centuries. What difference did treaty between the Lakota and the United States make when the Peoples opposed a pipeline development across their country in 2017?[27] The treaty was ignored. Is this a sign of things to come? How will treaty agreements between First Nations and the Australian state be applied and played out?

---

24 Irene Watson, 'The Future is Our Past: We Once Were Sovereign and We Still Are' (2012) 8(12) *Indig L Bull* 12–15.

25 Watson, *Raw Law,* above n 7, 96–119.

26 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/68, UN Doc A/RES/61/295 (13 September 2007).

27 Amy Harder, and Christopher Matthews, 'Trump Administration Gives Final Approval for Dakota Access Pipeline', *Wall Street Journal* (New York) (2 July 2017). When Trump signed an executive order to advance the construction of the pipeline on 24 January 2017, the treaty status of the First Nations, an environmental impact statement and public opposition to the pipeline were all ignored.

VII Future Relationships

To begin with, we should ask: what do we mean by recognition, and from whose perspective are we interpreting and translating how we know rights? Are we looking at rights from an Aboriginal or an Australian position? Why is there a need to articulate the difference? There are two reasons I suggest that we need to articulate the difference.

The first is because Australian legal history was founded upon difference and the exclusion of Aboriginal Peoples. The Australian Constitution is the result of a process of constructing, establishing, and constituting a legal foundation for what was (and remains) a British colonial society. It was (is) a process of making legal and independent colonial states into a commonwealth of states. The *Constitution* was (is) about the British Empire obtaining constitutional status and legitimacy for its invasion of the continent now called Australia. Throughout the process of constituting and legitimizing this colonial society, Aboriginal Peoples have been deemed non-existent, of the past, and a local problem. We were constructed as uncivilized, savage and backward peoples; this construction both derived from and is reflected in the foundation of the Australian legal system. 'Terra nullius' meant Aboriginal Peoples did not exist as subjects in law, sharing the same status as flora and fauna. In my view, this is not altogether a bad thing, as in Aboriginal legal systems of obligation and relationality we are all related — human, land, animal and plant. That is the law. But from 1788, from the earliest invasion time, the colonisers did not have the knowledge or the understanding of another way of being in law. And those knowledges of whom we are as First Nations has still not developed into any degree of respectful understanding.

Aboriginal futures were not considered capable of surviving the invasion, genocide and occupation of our lands. So, expected to evaporate, we were never included. Yet we did survive and we are still here. We were born at the first sunrise; we existed then as we still do today.

Perhaps the millions of dollars which have been expended during this constitutional recognition process could have gone towards the teaching and actioning of obligations to land and kin. We could have imparted knowledge at the same time as caring for land and peoples. I say this because we need to get a lot smarter in our thinking; these critical times demand this of us all.

At the advent of the British colonies in Australia, First Nations Peoples were deemed (by the British) 'British subjects' and from that early determination there has continued a long historical trajectory towards Aboriginal Peoples becoming assimilated 'Australians'. Identity constructs imposed by the colonial project have been constantly manifest, although these constructs were not translated to be accompanied by the protection of the law as British subjects might expect to be treated. We were instead deemed British subjects of a special protected status, without the same protections in law of 'real' British subjects. The kind of protection extended to First Nations was of the kind which determined how we named ourselves,

how we named our country, where we lived, the languages spoken by future generations, the nature of our work (more akin to enslavement) and detention and containment within Aboriginal reserved lands. Our lives were subjugated by the special laws of the *Aborigines Acts*.

Today our territories and our Aboriginal ways remain at the whim of the state. The power and control we have over our lands and our lives is still under the control of the state and we cannot stop destructive developments on our lands. In an Aboriginal context, however, we do have the authority to say 'no'. The meaning of 'recognition' is an imposition of the colonial state and it is derived from notions of progress — one which centres European ways of being, and demands of us that we become 'civilized' within the paradigm of progress.

The second reason for articulating the difference is because Aboriginal world views are based more upon an obligation and relational way of being and less upon an individual rights-based approach. For example, I belong to country because of my relationship and not because I have a stamped title of ownership.

Will Australian law provide a remedy for giving back what was stolen, which is land and lives and Aboriginal ways of being? Will Australian law enable the sustainability and healing of our natural worlds? If we answer 'no' to these questions, then of what value is the recognition of Aboriginal rights, and what else might constitutional recognition and a treaty enable? How might these processes fully reject terra nullius, de-centre colonial laws and re-centre Aboriginal People's laws and authority over place? Will this position ever be heard?

History shows that even the most entrenched social lies have been limited in scope and duration, even if, while in force and dominant, they appear to be the very source of truth.[28] The lies of native savagery became an embedded 'truth', which founded Australian law, but passed on a day-to-day basis as an unspoken code and best forgotten. How now might the truth be spoken beyond the oppositional binaries of backward native and advanced and civilised? And how might those truths enable a space for Aboriginal epistemologies to speak and to self-construct our own Aboriginality?

In respect of truths which can be spoken, we have the authority as the First Peoples and as the carriers of the first laws to speak of our ways and our knowledges. However, the power to know is still in the hands of the colonials and still takes up and controls most of the space. Therefore, how might our authority as First Peoples speak back to power?

What are, and where are, those spaces to speak the truth, back to the incumbent power? I would argue we have done it now, in this space, now, by simply putting the question and enabling our capacity to think otherwise.

So, it is in the doing, right now, that we speak the truth back to power, it is not new; it is old. Speaking back has been ongoing and on this

---

[28] Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Paradigm Publishers, 2014).

continent since the coming of Captain Cook. But what of its effect? Is it being heard? Is that which is heard being translated into action?

Returning to the question of recognition: what is it that we are going to be recognised as? In what capacity, in what space and time are we are going be recognised and what identities and connections are we going to carry to our territories and our kin?

Will words do it? Is there space for it to be more than words; will it change culture? What culture is there to change? Or is it going to be more of the same, setting the trajectory of assimilation into a dominant paradigm with 'progress' at the centre?

Treaty: what will be its status, and what are its mechanisms to monitor, evaluate and enforce agreements? Who will be the parties to a treaty? Who, indeed, have the power and the authority to make a treaty? What is left to treat with? If we are asked for our consent, can it be given and who has the authority to give it? In Aboriginal law the land speaks for itself: can you ask the land to say 'yes' to its own destruction?

Can First Nations agree to sell the land? I say 'no'. We have no lawful authority to do this and yet we are asked to do it over and over and over again. The voice saying 'no' is never heard. While the sound of 'yes' is grabbed up and run with and the conflicts begin. Across Australia, whether it be the Adani coal mine, the copper-uranium mine at Roxby Downs, or the lands for a proposed nuclear waste dump, First Peoples are asked to agree, asked to agree in a context in which they have no authority to say 'yes' and no power to say 'no'.

This is the colonial knot — the tension, disjuncture and gap. This is not the kind of gap represented by Aboriginal Peoples and their overwhelming context of disadvantage which has led to the deficit focus of Aboriginality. This is another kind of gap, and it is in how we see the world. This is the gap between the world views of First Nations and settler colonial society. It's time that the truths of the First Nations speak loud and proud and lay the tracks for the future. How might we enable this?

Will reconciliation do it? Whatever, it must be more than thinking through the matter of rights. It will take a shift to understanding and the renewing of obligations, a vision for all peoples to commit to another way of being on earth. A way which moves from progress in the now to understandings of ongoing obligations to future generations.

If we press on with this constitutional recognition program, where might we end up? The 1967 referendum was a response to the racism of colonialism. That racism wasn't eliminated then, however; it continues in many different ways and requires ongoing negotiations to make Aboriginal lives matter. The inputs of much energy and resources are ongoing and needed not only to make our lives matter but to ensure we have those lives to live.

In addition to the concerns we have for individual lives and the survival of an ongoing racism, we are further challenged — as is all of humanity — by an ecological crisis, the extent of which we have never known or met in our past. So we need responses to that. And that perhaps is the most critical

conversation of our time. These concerns which challenge us are not even on the agenda of constitutional recognition.

The beginning of a true process of justice and 'recognition' will be the restoration of that which was stolen, our land and our lives. A commitment to the healing of our natural world will follow. Without beginning a conversation from this space and a commitment to those actions, we will only ensure the continuity of the colonial project. Without such an action-commitment all things will stay the same; nothing will change. For the state to commit to the possibility of Aboriginal futures, futures which are more than lives to become assimilated, we need more than words.

On the question of reconciliation, who is to be reconciled to what? Are Aboriginal ways to become reconciled to the power of a progress paradigm? If that is the aim, what space would remain for the authority of Aboriginal epistemologies to hold truth, to speak, to act and to live?

What needs to be reconciled is the colonial state to the creation of spaces and places where Aboriginal voices are heard, and where our voices are not translated into a neo-liberal paradigm but are heard and heeded as the voices of the First Nations Peoples.

Why is the pressure on Aboriginal Peoples to be reconciled to a European centre? Why is it that Aboriginal Peoples are on the spot to articulate what and how recognition should look, when for many the thing which is most desired cannot be on the agenda, because it would never be supported by most Australians: that is, the return of stolen lands and stolen lives.

So why are we even having the conversation? We can't fix a problem which is about the inability of the Australian Constitution to see and know Aboriginal laws and peoples, because it would mean giving up too much. The Constitution needs to be fixed by the powers that be — though the High Court has said these are questions they cannot review as they threaten the skeletal principle of Australia's foundation.

But to refuse to do this — to refuse to know our ways and our laws as the First Peoples — will leave the Constitution as the colonists' words backed up by contemporary power, imposing them by force and not law. To fail to acknowledge who we are would be to continue our terra nullius past and present into the future.

But while terra nullius remains a lie, there is true law — law of the land and the sea. We walked and sang the law, becoming beings of law.

What is it we are to be recognised for? We had and have law. White Australia has its Constitution, imposed by force, but not the laws of the land. To ignore this is to bury the truth. How might we do otherwise? How might we enable the truth and build a relationship based on law and not power?

VIII Conclusion

I honour my mother and elders to whom I come back more and more to centre whom I am. My mother advised, in her words, that 'elders are meant

to be the *wave makers* and they should make the waves that will bring the change,' so we can move from survival and live the lives we are here to live. So it is the re-centring of First Nations laws, knowledges and relationships to land which we need so that we can live, so that we can live beyond barely surviving colonialism, and their genocidal consequences.

I honour those wave makers for their work, in holding the ground so that future generations can remember whom they are, for upholding our obligations to care for country and for enabling the future generations to have just that — a future, a future which exists simply because of Aboriginal ways of keeping country alive and well.

The elders in my time inspired our obligation and commitment for caring for country, a commitment which is core to my understandings of Aboriginality. It is who we are, it is what we do.

First Nations are a challenge to the colonial state by our very presence and survival. They are not new challenges — they are as old as the colonial invasion itself, and they have continued unabated and go on to this day.

For First Nations Peoples, the matrix of colonial power remains a fixture on our territories and, for us, colonial violence has never ended. It is unlikely to end in the lifetime of myself and those much younger.

Here is an excerpt taken from an 1840 speech given by the colonial governor to the parliament of South Australia during the introduction of the *Bill to Deal with Aboriginal Evidence in Court*:

> The British constitution is the growth of a thousand years; it cannot be imposed on a nation in a day. It is adapted for Britain — the country which stands highest in the world in the scale of religion, civilization, and improvement; it cannot be fully received or properly appreciated even by civilized nations of an inferior class, much less by the savages of Australia, who stand in the lowest degree in all the earth in religion, government, arts, and civilization. In all these respects they are morally, as in material things they are physically, the antipodes of Britain — and it is not an easy thing to make antipodes meet.[29]

Despite the concern of some reformers in England, here on the ground, with a whole continent up for grabs, there was no intention to make a meeting of the First Nations Peoples and the invader, but to rather eradicate the savage by force of arms. Any survivors of the frontier violence would be gathered into missions to be 'civilised' and ultimately assimilated into the identities of the coloniser.

We don't need assimilation into the progress paradigm, we have already arrived. We were here first, we are still standing and the laws of this continent always were, and always will be.

So how might we meet and greet and constitute a future for all the children yet to come and for whose futures I have great hope? I have great hope because hope is an obligation I carry; that is, to ensure their future, that the children to come have clean air to breathe, clean water to drink, and ongoing hope for their children.

I thank you for your attention. Listening: it is a great thing to do.

---

[29] *Bill to Deal with Aboriginal Evidence in Court* 1840 (SA).