

# MAKARRATA

## Options for Discussion

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Providing the detail and  
upholding the big ideas

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# MAKARRATA

## Makarrata's meaning

Edmund Burke, the great 18th-century statesman and philosopher, famously writes that a community is not a nation if it is divided. There is one nation, asserts Burke, one interest, a unity directly linked to and even coextensive with *the general*.

The general good of all Australians is the concern of reconciliation. While history will concern local matters, families and groups, reconciliation links these concerns with the national unity. This necessarily positions the need for settlement as a central concern of the general interest of the Australian nation.

Australia has, in that sense, failed to acknowledge its fundamental unity. It is a trinity consisting of Aboriginal and Torres Strait Islander culture and heritage, British institutions and a multicultural accomplishment. These are not merely features of our community, but elements that must be recognised as specific components of the general interest of the nation. The symbolic means to this end are discussed in *A Fuller Declaration of Australia's Nationhood*. The present pamphlet concerns one of the practical means to this end.

Writing for *The Monthly* in 2016, Galarrwuy Yunupingu recalled an occasion on which his late father instigated a makarrata. He wrote, “The dispute was very deep and very serious, and in the event [my father] Mungurrawuy made the peace. It was my father, perhaps for the last time before the missionaries arrived, who had the responsibility to make this happen in a proper way, in a proper Yolngu way—to bring about reconciliation. After the *makarrata* my father was widely praised by the senior leadership throughout East Arnhem Land. So the quest for ‘peace and harmony’ in the world wasn’t anything new to Yolngu when the missionaries came and spoke of such ideals. They were already our words and our way of life. We had seen it through the actions of my father, who performed these duties in his time. And we still think in this way when we think about our future. How do we reconcile? What do we need to give, and what must be given to us for our loss, for our grievance? How do we balance the wrongs that have been done with a need to work together in the future?”

It is through this Yolngu concept of makarrata that the Indigenous leaders’ Statement at Uluru envisaged “a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.” They understand makarrata as “the coming together after a struggle” and the means by which they hope to achieve it is a Makarrata Commission, which would “supervise a process of agreement-making between governments and First Nations and truth-telling about our history.”

It is not yet clear how the Yolngu concept of makarrata applies to 21st century Australia. Advocates and commentators will differ in the emphasis they place on different aspects of a makarrata between Australian governments and Indigenous peoples. What is clear, however,

is that this is not merely a process of historical inquiry, but one which aims at strengthening Australia as a whole. As a result of settling differences, Australia will be strengthened by a renewed conception of itself as having progressed towards a final settlement, and reconciliation between Indigenous and other Australians. To this end, it is useful to focus on five aspects of makarrata:

- 1 Recording the history of Indigenous peoples;
- 2 Preserving the culture of Indigenous peoples;
- 3 Empowering Indigenous peoples to take responsibility for their communities;
- 4 Creating commercial opportunities for Indigenous people; and
- 5 Concluding agreements between governments and Indigenous peoples that address the four criteria above.

This pamphlet proposes three options for how these five possible aspects of makarrata might be achieved.

## Agreement-making

The need to pursue the above aspects of makarrata must be considered in the context of the Australian federal arrangement. Any proposal must respect the Australian Constitution and the constitutions of the individual States. As addressed in greater detail in the rest of this monograph series, the Australian Constitution is a pragmatic charter of government. Specifically, the Constitution provides Parliament with its heads of power under section 51. The functions of the legislative and executive branches of government under section 51 must be respected, and not unduly constrained by any agreement.

The constitutions of the various States set out the powers and responsibilities of those governments. They set out the rules by which the States make laws to pursue their own peace, order and good government. As a matter of practicality, it is through the States that most Commonwealth-funded services (including education, health, housing and justice) are delivered to Indigenous peoples.

Because of the relationship between the Commonwealth and State governments, and the importance of their constitutions and the Australian Constitution, any agreements with Indigenous peoples must respect and preserve the federal arrangement.

There are six useful features of a meaningful process of agreement-making between governments and Indigenous peoples:

- An agreed historical basis upon which negotiations may commence;
- Identification of the correct parties to negotiate agreements and identification of appropriate representatives for these parties;
- A voluntary process that provides a level playing field for discussions;
- As an outcome, an agreed direction in which the future relationship between the

Indigenous people and the relevant government is to move forward;

- Final and complete settlement of historical grievances;
- A fundamental respect for the sovereignty of the state parties to the agreement.

Acting in accordance with these seven principles would allow Australia, as a whole, to come to terms with its history. Any proposal for makarrata should accommodate these features. It may then begin to address the historical, cultural, and commercial dimensions of makarrata in a meaningful way.

## The place of history

In any meaningful process of coming to terms with the past, there must be:

- Key people involved in recording the truth that have the trust and faith of all Australians and those of Indigenous people in particular;
- Key people charged with recording the truth that have sufficient powers to uncover it;
- The capacity to receive oral testimony to reflect an oral history tradition, and the capacity to do so on country and in language;
- A flexible approach to evidence that allows all relevant information to be considered, even if that information does not meet certain strict standards for legal evidence;
- Regard for the importance of narrative and reconciling it with potential harm to reputation;
- Capacity for the final form of the history to reflect the different experiences of different local peoples;
- Some means for the history to be accessible to the local public and to contribute to the history curriculum of local schools.

## Recording history

Recording the truth about the past enables the parties to come together and forge a positive future relationship after a history of conflict. In New Zealand, the Waitangi Tribunal has allowed Maori to tell their story and to feel that their grievances have been heard. The outcome of this process was a formal sense of closure necessary to lay fresh relations between the Maori and the Crown. Similar processes in Canada, the United States and Sierra Leone have allowed their indigenous people to share their stories and culture with their fellow citizens. Australia's nationhood and sense of unity would benefit from a similar process, as discussed in *A Fuller Declaration of Australia's Nationhood*. By recording local Indigenous history, it can be shared with local communities including the broader public who are eager to learn about the Indigenous history of their area.

## Preserving culture

The Indigenous leaders who assembled at Uluru in May 2017 said, “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.” The traditional knowledge, practices and cultural expressions, together with the tangible and intangible cultural property of Indigenous peoples are the patrimony of all Australians. But the Indigenous peoples are the custodians of this cultural treasury. Thus, governments need to enter into agreements with Indigenous peoples to ensure that local dance, music, songlines, writings, ceremonies, sacred sites and burial grounds, and oral traditions are properly preserved before they are lost.

This can include dual place-naming, as the New Zealand Geographical Board oversees, and the preservation of local languages. Supporting projects such as the cooperation between the Australian Institute of Aboriginal and Torres Strait Islander Studies and First Languages Australia are essential. A makarrata process aims to build on, and strengthen, these connections with land, language, and culture, to the benefit of all Australians. More generally, preserving the ancient and enduring languages that have been spoken in different parts of Australia will provide resources not only for the people who speak those languages, but for everyone who seeks a deeper appreciation of the languages spoken in the places where they live.

## Empowering communities

Communities ought to become self-reliant if they are to take responsibility for creating their own opportunities for a flourishing life. This involves a shift away from reliance on welfare, which has beset many Indigenous communities in Australia. This transition would be assisted by agreements with local Indigenous communities to build upon their capacity to take responsibility for their own welfare. An important aspect of this capacity-building is the self-governance of those communities and the local delivery of education, healthcare, employment, housing, and social services.

An example of successful agreements are the agreements between the Noongar peoples (a constellation of Indigenous peoples in south-west Western Australia) and the Western Australian Government. This raft of agreements facilitates the self-management of the Noongar peoples in relation to land use, cultural activities, capital works, and ongoing financial security.

## Creating commercial opportunities

Indigenous people need the ability to generate income so they can take responsibility for their own affairs. According to a 2018 PwC Indigenous Consulting report, in 2016, Indigenous businesses contributed approximately \$2.2-\$6.6 billion to Australia’s GDP (approximately 0.1%-0.4% total). In their report, PwC recommended that a robust and sustainable Indigenous economy is essential for facilitating sustainable and independent communities. To support this transition, governments might enter into agreements with local Indigenous communities that create more opportunities for Indigenous people to participate in their local economies. This is not a matter of the government giving jobs to Indigenous people; rather, it is a matter of supporting Indigenous businesses and providing finance to set up their own commercial ventures. This enables Indigenous entrepreneurs to increase their own prosperity and to employ other Indigenous people. It is important for governments to make agreements within remote communities to ensure local access to staff, skills and finance. The economic imperative for supporting constitutional reform is discussed elsewhere in this monograph series, in *Journey from the Heart*.

## Three options

Any form of makarrata is going to have to address not only the historical, but also the cultural, governance, and commercial dimensions of Indigenous peoples’ relationship with the government. In considering options for truth-telling and agreement-making in relation to these dimensions, the main issue relates to the role of an independent commission in the interaction between the Indigenous peoples and the governments involved.

Either an independent commission is established to preside over makarrata between Indigenous peoples and governments, or makarrata could occur without mediation by an independent commission.

If the preferred approach to makarrata is via a commission, then two options are proposed:

- **Royal Commissions of Makarrata**  
Ad-hoc commissions of inquiry established to inquire into the history of discrete regions, followed by direct negotiations between Commonwealth and local Indigenous peoples to conclude an agreement;
- **Makarrata Tribunal**  
An ongoing commission to which Indigenous people might refer claims for determination, after which the commission facilitates an agreement with the Commonwealth and oversees its implementation.

Alternatively, direct local makarrata might be pursued without the involvement of a commission.

Some of the key differences between these options are set out in the following table:

	Direct Local Makarrata	Makarrata Tribunal	Royal Commissions of Makarrata
<b>Type of commission</b>	None	Ongoing	Ad hoc
<b>Method of establishment</b>	MOU between local government and non-government bodies	Legislative action	Executive action
<b>Mode of initiating inquiries</b>	Commenced by agreement	Commenced by registering a claim	Commenced by the Crown
<b>Commission's role in relation to agreements</b>	Role of any independent agency to be determined at local level	Facilitates negotiation and oversees implementation	Does not facilitate negotiation or oversee implementation
<b>Scope of inquiry</b>	Historical and/or contemporary grievances	Historical and contemporary grievances	Limited to historical grievances

## Direct local makarrata

If makarrata is a matter of coming together after a struggle, then this might be possible without the assistance of an independent commission, although some arrangements would be required to ensure that there is a level playing field.

One option that is discussed in *Hearing Indigenous Voices* requires the Parliament to establish Indigenous legal entities for the various Indigenous peoples. The agreements that result in the establishment of these Indigenous entities might include agreements about the role of the traditional owners working with local government and other agencies, to achieve makarrata in their local community.

This might involve a memorandum of understanding about:

- how local governments will work with local Indigenous communities to record local Indigenous oral histories, and how they will share these with others in the local community;
- how geographical place-names might incorporate double-naming to ensure that local people and visitors are aware of country and the names used by traditional owners to describe country;

- how plans for management of country and its sacred sites might be jointly managed by traditional owners and government agencies;
- how agreements can be put in place to give local Indigenous communities greater control over delivery of services within their communities; and
- how local governments and businesses might be able to co-operate to increase commercial opportunities for Indigenous people within their local communities.

This could be approached on a case-by-case basis. The Commonwealth could take a different approach to how the new Indigenous entity should work with existing local agencies, depending on the circumstances of the local Indigenous community, local government, and other relevant local considerations.

## Makarrata tribunal

The Waitangi Tribunal was set up in New Zealand in order to resolve disputes under the Treaty of Waitangi concluded in 1840. It provides a possible template for the Uluru Statement's vision of a Makarrata Commission. Appended to this pamphlet is a *Makarrata Tribunal Bill 2018*. It offers a suggestion for what a Makarrata Commission based on the Waitangi Tribunal model might look like.

The Makarrata Tribunal would be a commission whose functions would include:

- Inquiring into the historical circumstances of a claimant group;
- Recommending terms for an agreement between claimants and the Commonwealth;
- Facilitating the negotiation of such agreements; and
- Overseeing the implementation of agreements that have been concluded.

An inquiry would commence when a person who represents an Aboriginal or Torres Strait Islander people submits a claim to the Tribunal alleging that their people have been prejudicially affected by some regulation, order, proclamation, notice or other statutory instrument made by the Crown since 1787; or by any policy or practice of the Crown (whether or not it is still in force); or by any action or omission of the Crown.

Having undertaken an inquiry into the claim, the Tribunal may make recommendations about actions that the Commonwealth might take to ameliorate or remove the prejudice, or to prevent others from being similarly affected in future.

On the basis of the report into the history of the claim and recommendations for actions to be taken by the Commonwealth, the matter may be referred to the division known as the Office of Settlements. The Office of Settlements will be responsible for facilitating the negotiation of an agreement between the claimant group and the Commonwealth which

addresses the historical, cultural, empowerment and commercial aspects of makarrata between the claimants and the Commonwealth.

Once an agreement has been concluded, the Tribunal's Implementation of Settlements Unit will be responsible for overseeing the implementation of the agreement.

## Royal commissions of makarrata

Royal commissions examine matters of the highest importance and, often, controversy. They are major ad-hoc formal public inquiries into defined issues. They are established by the Crown through Letters Patent. Once established, the government cannot intervene in proceedings. Royal commissions are often granted greater powers of inquiry than would be available to a judge, but these are limited by the commission's terms of reference.

Each Royal Commission of Makarrata would be established to inquire into:

- The identity of the persons authorised to speak for the local Indigenous peoples;
- Failures by the Crown to ensure that the Indigenous peoples were treated according to the terms set out in the colony's founding documents; and
- Terms on which the Commonwealth (and possibly the relevant State) might enter into an agreement with the local Indigenous peoples to resolve historical grievances and to establish a productive partnership for moving forward.

Once a Royal Commission of Makarrata has handed down its report into the history of interactions between the Crown and the specified Indigenous peoples, and made its recommendations for an agreement between the Commonwealth and those Indigenous peoples, the commission would be terminated. At that point, the Commonwealth (and possibly the relevant State) would enter into direct (unmediated) negotiations with the representatives of the Indigenous peoples, with a view to concluding an agreement addressing the historical, cultural, governmental, and commercial aspects of makarrata raised by the Royal Commission's report.

The agreement would form the basis for ongoing relations between the Indigenous peoples and governments, and it would provide for mechanisms to resolve any disputes that might arise out of the agreement in the future.

An example of Letters Patent for a Royal Commission of Makarrata into the Kimberley Region is appended to this pamphlet.



## APPENDICES

### Letters Patent for a Royal Commission of Makarrata into the Kimberley Region

ELIZABETH THE SECOND, by the Grace of God Queen of Australia and her other Realms and Territories, Head of the Commonwealth:

TO

[INSERT NAME OF ROYAL COMMISSIONER(S)]

GREETING

WHEREAS on 18 June 1829, Captain James Stirling's Proclamation of the establishment of the Swan River Colony declared, "And whereas the Protection of Laws doth of Right belong to all People whatsoever who may come or be found within the Territory aforesaid, I do hereby give Notice that if any Person or Persons shall be convicted of behaving in a fraudulent, cruel or felonious Manner towards the Aborigines of the Country, such Person or Persons will be liable to be prosecuted and tried for the Offence, as if the same had been committed against any other of His Majesty's Subjects";

AND WHEREAS on 26 May 2017, the Uluru Statement from the Heart recited that "Makarrata is ... 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 do, by these Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and under the Constitution of the Commonwealth of Australia, the *Royal Commissions Act 1902* and every other enabling power, appoint you to be a Commission of inquiry, and require and authorise you to inquire into the following matters:

- (a) Persons duly authorised by the peoples of the Kimberley Region to represent their interests before your Commission of inquiry and in subsequent negotiations with Our Government of the Commonwealth and Our Government of the State of Western Australia in matters arising therefrom;
- (b) Failures by representatives of the Crown, its advisers and agents to ensure that the peoples of the Kimberley Region enjoyed the same rights, privileges and protections as all other subjects of the Crown in the period between 1829 and 1999, having regard to:
  - (i) Facts verifiable to your satisfaction according to the relevant standard of evidence;

- (ii) Other relevant credible assertions about the past that may not be verifiable by evidence of a standard ordinarily acceptable before a court;
  - (iii) The appropriate weight to be given to each of the above;
- (c) The terms in which it would be appropriate for Us to issue an apology for this history of failure, having due regard to the sensitivities and wishes of the peoples of the Kimberley Region, as well as other relevant considerations;
- (d) Issues relating to cultural redress for the historical mistreatment of the peoples of Kimberley Region, their artefacts and human remains, including:
  - (i) Vesting of sacred and culturally significant sites;
  - (ii) Co-governance of sacred and culturally significant sites, national parks and waterways;
  - (iii) Protocols governing artefacts of cultural significance;
  - (iv) Dual geographical place naming;
  - (v) Statutory recognition of traditional owners;
  - (vi) Any other matters the peoples of the Kimberley Region deem relevant to their reaffirming their culture and its enduring significance for them and for the Australian nation;
- (e) Empowerment of communities of the Kimberley region, in order that they might be able to take responsibility for their own affairs in partnership with Our Government of the Commonwealth and Our Government of the State of Western Australia;
- (f) Terms on which the peoples of the Kimberley region, and Our Government of the Commonwealth and Our Government of Western Australia might reach an agreement to settle historical grievances of the peoples of the Kimberley Region, and provide for a new partnership between these peoples and governments, having regard to:
  - (i) How such an agreement might be negotiated fairly, having regard to the power imbalance between the negotiating parties;
  - (ii) How such an agreement might be affected by any matters currently before the National Native Title Tribunal;
  - (iii) How such an agreement might be concluded in a deed of settlement; and
  - (iv) How a statute might be enacted by the Parliament of the Commonwealth to which the deed and apology might be annexed as schedules.

AND We further declare that you may inquire into any of these matters to the extent that the matter relates to or is connected with the peace, order, and good government of the Commonwealth and any public purpose or any power of the Commonwealth.

AND We direct you to make any recommendations arising out of your inquiry that you consider appropriate.

AND We declare that you are a relevant Commission for the purposes of sections 4 and 5 of the *Royal Commissions Act 1902*.

AND We declare that you are a Royal Commission to which item 5 of the table in subsection 355-70(1) in Schedule 1 to the *Taxation Administration Act 1953* applies.

AND We declare that you are authorised to conduct your inquiry into any matter under these Our Letters Patent in combination with any inquiry into the same matter, or a matter related to that matter, that you are directed or authorised to conduct by any Commission, or under any order or appointment, made by any of Our Governors of the States or by the Government of any of Our Territories.

AND We declare that in these Our Letters Patent:

**Peoples of the Kimberley Region** means the following peoples:

1 Balangarra	10 Koonjie Elvire	19 Purnululu
2 Bardi and Jawi	11 Kurungal	20 Yawuru
3 Bindunbur	12 Malarngowem	21 Tjurabalan
4 Bunuba	13 Mayala	22 Uunguu
5 Dambimangari	14 Miriuwung Gajerrong	23 Warrwa Mawadjala Gadjidgar
6 Gooniyandi	15 Ngarrawanji	24 Wanjina Wunggurr Wilinggin
7 Gooring (Lumugal)	16 Ngurrara	25 Yarrangi Riwi Yoowarni Gooniyandi
8 Jaru	17 Noonkanbah	26 Yi-Martuwarra Ngurrara
9 Karajarri	18 Nyikina Mangala	27 Yurriyangem Taam

**AND We:**

- (a) Require you to begin your inquiry as soon as practicable; and
- (b) Require you to make your inquiry as expeditiously as possible; and
- (c) Authorise you to submit to Our Governor-General any interim report that you consider appropriate; and
- (d) Require you to submit to Our Governor-General a report of the results of your inquiry, and your recommendations, not later than three years after date of these Our Letters Patent.

AND We declare that your inquiry shall be known as a Royal Commission of Makarrata.

IN WITNESS, We have caused these Our Letters to be made Patent.

**WITNESS General the Honourable Sir Peter Cosgrove AK MC (Ret'd)**

**Dated**

**Governor-General**

**By His Excellency's Command  
Prime Minister**

## Makarrata Tribunal Bill 2018

**A Bill for an Act to enable Aboriginal and Torres Strait Islander peoples to record their histories and to assist them in making new agreements with government agencies.**

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**The Parliament of Australia enacts:**

## **PART 1 PRELIMINARY**

### **1 Short Title**

This Act is the *Makarrata Tribunal Act 2018*.

### **2 Commencement**

This Act commences on the day on which it receives the Royal Assent.

### **3 Act binds Crown**

This Act shall bind the Crown in right of the Commonwealth.

### **4 Application to external Territories, coastal sea and other waters**

This Act extends to each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*.

### **5 Concurrent operation of State and Territory laws**

This Act is not intended to exclude or limit the operation of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act.

### **6 State constitutional powers**

This Act does not enable a power to be exercised to the extent that it would impair the capacity of a State to exercise its constitutional powers.

### **7 Objects**

The main objects of this Act are:

- (1) to establish a mechanism to make recommendations for future agreements between Aboriginal and Torres Strait Islander peoples and the Commonwealth (and other governments on an opt-in basis) based on an understanding of those peoples' grievances in relation to actions and omissions of the Crown since 1788;
- (2) to facilitate the negotiation of future agreement; and
- (3) to assist in the implementation of agreements that have been negotiated.

### **8 Simplified outline of this Act**

Part 2 of this Act establishes the Makarrata Tribunal and sets out its functions and powers including:

- (a) the ability of the Tribunal to inquire into claims relating to grievances; and
- (b) the ability of the Tribunal to make recommendations about future agreements.

Part 3 deals with the powers of the Tribunal to mediate both claims and settlement negotiations.

Part 4 establishes the Office of Settlements and the manner of negotiating agreements.

## **9 Interpretation**

*Aboriginal and Torres Strait Islander person* is:

- (1) a person of Aboriginal or Torres Strait Islander descent who;
- (2) identifies as an Aboriginal or Torres Strait Islander; and
- (3) is accepted as such by the community in which they live.

*Claimant* is an Aboriginal or Torres Strait Islander person who brings a claim against the Crown under this Act.

*Claimant Group* is a group of Aboriginal or Torres Strait Islander persons who share a common ancestry and seek to negotiate a settlement under this Act.

*Native Title* has the same meaning as Section 223 of the Native Title Act 1993.

*Settlement Deed* is the document outlining the agreed terms of the negotiation.

## **PART 2 MAKARRATA TRIBUNAL**

### **10 Establishment of the Makarrata Tribunal**

This Act establishes a commission to be known as the Makarrata Tribunal (Tribunal).

### **11 Functions of Tribunal**

*Applications, inquiries and reports in relation to historical claims*

- (1) The Tribunal has the function to inquire into and report upon the history of a Claimant Group.

*Recommendations*

- (2) The Tribunal has the function to make recommendations in relation to potential agreements between a Claimant Group and the Commonwealth.
- (3) If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Commonwealth that action be taken to ameliorate or remove the prejudice or to prevent other persons from being similarly affected in the future.
- (4) The recommendations of the Tribunal are not binding upon the parties to the negotiation.

*Negotiating agreements*

- (5) The Tribunal has the function, through the Office of Settlements, to facilitate the negotiation of agreements between Claimant Groups and the Commonwealth Government and other governments that opt in.

*Implementation*

- (6) The Tribunal has the function, through the Implementation of Settlements Unit, to oversee the implementation of agreements.

### *Mediation*

- (7) The Tribunal has the function to mediate both historical claims and negotiations in relation to future agreements.

### *Research*

- (8) The Tribunal may carry out research for the purposes of performing its function.

## **12 Tribunal's mode of operation**

### *Objectives*

- (1) The Tribunal must carry out its functions in a fair, just, economical, informal and prompt way.

### *Concerns of Aboriginal peoples and Torres Strait Islander people*

- (2) The Tribunal, in carrying out its functions, may take account of the cultural and customary concerns of Aboriginal and Torres Strait Islander peoples, but not so as to prejudice unduly any party to any proceedings that may be involved.

### *Tribunal not bound by technicalities etc.*

- (3) The Tribunal, in carrying out its functions, is not bound by technicalities, legal forms or rules of evidence.

## **13 Jurisdiction of the Tribunal**

- (1) An Aboriginal or Torres Strait Islander person may submit a claim to the Tribunal under this section where any group of Aboriginal or Torres Strait Islander people of which he or she is a member is or is likely to be prejudicially affected:
- (a) by any regulations, orders, proclamation, notice or other statutory instrument made, issued or given by the Crown at any time commencing with the issuance of instructions to Captain Arthur Phillip in 1787 (whether or not still in force);
  - (b) by any Act or legislative instrument of the Australian Parliament made after 1 January 1901 (whether or not still in force);
  - (c) by any policy or practice (whether or not still in force) adopted by or on behalf of the Crown; or
  - (d) by any act done or omitted at any time by or on behalf of the Crown.
- (2) The Tribunal has the power:
- (a) to inquire into a claim submitted under subsection (1);
  - (b) to determine the truth about a Claimant Group's history; and
  - (c) to make recommendations about negotiations between the Claimant Group and the Commonwealth, its agencies and other governments that choose to opt in.
  - (d) subject to Part 4, the Tribunal has the power to mediate claims under subsection (1) and negotiations under section 24;

- (e) to assist and facilitate negotiations under Part 4; and

- (f) to oversee implementation of negotiated agreements.

- (3) The Tribunal must inquire into every claim submitted to it under subsection (1), unless section 14 applies.
- (4) If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Commonwealth that action be taken to ameliorate or remove the prejudice or to prevent other persons from being similarly affected in the future.
- (5) A recommendation under subsection (4) may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Commonwealth should take.
- (6) The Tribunal shall cause a sealed copy of its findings and recommendation(s) (if any) with regard to any claim to be served on:
- (a) the Claimant;
  - (b) the Minister and other relevant Ministers;
  - (c) the Office of Settlements of the Tribunal; and
  - (d) any other such persons as the Tribunal thinks fit.

## **14 Tribunal may refuse to inquire into claim**

- (1) The Tribunal may in its discretion decide not to inquire into, or, as the case may require, not to inquire further into, any claim made under section 13 if in the opinion of the Tribunal:
- (a) the subject matter of the claim is trivial;
  - (b) the claim is frivolous or vexatious or is not made in good faith; or
  - (c) there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition Parliament or to make a complaint to the Ombudsman, which it would be reasonable for the person alleged to be aggrieved to exercise.
- (2) The Tribunal may, from time to time, for sufficient reason, defer, for such periods or periods as it thinks fit, its inquiry into any claim made under section 13.
- (3) In any case where the Tribunal decides not to inquire into or further inquire into a claim or to defer its inquiry into any claim, it shall cause the claimant to be informed of that decision, and shall state its reasons.

## **15 Relationship with Native Title**

- (1) The Tribunal may not reopen determinations made by the Federal Court of Australia in relation to the *Native Title Act 1993*.
- (2) In exercising any of its functions under this section the Tribunal must have regard to relevant Native Title determinations.

- (3) Where Native Title has neither been determined nor extinguished, non-traditional owners may be considered as custodians.

#### **16 Membership of the Tribunal**

- (1) The Tribunal shall consist of:
- (a) a Chair being:
    - (i) a Judge or retired Judge of the Federal Court; or
    - (ii) a current or former Chair or Member of the National Native Title Tribunal;who shall be appointed by the Governor-General; and
  - (b) no fewer than 2 other members and not more than 20 other members to be appointed by the Governor-General.
- (2) In considering the suitability of persons for appointment to the Tribunal, the Governor-General shall have regard to their:
- (a) qualifications;
  - (b) personal attributes;
  - (c) experience, leadership and knowledge of Aboriginal and Torres Strait Islander peoples and matters affecting them; and
  - (d) knowledge and experience in the different aspects of matters likely to come before the Tribunal.
- (3) The Chair of the Tribunal appointed under subsection (1) holds office for a term not exceeding 5 years as specified in the instrument appointing the Chair and may be reappointed.
- (4) Any member of the Tribunal may be removed from office by the Governor-General for inefficiency, inability to perform the functions of the office, neglect of duty, bankruptcy or misconduct, proved to the satisfaction of the Governor-General.

#### **17 Tribunal to be a Commission of Inquiry**

- (1) The Tribunal shall be deemed to be a Commission of Inquiry under the *Royal Commissions Act 1902*, and subject to the provisions of this Act, all the provisions of that Act, except Part 4, shall apply accordingly.
- (2) The Chair of the Tribunal, or any other person being the presiding officer at a sitting of the Tribunal or a member of the Tribunal purporting to act by direction or with the authority of the Chair:
- (a) may issue directions or conduct conferences;
  - (b) may issue summonses requiring the attendance of witnesses before the Tribunal or the production of documents; or
  - (c) may do any other act preliminary or incidental to the hearing of any matter by the Tribunal.

### **PART 3 MEDIATION**

#### **18 Power of Tribunal to refer matter for mediation**

- (1) The Tribunal may from time to time refer any claim submitted to the Tribunal under section 13 or section 31 for mediation.
- (2) The Tribunal may refer the claim for mediation to any member of the Tribunal or any other person.
- (3) Where a claim is referred for mediation to a member of the Tribunal under subsection (1), that member shall not sit as a member of the Tribunal for the purposes of the inquiry into that claim.

#### **19 Duties in relation to claim referred for mediation**

The person to whom a claim is referred for mediation under section 18 shall use their best endeavours to bring about a settlement of that claim.

#### **20 Settlement of claim referred for mediation**

- (1) Where a claim is referred under section 18, the person to whom the claim was referred shall record in writing the terms of the settlement, which shall be signed and dated by the representatives of the parties.
- (2) The terms of settlement of the mediation shall be given to the Tribunal by the person to whom the claim was referred.
- (3) When the Tribunal has received the terms of settlement, the Tribunal may include those terms in a recommendation under section 13(4).

#### **21 Reference back to Tribunal of unmediated claim**

- (1) If a claim that has been referred under section 18 has not been mediated, the person to whom the claim was referred shall refer the claim back to the Tribunal if:
- (a) that person considers the claim unlikely to be mediated; or
  - (b) the Tribunal requires that person to do so.
- (2) Where a claim is referred back to the Tribunal under subsection (1), the person to whom the claim was referred shall deliver to the Tribunal a written record showing separately:
- (a) those matters on which agreement is reached between the parties; and
  - (b) those matters on which no agreement is reached between the parties.

### **PART 4 OFFICE OF SETTLEMENTS**

#### **22 Office of Settlements**

A separate division is established within the Tribunal known as the Office of Settlements.

### **23 Application for Agreement Assistance**

- (1) Once a claim under section 13 has been resolved by the Tribunal the parties to the claim may apply for assistance in reaching an agreement from the Office of Settlements.
- (2) Recommendations made by the Tribunal in resolving a claim under section 13 are not binding upon the parties to the negotiation.

### **24 Terms of negotiation**

- (1) Terms of negotiation are to be agreed between the parties, with the assistance of the Office of Settlements.
- (2) The terms of negotiation must specify:
  - (a) the rules for conduct of the negotiation;
  - (b) the ideal outcomes of the negotiation for each party; and
  - (c) the composition of the Claimant Group.

### **25 Components of an agreement**

- (1) Agreements negotiated with assistance from the Office of Settlements may include the following elements:
  - (a) historical accounts based on the findings of the Tribunal;
  - (b) acknowledgement and apology by the Crown;
  - (c) cultural redress; and
  - (d) economic redress.

### **26 Facilitation of negotiations with the Commonwealth**

Commonwealth negotiators will be chosen by the Attorney-General.

### **27 Acceptance of settlement**

- (1) Once a draft Settlement Deed has been agreed upon by the negotiators, it shall be reviewed by the entire Claimant Group and explained by the negotiators.
- (2) The Australian Electoral Commission will then conduct a vote amongst the entire Claimant Group to accept or reject the draft Settlement Deed.
- (3) If the draft Settlement Deed is accepted by a majority of the Claimant Group then there will be a signing ceremony to celebrate the settlement.
- (4) If the draft Settlement Deed is rejected by a majority of the Claimant Group then negotiations will continue.
- (5) The signing ceremony may be held at Parliament House or on country.

### **28 Finality of settlement**

- (1) The Settlement Deed must be a full, final and comprehensive settlement of the Claimant Group's grievances against the Crown in right of the Commonwealth.

- (2) Where two groups make overlapping claims then non-exclusive redress may be available at the discretion of the Tribunal.

### **29 Settlement Deed to be reflected in Act of Parliament**

The Minister shall introduce into the Parliament a bill that records and gives effect to each Settlement Deed.

### **30 Oversight of implementation of Settlement**

The Tribunal shall have an Implementation of Settlements Unit which has oversight of the implementation of the Settlement Deed.

### **31 Dispute Resolution**

In the event of disputes arising from the Settlement Deed or its implementation; either party may apply to the Tribunal for resolution of the dispute.

## Three new options for makarrata

The Indigenous leaders who assembled at Uluru in May 2017 called for the establishment of a Makarrata Commission that would oversee a process of truth-telling about Australia's Indigenous history and agreement-making about how governments would work with Indigenous peoples in future.

This pamphlet provides three options for how these calls might be realised in practice, and includes legal drafting that could provide the basis for achieving this.

It is intended to provide options which could serve as the basis for further consultation with Australia's Indigenous peoples and for subsequent consideration by parliamentarians.

Uphold & Recognise has collaborated with the PM Glynn Institute, Australian Catholic University's public policy think-tank, under the strategic guidance of Professor Megan Davis, Sean Gordon, and Noel Pearson, to develop these proposals with in-kind support from Allens and seed funding from Westpac Banking Corporation and the Commonwealth Bank of Australia.

**UPHOLD & RECOGNISE** is a non-profit organisation committed to its charter for upholding the Australian Constitution and recognising Indigenous Australians.

This pamphlet forms part of the Uphold & Recognise Monograph Series:

- 1 *The Australian Declaration of Recognition*
- 2 *Practical Recognition from the Mobs' Perspective*
- 3 *Claiming the Common Ground for Recognition*
- 4 *This Whispering in Our Hearts*
- 5 *Journey from the Heart*
- 6 *Hearing Indigenous Voices*
- 7 *Makarrata*
- 8 *A Fuller Declaration of Australia's Nationhood*

For more information, or to download a copy of any of these, visit [www.upholdandrecognise.com](http://www.upholdandrecognise.com)