Chapter 1
Why question the rules?

I was born in 1969, two years after a Constitutional referendum was passed by almost 90 per cent majority of Australians. This referendum allowed Indigenous Australians to be included in the census figures and provided the federal government with the power to make laws in relation to Indigenous people. This was the same year that the policy allowing the removal of Aboriginal children from their families formally ended in New South Wales.

I was born into the generation of Indigenous people who reaped the benefits of the civil rights movement of the 1960s — including greater access to education. I went straight from high school to university, something that previous generations of Indigenous people had never had the opportunity to do.

Despite these changes, I was educated within a school system that taught nothing of Australia’s history of the dispossession of its Indigenous people or of the removal of Aboriginal children — historical actions that defined my Indigenous family. As I came to understand my own family history and the story of my grandmother’s forced removal from her parents, I became angry that my classmates remained ignorant.

This frustration fuelled my resolve to achieve change through the law. Even as a young adult, I understood the power of the law through its impact on my family — dispossession, removal, incarceration. I became a lawyer to change laws, idealistically to right historical wrongs and make sure that the injustices of the past — the Stolen Generations and land grabs — would not happen again.

I graduated from law school in the year of the Mabo case, when a group of Murray Islanders, including Eddie Mabo, sought recognition of their rights over their traditional land. In an historic judgment, the High Court ruled that the Islanders held native title rights over that land, and that the doctrine of terra nullius, (literally ‘land of no one’, declaring that Australia was without prior occupants or sovereigns at
the time of European arrival) was false.¹ I was in the middle of my doctoral studies when the Wik decision² was handed down by the High Court. The Wik decision held that native title was not necessarily extinguished by pastoral leases over land, and that both titles could, in fact, co-exist.

What struck me at the time of both decisions was the hostile public reaction to what were, in real terms, minimalist and cautious legal advancements. I was also struck by the subsequent easy ability of legislation to sweep away hard-fought rights recognition. I watched as the rights recognised by the High Court in the Mabo and Wik cases were extinguished, eroded and/or watered down by the Commonwealth Government.

The willingness of Australian governments to prevent the application of the Racial Discrimination Act 1975 (Cth) from protecting Indigenous rights also highlighted the fragility of those rights in Australia.

Prime Minister John Howard’s rhetoric surrounding the passing of the Native Title Amendment Act 1998 (Cth) brought into focus the conflicting visions Australians have about our country. The Act was a diluted version of a ‘10 Point Plan’ which included:

- reducing the say native title holders have on mineral exploration in their traditional country;
- enabling the States and Territories to replace the right to negotiate on pastoral leases;
- allowing a range of primary production activities to take place on pastoral leases without negotiation with traditional land holders;
- native title holders having less say in a whole range of government activities on their land; and
- making it more difficult for native title holders to present their case in a claims hearing.

When finally passed, the amending legislation reduced the opportunities for native title holders to be consulted about their activities on their traditional land.

In the wake of the Wik decision, the Federal Government tried to gain popular support for its proposed legislative changes by

¹ Mabo v Queensland (No 2) (1992) 175 CLR 1.
portraying that pastoral leases were held by small, family-run farms. In reality, many pastoral leases are held by wealthy individuals or corporations. The Prime Minister continued to push an approach informed by the ideologies of white Australian nationalism and a psychological *terra nullius*, playing into ‘settlement’ myths of Australia’s land being tamed by brave men who struggled to make a living off the land (see Chapter 3 for a discussion of nationalism and identity). The Prime Minister stated:

Australia’s farmers, of course, have always occupied a very special place in our heart ... They often endure the heartbreak of drought, the disappointment of bad international prices after a hard-worked season and quite frankly I find it impossible to imagine the Australia I love, without a strong and vibrant farming sector.³

This rhetoric sought to appeal to romanticised, nationalistic ideals that ignore the fact that the *Mabo* and *Wik* cases found there was a legitimate property right held by Indigenous peoples; it brushed over the historical context in which dispossession took place. Howard employed a notion of formal equality in this debate: ‘[W]e have clung tenaciously to the principle that no group in the Australian community should have rights that are not enjoyed by another group.’⁴ He also referred to the ‘politics of guilt’: ‘Australians of this generation should not be required to accept the guilt and blame for the past actions and policies over which they had no control.’⁵

Howard’s lack of recognition of any historical context regarding the treatment of Aboriginal and Torres Strait Islander people since European settlement — massacres of Indigenous peoples, dispossession, government policies of assimilation and removal of children — enabled him to view the recognition of native title interests in a vacuum.

The Prime Minister claimed that the wrongs committed against Indigenous people were historic and therefore not the responsibility of Australians today. This lack of recognition compounded the continual failure of Australian legal and political institutions to recognise native title as a legitimate property right.

Native title was only recognised legally in 1992 as a result of the *Mabo* judgment and the passing of the *Native Title Act 1993* by

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³ ‘The sooner we get this debate over the better for all of us’; *The Age*, 1 December 1997.


⁵ ‘Mr Howard unreconciled’, *Sydney Morning Herald*, 27 May 1997.
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the Keating Government. However, Indigenous dispossession still continues, facilitated by the passing of the *Native Title Amendment Act* 1998 (Cth), the enactment of which limited the circumstances in which native title could be claimed and meant that 80 of the 115 claims then before the Native Title Tribunal in New South Wales (NSW) were dismissed.

The rhetoric employed to stir up antagonism towards native title interests after *Wik* also came into play in the response to the Human Rights and Equal Opportunity Commission (HREOC) report on the activities and legacies of the Aborigines Protection Board. The report contained a detailed look at the experiences of people removed by the Aboriginal welfare regimes in each State and Territory.

The report, *Bringing Them Home,* was released in 1997. It noted the connection between the removal of Indigenous children from their parents – ‘the Stolen Generations’ – by the State and the problems with suicide, mental illness, substance abuse, family breakdown and cyclical poverty in Indigenous communities. Despite Federal Government attempts to minimise and quantify the effect of the removal policy, Aboriginal people in NSW attest to the fact that there is not an Aboriginal family in that State that was not adversely affected by this policy in some way.

Before the HREOC report brought the matter to the attention of the nation, very few Australians knew of the existence of the government’s Aboriginal child removal policy. Many Australians felt moved by the revelations of the report, including Governor-General William Deane who stated: ‘It is vital that we acknowledge past injustices and recognise wounds inflicted in our earlier policy of denial.’

However, a different response came from Australians who embrace the Australian identity only in its colonial manifestation. This response was reflected in John Howard’s assertion that Australians should feel neither guilt nor responsibility for past actions and policies. Nowhere was this philosophy more evident than in the Federal Government submission to the Senate Legal and Constitutional References Committee on the ‘Inquiry into the Stolen Generation.’ In that submission, the government stated:

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7 ‘Governor joins call for apology’, *Sydney Morning Herald,* 3 June 1997.
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- 'There was never a "generation" of stolen children'; and
- 'Emotional reaction to heart-wrenching stories is understandable, but it is impossible to evaluate by contemporary standards decisions that were taken in the past.'

Ironically, it appears it is often easier for Australians to see the context and legacies of conflicts in other countries rather than in their own. For example, it is more readily acknowledged by Australians that violent conflict in Northern Ireland or the former Yugoslavia is complicated by competing passions steeped in a complex historical background. Australians can see the disadvantages faced by African-Americans and readily understand their contemporary situation as a legacy of slavery, but it seems harder to make the connection between historical actions and contemporary realities as they have played out on their own soil. The connection between past and present seems to be a difficult conceptual leap, even when the links have been set out clearly in thoughtful, well-researched reports such as those by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), which examined the alarming high mortality rates of Indigenous prisoners, and the HREOC report on the Stolen Generations.

The 'politics of guilt' is often used as a way to distance Australians from their past and prevents meaningful interaction with an understanding of Australian history and Australian identity. In fact, those who claim that the mistakes and injustices in Australia's history should be ignored (because they supposedly generate guilt) make two mistakes.

- They minimise the efforts and contributions of those Australians — black and white — who have sought to improve the situation of all Australians, and who have worked to counter prejudice and discrimination.
- They ignore the fact that confronting history, especially the moments that might not make one proud, allows the legacies of those moments to be countered. It is not about shaming or 'guilting' or blaming. It is about acknowledging a truth, and with that acknowledgment will come reconciliation, healing, empowerment and pride.

The populist appeal of Howard’s romanticised, nationalistic, simplistic and erroneous account of Australian history, and his blind denial of historical facts and their legacies, raises a very difficult question for me as a lawyer, as an Aboriginal person and as someone who believes in protecting basic rights: How can the hard-fought recognition of rights achieved in the Mabo case and the Wik case be protected from being overturned or eroded by the legislature, the popularly-elected branch of our government?

This issue becomes especially pertinent given the remaining ambiguity of the decision in the Hindmarsh Island Bridge case.\(^9\) This was a case where the Ngarrindjeri women in South Australia challenged the Hindmarsh Island Bridge Act 1997 (Cth). The Act prevented the plaintiffs from claiming that the area had secret and sacred significance to them and denied them the use of heritage protection legislation.\(^10\) The case has left a question mark over whether the ‘race power’ contained in s 51(xxvi) of the Australian Constitution empowers the government to make laws to the detriment of Indigenous Australians.

Two matters become self-evidently crucial.

- The importance of removing historical ignorance surrounding the experiences and situation of Indigenous Australians, including reconciling Australians with their history and understanding the way historical acts leave contemporary legacies.
- Creating a concrete rights framework that will protect the basic rights of all Australians, especially those of one of the most vulnerable groups in Australian society, the Indigenous community.

While understanding that these are two key elements in the step towards the protection of Indigenous rights, it is important to appreciate that several other issues also need to be addressed. If piecemeal legislative changes and sporadic court decisions are failing to produce an Australia that treats all its citizens fairly, other strategic approaches need to be considered that will create substantive changes to the situation of all Australians, especially the most economically, socially and legally vulnerable.

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10 For a concise brief of the Hindmarsh Island Bridge case, see T Blackshield, M Coper and G Williams, The Oxford Companion to the High Court, Oxford University Press, p 325.
Australians and the first Australians

The relationship of non-Indigenous Australians to Indigenous peoples continues to be a problematic one. From periods of cultural genocidal practices – invasion, massacres of Aboriginal people, the removal of Aboriginal children from their families – to theft of property and denial of fundamental rights, it is a relationship complicated by historical injustice, compounded by institutional legacies and an idealised nationalism.

Today, over 30 years after the 1967 Constitutional amendment, Indigenous people are still the most socio-economically disadvantaged within Australian society and are still vulnerable to systemic discriminatory practices. Indigenous Australians continue to be the poorest sector of the Australian community.

In many respects, Indigenous Australia is a typical profile of a conquered and colonised people and at just over 2 per cent of the population, are an impoverished minority.

To provide a snap-shot from the 1990s:

The life expectancy of Aboriginal people is 20-21 years less than the general population.

Aborigines and Torres Strait Islanders are more than four times as likely to die as non-Aboriginal people if less than 30, and seven times more likely to die (if over 30).

Indigenous childhood mortality is still more than three to five times higher than that for other Australian children.

Infectious diseases are 12 times higher than the Australian average.

Diabetes affects 30 per cent of people in Aboriginal and Torres Strait Islander communities.

Hospital admissions for Aboriginal men are 71 per cent higher and for Aboriginal women are 57 per cent higher than for non-Aboriginal men and women.

13.6 per cent of Indigenous people have tertiary degrees, compared with 34.4 per cent of all Australians.

The unemployment rate is 22.7 per cent for Indigenous people, compared with 9.2 per cent for the general population.

30.8 per cent of Indigenous households owned or were purchasing their lands, compared with 70 per cent of all Australians.
• The mean individual Indigenous income is 65 per cent of that of the general population.
• Indigenous peoples are 17.3 times more likely to be arrested; 14.7 times more likely to be imprisoned; and 16.5 times more likely to die in custody than non-Indigenous Australians.\textsuperscript{11}

These statistics highlight the undeniable socio-economic disparity between Indigenous people and other Australians in every measurable service sector: access to medical treatment, education, employment and economic development. The processes of dispossession and colonisation have placed Australia's Indigenous community in a cycle of poverty: poor health, little education, high rates of unemployment, low incomes and poor access to essential services. It is perhaps the biggest condemnation that many of these disparities occur in areas that are considered to be unquestioned rights for other Australians.

Unable to form a political majority, Indigenous Australians have had to rely on an unresponsive court system and the wavering sympathies of the Australian community in order to have their basic rights recognised and protected.

Indigenous Australia remains the unreconciled, unattended aspect of Australia's past and present and until this relationship has been attended to and reconciled, it will continue to divide Australians.

Redefining the relationship between Indigenous and non-Indigenous Australians is a challenge that involves assessing the impact of historical injustice. It is only when we understand how the ideologies of colonialism have permeated today's institutions that we can begin to break the grip of the historical legacy. Once that grip is broken, Australians will be free to explore alternatives to colonisation and assimilation.

Nowhere is this historic, institutional legacy more apparent — and perhaps most symbolic — than in the Australian Constitution, a document drafted with the erroneous assumption that Indigenous

people were a dying race, and guided by the offensive principle that it was acceptable to discriminate on the basis of race.

While the recognition of past injustices will make a symbolic atonement for the misdeeds of colonisation, there needs to be a concerted, strategic campaign to transform the institutions within Australia that have entrenched ideologies that operate to exclude Indigenous people. This needs to be coupled with the creation of opportunities and arrangements that empower Indigenous people, allowing them to transcend the socio-economic circumstances into which they are born.

**Practical reconciliation or the rights agenda?**

The approach taken to dealing with the socio-economic disparities between Indigenous Australians and the general populace has become fractured. There are two answers often proposed as the solution:

- A welfare approach to breaking the cycle of poverty by injecting funds into the areas of need, an approach sometimes referred to as 'practical reconciliation'.
- A rights framework that focuses on altering the institutions which continue the colonisation process.

There is a tension between the concept of practical reconciliation and the development of mechanisms that protect recognised human rights, that is, a rights framework. While the link between economic issues and rights issues is not being made, the notion of practical reconciliation is antagonistic to a broader rights framework because practical reconciliation is only a set of policies that react to emerging problems, and in doing so ignores the longer-term structural and institutional changes that can protect rights. This book proposes the need to take a new approach to the connection between broader legal reforms and economic development, one that moves away from a welfare mentality.

This book considers why a rights framework is important by examining what it can achieve. It seeks to address some of the concerns about a big picture approach achieving a more equitable and just society through constitutional, legislative and jurisprudential change.

In 2000, at the hand-over of the Final Report by the Council for Aboriginal Reconciliation (set up by the previous Labor Government in September 1991), Prime Minister John Howard announced that his
government rejected the Report’s recommendation of a treaty between Australian and Indigenous peoples, preferring instead to concentrate on the concept of practical reconciliation. Practical reconciliation describes a policy of government funding in targeted areas that go to the core of socio-economic disadvantage, namely, employment, education, housing and health. Howard said in his address at the presentation of the Final Report:

We are determined to design policy and structure administrative arrangements to address these very real issues and ensure standards in education and employment, health and housing improve to a significant degree ... That is why we place a great deal of emphasis on practical reconciliation.12

Howard pointed to the amount of dollars his government had spent on ‘Indigenous-specific programs’.

A measure of the genuineness of the government’s commitment to practical reconciliation is that the $2.3 billion now annually spent on Indigenous-specific programmes is, in real terms, a record for any government — Coalition or Labor.13

What Howard didn’t detail in his address is that part of that $2.3 billion went towards defending the Stolen Generations test case brought by Peter Gunner and Loma Cabillo in the Northern Territory14 (in which the plaintiffs sought to claim damages for the emotional and physical harms they suffered while removed from their families) and were also directed into the various government arms that were actively trying to defeat native title claims. In other words, money spent preventing the recognition and protection of Indigenous rights was counted as money allocated for specific policy areas of practical reconciliation.

Practical reconciliation aims to resolve the legacies of colonisation by focusing on relieving socio-economic disparity. In his Menzies Lecture, delivered on 13 December 2000, just a few days after receiving the Final Report from the Council for Aboriginal Reconciliation, Howard said:

13 Howard, 2000b, p 3.
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It is true, as was noted recently, that past policies designed to assist have often failed to recognise the significance of indigenous culture and resulted in the further marginalisation of Aboriginal and Torres Strait Islander people from the social, cultural and economic development of mainstream Australian society.¹⁵

Looked at this way, the current socio-economic disparity is the result of past cultural conflict and unsympathetic policy-making and it is what has been instrumental in establishing a welfare mentality. According to Howard, ‘This led to a culture of dependency and victimhood, which condemned many Indigenous Australians to lives of poverty and further devalued their culture in the eyes of their fellow Australians’.¹⁶

In Howard’s view, the main issues are dependency, victimhood and poverty; according to the advocates of practical reconciliation, these can be redressed by a more benevolent legislature.

It is absolutely true that past government policies such as child removal practices have contributed to the socio-economic inequalities and systemic racism experienced in Indigenous communities and families today. But as the Kruger case (the first Stolen Generations case to be brought before the High Court) illustrated,¹⁷ this has been compounded by the absence of a rights framework that can prevent unfair and racist policy-making.

For a government who claims that Indigenous problems should not just have money thrown at them, its focus on the amount of dollars spent – without analysing whether those dollars actually benefit Indigenous people and communities – is ironic. By not being concerned with broader, long-term, structural goals, it confines its activities to reactive policy-making.

Practical reconciliation does not attack the systemic and institutionalised aspects of the impediments to socio-economic development. While claiming that ‘more handouts’ are not going to make a difference, the government fails to address the issues and put strategies in place that go to the heart of historical and institutional racism. This approach also fails to understand that there needs to be tangible protection of rights, including economic and property rights. The

¹⁵ J Howard, 2000c, Menzies Lecture Series: Perspectives on Aboriginal and Torres Strait Islander Issues, 13 December, p 3.
¹⁶ Howard, 2000c, p 3.
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recognition and protection of these rights would put land under people’s feet, allow access to natural and other economic resources and work towards ensuring that Indigenous communities were economically self-sufficient.

Without a working rights framework, there is no ability to create and protect the rights to economic self-sufficiency.

In recent times, there has been an emerging voice from some members of Indigenous communities questioning the emphasis on the need for a rights framework, with particular frustration expressed at the slowness of the process. Their claim, that esoteric talk of constitutional change does not put food on the table or end high levels of violence in the community, is compelling. It is easy, when placed in that light, to dismiss the focus on the rights agenda as the privilege of the elite.

Granted, structural change, particularly constitutional change, is a long-term goal. However, there are several things that the rights agenda offers Indigenous people, even in the short term.

First, a rights framework provides a language with which to communicate about harms suffered and political aspirations. The existence of an agreed standard of rights creates a medium through which to communicate harms suffered. For example, the plaintiffs in Kruger were able to articulate the harms suffered by those affected by the child removal policy and, in particular, were able to show that these are rights that others take for granted, such as freedom of movement and due process before the law.

In a more positive way, the language of rights can provide a means of communicating political aspirations: the right to hunt and fish, the right to native title, the right to work, the right to provide for one’s family, the right to education, the right to adequate health services.

Secondly, the existing international rights framework provides minimum standards against which the federal government can be held accountable, and provides a basis for objective assessment of the recognition and protection of Indigenous rights. This objective assessment was particularly evident in the 2000 report by the United Nations’ Committee on the Elimination of all forms of Racial Discrimination, which was critical of Australia’s record.18 It found that the Australian government had failed to meet certain obligations that it

had agreed to uphold under the Convention to Eliminate all forms of Racial Discrimination (CERD). The CERD Committee’s report expressed concern about the absence of any entrenched law guaranteeing against racial discrimination, provisions of the Native Title Amendment Act 1998 (Cth), the failure to apologise for the Stolen Generations and the Federal Government’s refusal to interfere to change the mandatory sentencing laws operational in both the Northern Territory and Western Australia. The need for objective international standards is particularly necessary while Australia is without domestic rights protection.

Thirdly, a rights framework can also offer long-term solutions that should not be dismissed because of the length of time needed for its implementation. Such a rights framework can provide renewed protection of Indigenous rights and substantially change the status quo between Indigenous peoples and the Australian state. Such institutional change needs to be targeted at the Constitution, since it is the document that establishes government and, not insignificantly, symbolises our coming together to consent to nationhood.

Grass roots issues that affect Indigenous people day-to-day — violence against women, child sexual abuse, systemic poverty, lack of access to services, substance abuse, high youth suicide rates — are issues that need to be addressed as a priority, but this needs to be done in conjunction with, not in the absence of, a broader framework for institutional change. The objectives of this book are to explain why and to show how that can be done.

A belief in substantive equality

The 1967 Referendum was a symbolic act of recognition that raised Indigenous expectations for the beginning of a new, inclusive relationship in which Indigenous peoples would enjoy, on the face of it, the same rights and protections as all Australians. It was not the first time that Indigenous people had sought symbolic inclusion with the hope that neutral, formal equality would lead to an improvement in circumstance and treatment.

However, since the 1967 Referendum, it has become increasingly evident that the formal structures and institutions within Australia have not changed enough to equalise — let alone reverse — the socio-economic impact of colonisation and past government policies and practices.
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At the same time that momentum gathered for the 1967 Referendum, Aboriginal and Torres Strait Islander people began to push even harder for the recognition of their traditional property rights and assertion of sovereignty. This protest led to the establishment in 1972 of an Aboriginal Tent Embassy on the lawn of Parliament House in Canberra. There were two strains of political strategy being used by Indigenous people at the Tent Embassy that were integral to Indigenous people’s aspirations that on the first appearance might have seemed contradictory.

- Indigenous people wanted to be treated equally with all other Australians and demanded the reversal of paternalistic, racist and discriminatory practices. The poverty and historical treatment of Indigenous Australians emphasised the fact that they did not enjoy the same access to society and the same rights as other Australians.
- The notion of a Tent Embassy highlighted the fact that Indigenous people saw themselves as a distinct people, a distinct nation and a political entity.

On the one hand, Aboriginal people were claiming equality within the Australian state. On the other, they were defining themselves as a separate entity, questioning the legality of Australian institutions to rule over their lives. These seemingly paradoxical claims require further investigation. In understanding how these claims of inclusion and difference co-exist, the political agenda of Indigenous peoples is revealed to be rich and complex rather than confused and contradictory. This complexity reveals the intricate relationship between claims of equal protection and special protection. The investigation here into the political aspirations of the Indigenous community for the protection of rights will consider the way that seemingly contradictory aspirations can actually work together to produce a more comprehensive and representative process of protecting rights.

More than a ‘noisy minority’:
The democratic challenge posed by Indigenous people

It is a mistake to think of Indigenous rights and well-being as merely an ‘Indigenous issue’ or ‘Indigenous problem’. The rights and quality of life for Aboriginal and Torres Strait Islander communities pose questions and have implications for Australian society as a whole, and their
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current situation offers a challenge to all Australians – especially jurists, rights advocates and the political elite of Australian communities.

The situation demands consideration of socio-economic equality, the importance of inclusion and political and cultural recognition. The challenge of improving rights protections needs to be approached by broader strategies than piecemeal court wins and band-aid welfare measures. Finding a better approach to the protection of Indigenous rights is a multi-faceted process that must include the following.

- A better understanding of how inequalities have become institutionalised, allowing ‘formal equality’ to become a tool that maintains an unequal status quo and perpetuates injustice. How can seemingly neutral laws operate to produce inequality? For example, how does property law, seemingly neutral, perpetuate a disadvantage that leaves Indigenous people continually dispossessed?
- A thorough understanding of what Indigenous political aspirations are and an exploration of how those aspirations can be accommodated within Australia’s institutions. This includes aspirations of framework agreements and/or a treaty.
- A coupling of legal victories with attempts to change public (mis)perceptions about Indigenous Australians. These changes need to be undertaken in concert with changes to Australia’s institutions. What kind of Australia do we want to be? How do we see ourselves?
- An exploration and implementation of the ideals of identity and equality and Indigenous legal and political aspirations through changes to Australia’s institutions. Such institutional changes need to aim at making institutions more effective at achieving equality and fairness in their operations.

This final point — the need for institutional change — highlights a very important issue. If Australia’s institutions cannot protect one of the most vulnerable sectors of the Australian community, how democratic are they? Do they embody the ideals we have as a nation if they produce and compound injustice and inequity? It is in answering this question that Indigenous rights take on a special role: they are the litmus test of how well our institutions operate and of how fair and equal our society is. As former Prime Minister Gough Whitlam once said: ‘Australia’s treatment of her Aboriginal people will be the thing
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upon which the rest of the world will judge Australia and Australians — not just now, but in the greater perspective of history.’

The directions and solutions to the dilemmas facing Aboriginal and Torres Strait Islander people and communities have wider implications since the institutional form given to the recognition of Indigenous rights and Australian democratic ideals will shape the kind of society that Australia will be. For this reason, these institutional goals should be guided by a vision of the kind of society we all want to live in, a process that would make institutions more responsive and beneficial for all Australians. It is a process that sees Indigenous Australians as the litmus test of success, rather than the exception to the rule. As part of the process of assessing the effectiveness of Australia’s laws and institutions in protecting the rights of Indigenous peoples, the socioeconomic results they produce should be objectively assessed against notions of democracy that reflect the ideals that Australian society should embody. This moves away from treating Indigenous rights as an Indigenous ‘problem’ that needs to be solved and instead treats it as an issue whose resolution will benefit all Australians by virtue of improved institutions, service delivery and rights protection. It also takes Indigenous people from the periphery of debates about rights, politics and ideals and places them in the middle of those discussions.

A concept of democracy

Democracy, the label given to the idea that a system of government that is fair and inclusive, is an amorphous concept and needs to be defined by the visions and ideals of the kind of Australia we want to live in. John Dewey provides the following useful definition.

From the standpoint of the individual, it consists in having a responsible share according to capacity in forming and directing the activities of the groups to which one belongs and in particular according to need in the values which the groups sustain. From the standpoint of the groups, it demands liberation of the potentialities of members of a group in harmony with the interests and goods which are common. Since every individual is a member of many groups, this specification cannot be fulfilled except when different groups interact flexibly and fully in connection with other groups.

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Dewey's definition identifies certain cornerstones of 'democracy'. He notes:

- the importance of the integrity and autonomy of the individual;
- the importance of the ability of the individual to participate in associations that form the quality of his other life;
- the difficulty in balancing the interests of individuals with the interests of groups; and
- the need to achieve democracy with flexibility and that such flexibility must be present in the institutions created to achieve democratic ideals.

The complex relationship of individual freedom to group identity is a backdrop for universal questions raised by the issues related to the protection of Indigenous rights regarding the institutional framework in all (democratic) societies:

- To what extent should institutions recognise group rights and rights to association?
- What institutions should we use to structure these societies?
- How can institutions allow individual freedom?

All societies grapple with tensions over what values should be protected. In trying to find alternative paths for the improved protection of Indigenous rights, the following needs to be considered:

- the relationship of the individual to their cultural and political groups;
- institutional arrangements which could reflect that relationship.

There are two issues wrapped up in the above questions.

- Indigenous identity: What is it? How should it be preserved?
- How should that identity be given institutional recognition? How can institutions give substantive content to rights?

Roberto Mangabiera Unger of Harvard Law School adds another dimension to this conception of democracy when he stresses that it should be understood as:

- the effort to make a practical and moral success of society by reconciling the pursuit of two families of goods: the good of material progress, liberating us from the drudgery and incapacity and
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giving arms and wings to our desires, and the good of individual emancipation, freeing us from the grinding schemes of social division and hierarchy.21

Unger stresses two elements:

• the importance of economic development;
• the importance of individual freedom.

These two elements need to guide any attempt at developing a framework for Indigenous rights. Australia’s Indigenous population, a small, impoverished, minority is in need of effective and innovative solutions to socio-economic and political challenges in the face of an unsympathetic public and a hostile government.

New approaches to Indigenous rights protection

By exploring the extent of Indigenous visions of equality, inclusion and autonomy, a reconceptualisation of approaches to the better protection of Indigenous rights should occur. This means, as a start, exploring what Indigenous political aspirations encompass. What is it that Indigenous people need? The public dialogue with (rather than about) Aboriginal people is a recent approach to policy-making concerning Indigenous issues, so it is not surprising that many non-Indigenous people are not familiar with the political aspirations of Indigenous people and their communities.

In Indigenous expression of political aspirations, two political goals seems ubiquitous: the claims for the recognition of ‘Aboriginal sovereignty’ and ‘self-determination’. The key to understanding the Indigenous political agenda is to unlock what it is that Aboriginal people are describing when employing the terms ‘Aboriginal sovereignty’ and ‘self-determination’.

A deconstruction of these terms reveals a different political agenda from ‘sovereignty’ as it is used in an international legal context. ‘Sovereignty’ and ‘self-determination’ need to be defined in this context so that the proper parameters of the rights debates in Australia can be established to complement and facilitate the exact rights that Indigenous people are seeking. It is here that the complexity of political terms can be deconstructed and the co-existence of

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seemingly conflicting agendas reconciled; autonomy within the state coupled with inclusion through substantive equality; respect for individual identity in tandem with the protection of group identity.

Once the rights sought by Indigenous people have been articulated, ways of recognising Indigenous aspirations become the next challenge. It is therefore necessary to look at what is contained within these claims of ‘sovereignty’ and ‘self-determination’ and then, from this deconstruction, to develop experimental democratic programs that will assist in making those aspirations realisable.

From a deciphering of the claims to ‘Aboriginal sovereignty’, it becomes apparent not only that many of the international implications of the term are absent but that many of the elements that are seen to be included in the claim are also rights that should already be protected and recognised under existing Australian law. They are rights that are recognised as fundamental either within Australian law or within international instruments ratified by Australia.

It is here again that the lesson learnt from the Tent Embassy should be reiterated: a program of piecemeal, episodic changes have not taken Indigenous people forward to the stage where they enjoy the same rights as other Australians. Another approach, one that challenges the institutions of Australian society and their entrenched biases, needs to be examined. Strategies for the better protection of Indigenous rights must seek to implement a process of institutional change and, in order to achieve this, it is necessary to expose and probe the dominant, seemingly neutral, ideological base of institutional frameworks. Without an accompanying project of institutional change, Indigenous Australians will be frustrated with the critique and left wanting for practical outcomes and the achievement of visionary aims.

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Beginning with an exploration of the way in which seemingly neutral laws have contributed to the erosion of the rights of Indigenous Australians, this book calls into question the notion of formal equality as a determinant of fairness. This leads to an investigation and deconstruction of Australia’s idealised nationalist identity that can still be acknowledged as informing decision-making processes and institutions, to the detriment of those who challenge those values. At the same time, it identifies the importance of identity and the sense of
self. Questioning these assumptions leads to the need to create a new perspective from which to start thinking about institutional change that might better promote fairness within Australian society for Indigenous people.

This book then considers a spectrum of what it is that Indigenous people aspire to politically under the rubric of ‘Aboriginal sovereignty’ and ‘self-determination’. This is not meant to be a definitive exploration, merely a chance to get a sense of the scope of Indigenous political goals. It will also enable an assessment of the democratic principles missing from Australia’s institutions, and examine a program for institutional change that will inject those values into our societal institutions and structures.

Following from this, the book explores what can be seen as some of the key steps necessary to shift the historical legacies and contemporary experiences and improve Australia’s institutions for Indigenous Australians — and all Australians. The purpose is not to state definitively the Indigenous political agenda nor to provide answers to what should be done. Rather, this book seeks to inject the current debates with some possible options, bringing attention to the inherent inequities within the system and highlighting the pervasiveness of Australia’s psychological terra nullius.