

First Nations
language protection
in Australia: a
question of human
rights?

Exploring rights, policies and agreements

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Abstract

This paper explores the relationship between the absence of a domestic human rights instrument in Australia and the (non-)recognition and legal protection of First Nations languages. It highlights challenges and opportunities within the current legal landscape, including whether Australian common law can apprehend language-related rights. The paper argues that native title settlements could serve as a catalyst for advancing First Nations' linguistic interests, potentially paving the way for greater recognition and emancipation of linguistic rights in practice. By examining the Noongar settlement, the largest native title settlement in Australia, the paper explores how negotiated agreements can facilitate Indigenous autonomy and language revitalisation. The article underscores the importance of enshrining fundamental rights in the legal system to protect the linguistic rights of minorities and Indigenous people. The doctrinal analysis concludes that despite numerous policy commitments, Australian law falls short of properly considering and accommodating the concerns of First Nations language speakers to preserve and revitalise Indigenous languages. However, the paper gives insights into various legal pathways on how the recognition of language rights could be achieved in Australia.

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Keywords

Indigenous Rights, Australia, Language Rights, Linguistic Rights, Human Rights, Fundamental Rights, First Nations, Native Title Settlements

First Nations language protection in Australia: a question of human rights?

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Introduction¹

Before European settlement, more than 250 First Nations² languages were spoken across the Australian continent.³ Indigenous languages are an invaluable component of the identities of First Nations people, which uphold a deep connection to the land and the environment.⁴ At present, despite the devastating effects of colonisation and forced assimilation, over 150 Aboriginal and Torres Strait Islander languages continue to be spoken,⁵ but of these, only 13 are considered strong.⁶ Internationally, Australia is mentioned among the world areas with the highest proportion of languages endangered and among those that have undergone the greatest language loss.⁷ Australia's settler-colonial history is marked not only by land dispossession but also by linguistic domination, pushed by a prevailing monolingual mindset.⁸

Having been settled based on the doctrine of discovery and terra nullius⁹, the Australian states were legally founded as self-governing colonies, in complete disregard of the continent's First Nations peoples. No treaty or agreement with First Nations was concluded. In 1901, the six colonial governments federated and adopted a constitution for the newborn Commonwealth of Australia, with themselves as six constituent states. This constitution outlines a technical roadmap for the functioning of a constitutional monarchy with parliamentary government, without almost any mention of fundamental rights or values. The legal fiction of terra nullius has since been abolished in the famous 1992 Mabo decision of the High Court of Australia, which acknowledged First Nations' traditional ownership of and connection to the land.¹⁰ Nevertheless, to date, Australia is the only liberal democracy in the world devoid of a national human rights instrument.¹¹ This lack of a centralised domestic bill of rights poses a challenge to the pursuit of equality in a country where historic cleavages between

¹ I would like to thank my PhD supervisors, Associate Professor Mary Anne Kenny and Dr Kathryn Trees at Murdoch University, for giving me valuable feedback during the drafting process of my paper. I am also grateful to Francisco Javier Romero Caro (PhD) at the Eurac Research Institute for Comparative Federalism in Bolzano/Bozen (Italy), for guiding me through the publication process on behalf of DiGoP.

² This paper uses the term 'First Nations peoples' to refer to the sovereign peoples of territories colonised by foreign powers. Occasionally, the terms 'Indigenous peoples' and 'Aboriginal and Torres Strait Islander peoples' are used as well. By employing this terminology, the author respectfully recognises the rich diversity of First Nations peoples, their histories, and cultures.

³ The estimates of the numbers of Australian languages spoken prior to European settlement vary, but most sources indicate a figure between 200-300. Patrick McConvell and Nicholas Thieberger, *State of Indigenous languages in Australia - 2001* (Second Technical Paper Series No 2 (Natural and Cultural Heritage), Department of the Environment and Heritage Canberra 2001) 16.

⁴ Noelle Higgins and Gerard Maguire, 'Language, Indigenous Peoples, and the Right to Self-Determination' (2019) 31 *New England Journal of Public Policy* 1, 3.

⁵ Australian Bureau of Statistics, 'Language Statistics for Aboriginal and Torres Strait Islander Peoples' 2021) <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/language-statistics-aboriginal-and-torres-strait-islander-peoples/latest-release>> accessed 11 September 2024.

⁶ Doug Marmion, Kazuko Obata and Jakelin Troy, *Community, identity, wellbeing: the report of the Second National Indigenous Languages Survey* (Australian Institute of Aboriginal and Torres Strait Islander Studies 2014) xii.

⁷ Lindell Bromham and others, 'Global predictors of language endangerment and the future of linguistic diversity' (2021) 6 *Nature Ecology & Evolution* 163, 165.

⁸ Jane Simpson, Jo Caffery and Patrick McConvell, *Gaps in Australia's Indigenous Language Policy: Dismantling bilingual education in the Northern Territory* (AIATSIS 2009) 7.

⁹ See Robert J Miller and others, 'The Doctrine of Discovery in Australia' in Robert J Miller and others (eds), *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press 2010); Michael Connor, *The invention of Terra Nullius: historical and legal fictions on the foundation of Australia* (Macleay Press 2005); Bruce Buchan and Mary Heath, 'Savagery and Civilization: From Terra Nullius to the "Tide of History"' (2006) 6 *Ethnicities* 5.

¹⁰ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, ('Mabo case').

¹¹ George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (NewSouth Publishing 2018) 14. On the state and territory level, the Australian Capital Territory, Victoria, and Queensland have legislated respective human rights acts or charters.

Indigenous and non-Indigenous people still need to be overcome.¹² It also hinders the endeavours of First Nations people to protect and revitalise their languages.¹³

Identifying potential legal avenues to ensure the survival and continued use of Aboriginal languages is of critical importance. Aboriginal languages are both an essential identity marker and the primary vehicle for the intergenerational transmission of Indigenous knowledge.¹⁴ Survey data has revealed that maintaining traditional languages is vital for First Nations people's well-being.¹⁵ Preserving Aboriginal languages is essentially a question of morality and social justice.¹⁶ Protecting and promoting Aboriginal languages is one way of contributing to healing past injustices and fostering a more democratic and reconciled society.¹⁷

This paper explores the relationship between the absence of a centralised domestic human rights instrument in Australia and the survival of First Nations languages, highlighting the challenges and opportunities within the current legal landscape. The paper undertakes a brief doctrinal examination of whether the Australian common law is capable of apprehending language-related rights. Subsequently, the idea is presented that native title settlements could serve as a catalyst for advancing First Nations' linguistic interests, potentially paving the way for greater recognition and emancipation of language use. By investigating these issues, this paper aims to contribute to a broader discourse on Indigenous rights and language concerns, offering insights that could inform policy and advocacy efforts.

1 Absence of Human Rights Instrument in Australia

While Australia is a party to the seven core international human rights treaties, the Australian domestic legal system does not set out a comprehensive list of fundamental and inalienable rights; instead, it provides a patchy and loose framework of constitutional and statutory rights, covering a selection of human rights matters (e.g. freedom of religion, trial by jury, compensation for compulsory property acquisition, racial discrimination), as well as common law principles.¹⁸

In explaining this reluctance to having a comprehensive bill of rights, scholars and judicial officers usually refer to Australia's strong historical tradition of parliamentary sovereignty and the faith placed in the functioning of responsible government.¹⁹ The attitude prevails that to enshrine rights would

¹² The latest report on the progress of the "National Agreement on Closing the Gap" shows that out of 19 socio-economic targets for Indigenous people only five are anticipated to be met as planned and that progress for four targets is even worsening. See Australian Government, *Closing the Gap Annual Data Compilation Report* (Productivity Commission Report, Canberra, July 2024).

¹³ In the Second National Indigenous Languages Survey 2014, Indigenous Australians overwhelmingly expressed the desire that traditional languages be kept alive and strong in the future. See Marmion, Obata and Troy, *Community, identity, wellbeing: the report of the Second National Indigenous Languages Survey* (n 6) 28ff. In the last two decades, numerous local language revitalisation projects have been initiated across Australia. An example is the "Wirlomin Noongar Language and Stories Project", dedicated to revitalising the Wirlomin dialect of the Noongar language, spoken by the Noongar people of southwestern Australia. The initiative focuses on reclaiming and preserving the language by collecting stories and songs and producing bilingual books; the aim is to reconnect Noongar families with their linguistic roots and promote the use of the Noongar language in everyday life. See 'Wirlomin Noongar Language and Stories', (Webpage) <<https://www.wirlomin.com.au/>> accessed 17 Oct 2024.

¹⁴ UN Human Rights Council, *Role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples, Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/21/53 (16 Aug 2012) 10 ('*Role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples, Study of the Expert Mechanism on the Rights of Indigenous Peoples*').

¹⁵ Marmion, Obata and Troy, *Community, identity, wellbeing: the report of the Second National Indigenous Languages Survey* (n 6).

¹⁶ Nicholas Thieberger, 'Language maintenance: why bother?' (1990) 9 *Multilingua* 333, 333.

¹⁷ For an elaborate discussion of language policies as measures of transitional justice, see Gareth Price, 'Language policy and transitional justice: rights and reconciliation' (2020) 19 *Language Policy* 485, 500.

¹⁸ Australia's "exceptionalism" is salient and has often been deplored by legal scholars and human rights experts. See Sarah Joseph, 'Australia's Exceptionalism: Antipathy towards Human Rights?' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Thomson Reuters Australia 2022); George Williams, 'Australia's Constitutional Design and the Protection of Human Rights' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia*, (Oxford: Hart Publishing 2019).

¹⁹ Joseph, 'Australia's Exceptionalism: Antipathy towards Human Rights?' (n 18) 604; Hilary Charlesworth, 'The Australian reluctance about rights' (1993) 31 *Osgoode Hall LJ* 195; Toohey John, 'A government of laws, and not of men?' (1993) 4 *Public Law Review* 158. In response to repeated criticisms from UN bodies

undermine parliamentary authority by shifting power to an unelected judiciary. The common law system is also deemed capable of protecting the interests of individuals and society. The principle of legality establishes the presumption that the legislature does not aim to infringe upon fundamental common law rights, freedoms, and principles unless it does so with clear and unequivocal language.²⁰ In contrast, however, over the last 40 years, fellow common law countries such as Canada, New Zealand and the United Kingdom have all felt the need to legislate at least some kind of human rights instrument that upholds basic rights and freedoms whenever the common law reaches its limits.²¹

International human rights law can remedy this domestic lacuna in fundamental rights protection only to a limited extent, given the Australian legal system's dualist relationship with international law. The rights enshrined in international treaties ratified by Australia do not unfold any domestic legal effect unless specific Australian legislation is adopted.²²

In contrast to this rights-unfriendly environment, the High Court of Australia has been instrumental in recognising certain fundamental rights within Australian law. It has done so by deducing "implied" constitutional freedoms, such as political communication and the right to vote.²³ Furthermore, the High Court has affirmed that international treaties ratified by Australia give rise to a "legitimate expectation" by the citizen that the domestic legislator would act in accordance with these international standards.²⁴ In addition, judicial reasoning in relation to the 1966 International Covenant on Civil and Political Rights (ICCPR) has clarified that international law does indeed have an important leverage effect on the common law, in particular "when international law declares the existence of universal human rights."²⁵ In contrast, however, there are also numerous instances where Australian courts have taken a restrictive position towards international human rights.²⁶ It is also relevant to note that the Australian legal system is not embedded in any regional human rights protection system, such as the Council of Europe. A comparable framework or human rights watchdog is absent in Australia's geographical region.²⁷

regarding its failure to incorporate treaties into domestic law, Australia has often cited its federal system of government, asserting that many treaty obligations fall within the competence of the states rather than the Commonwealth.

²⁰ See Bruce Chen, 'If at First You Don't Succeed... A Critique of the Australian Human Rights Act Proposal and the Inquiry into Australia's Human Rights Framework Thematic Developments in Rights, Freedoms and Accountability' (2024) 47 University of New South Wales Law Journal 355, 364.

²¹ Scholars have come to speak of a "new Commonwealth model of constitutionalism" that is based on a legislative bill or charter of rights. See Stephen Gardbaum, 'Reassessing the new Commonwealth model of constitutionalism' (2010) 8 International Journal of Constitutional Law 167.

²² Sarah Joseph, Adam Fletcher and Anna Lochhead-Sperling, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level in Australia' in Sarah Joseph and others (eds), *The Impact of the United Nations Human Rights Treaties on the Domestic Level: Twenty Years On: Second Revised Edition* (Brill | Nijhoff 2024) 37-38. The prime example of a statutory enactment of an international convention, is the *Racial Discrimination Act 1975* (Cth), passed to fulfill Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The wording of the RDA closely follows the text of the ICERD. See Neil Rees and others, *Australian Anti-Discrimination and Equal Opportunity Law* (3 edn, The Federation Press 2018) cited in Alice Taylor, 'Anti-Discrimination Law as the Protector of other Rights and Freedoms: The case of the 'Racial Discrimination Act'' (2021) 42 *The Adelaide Law Review* 405, 408.

²³ Joseph, Fletcher and Lochhead-Sperling, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level in Australia' (n 22) 33-34. There is a certain optimism among constitutional lawyers on the potentialities of a more process-based interpretation of the constitution. See Dylan Lino, 'Indigenous Recognition' in Rosalind Dixon (ed), *Australian Constitutional Values* (1 edn, Hart Publishing 2018); Amelia Loughland, 'Taking Process-Based Theory Seriously: Could "Discrete and Insular Minorities" Be Protected Under the Australian Constitution?' (2020) 48 *Federal Law Review* 324.

²⁴ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 ('*Minister for Immigration and Ethnic Affairs v Teoh*').

²⁵ *Mabo case* (n 10), 42.

²⁶ For example, in *Kruger v Commonwealth*, with regard to the Genocide Convention, the Court rejected the claim of the applicants that "there are some rights at common law which are so fundamental that it is beyond the sovereign power of parliament to destroy them." *Kruger v Commonwealth* (1997) 190 CLR 1, 72 ('*Kruger v Commonwealth*'); in a case concerning the Government's power to detain immigrants at sea and take them to a place outside Australia, the High Court further held that there is "no presumption that the statute is to be read as legislatively constraining the [executive] officer to act in conformity with international law norms." Keane further reiterated that "Australian courts are bound to apply Australian statute law 'even if that law should violate a rule of international law'". *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, [385] (Gageler J), [462] (Keane J) ('*CPCF v Minister for Immigration and Border Protection*').

²⁷ Australia is a member of the Association of Southeast Asian Nations (ASEAN), but the level of human rights protection afforded under the ASEAN Human Rights Declaration is markedly low. Regarding the lack of protection of linguistic rights under the ASEAN regime, see Aisyah Ishak, 'Language Rights under ASEAN's Human Rights Regime: Linguistic Minorities in Thailand' (2023) 24 *Australian Journal of Asian Law* 19.

Until now, all constitutional or legislative attempts to enshrine fundamental rights at the Commonwealth level of Australian government have been unsuccessful.²⁸ A recent parliamentary inquiry on Australia's human rights framework resulted in a comprehensive 2024 report explicitly recommending the adoption of a federal human rights act.²⁹ The report largely supports a human rights bill previously elaborated by the Australian Human Rights Commission, which outlines a dialogue-based protection model. While the bill aims at implementing the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the core principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), it is also designed to safeguard parliamentary sovereignty. In practice, the model would install a shared responsibility for upholding human rights between the executive, legislature, and judiciary – without, however, automatically invalidating an act of parliament found to be “rights-incompatible”. The approach closely resembles the one adopted in the state and territory human rights acts that have been legislated respectively in the Australian Capital Territory (ACT)³⁰, Victoria (VIC)³¹, and Queensland (QLD).³² From an international human rights point of view, this would be a soft approach – but a milestone for Australia in human rights reform. The UN High Commissioner for Human Rights has voiced strong support for the adoption of the proposed human rights bill, reiterating the need to “close the gaps in Australia’s existing domestic legal framework on human rights”.³³ Yet, with elections in 2025 approaching, the political context and party dynamics do not favour an adoption of the bill. Whereas majority and independent committee members endorsed the proposal, a spokesperson stated that the government currently has no intentions of implementing a federal human rights act.³⁴

2 Is there room for indigenous language rights in Australian law?

2.1 Definition and international legal framework

There is no internationally recognised, universal definition of language rights. This paper broadly follows the definition that language rights are “fundamental rights protecting language-related acts and values”, which, in some way or another, are enshrined in constitutional law or binding international treaties.³⁵ Regarding the level of protection, it follows that any process of enshrining language rights into a domestic legal system should ultimately aim at endowing these rights with a minimum of constitutional or quasi-constitutional protection or at implementing binding international law on language rights. Of course, in common law systems with rigid constitutions, ordinary legislation can also grant certain

²⁸ For a concise overview of the various attempts to adopt an Australian Bill of Rights, see Chen, 'If at First You Don't Succeed... A Critique of the Australian Human Rights Act Proposal and the Inquiry into Australia's Human Rights Framework Thematic Developments in Rights, Freedoms and Accountability' (n 20) 357-360. About the 2012 proposal to insert a section on Aboriginal languages into the Constitution: See chapter 2.b. of this paper.

²⁹ Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (Report, May 2024).

³⁰ *Human Rights Act 2004* (ACT).

³¹ *Charter of Human Rights and Responsibilities Act 2006* (VIC).

³² *Human Rights Act 2019* (QLD).

³³ 'High Commissioner shows support for Human Rights Act in Australia', *Speech delivered by UN High Commissioner for Human Rights Volker Türk* (Free and Equal Human Rights Conference, Australia, 7 June 2024) <<https://www.ohchr.org/en/statements-and-speeches/2024/06/high-commissioner-shows-support-human-rights-act-australia>> accessed 30 October 2024.

³⁴ Daniel Lo Surdo, 'Human Rights Act proposed by Committee, rejected by Government' *The Daily Aus* (Sydney, 3 June 2024) <<https://thedailyaus.com.au/stories/government-rejects-human-rights-act-proposal/>> accessed 27 September 2024. Technically, by initiating the parliamentary inquiry, the government already fulfilled its previous election promise to review the human rights framework.

³⁵ Susanna Mancini and Bruno De Witte, 'Language Rights as Cultural Rights: a European Perspective' in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Brill | Nijhoff 2008) 247.

protection to language-related concerns, especially if the high courts subsequently confirm those statutory provisions.³⁶

Regarding the content of language-related rights and interests, an important premise is that the latter cannot be subsumed under the umbrella of heritage protection. Instead, language rights need to be contemplated through the lens of the human individual or group. From a holistic perspective, linguistic rights are “cross-cutting”,³⁷ comprising all elements of human rights related to the ability of individuals and groups to choose, promote, learn, and use their preferred languages in both public and private settings.³⁸ The focus of this paper is on the right of First Nations peoples to maintain and revitalise an Indigenous language, which is severely endangered as a result of colonisation and forced assimilation.

International law does not clearly set out a stand-alone right to maintain and revitalise an endangered Indigenous language. However, such a right could be derived from the right to enjoy and preserve one’s linguistic identity as an aspect of human dignity. The core provision of binding international law in this regard is Article 27 ICCPR, which protects the right of persons belonging to an ethnic, religious or linguistic minority “to use their own language”.³⁹ Also, freedom of expression (Article 19 ICCPR) and the right to non-discrimination (Article 26 ICCPR) provide a minimum level of protection for the linguistic interests of minorities and Indigenous groups.⁴⁰ Regarding Article 27 ICCPR, the Human Rights Committee (HRC) has made clear in its longstanding caselaw that Indigenous peoples’ can avail themselves of the article’s protection.⁴¹ However, the vagueness of the wording in Article 27 has engendered much controversy, particularly whether states are under a positive obligation to protect and promote the linguistic interests of a minority – beyond a mere duty of non-interference.⁴² In its recent caselaw on climate litigation, the HRC has embraced a novel interpretative approach, which could broaden the scope of rights under Article 27: namely, that the article needs to be read “in the light of” the UNDRIP of 2007.⁴³ In the cited decisions, the HRC repeatedly referred to the declaration – regardless of its non-binding nature – as an important guiding tool to interpret the 1966 ICCPR. And, in terms of language rights, the UNDRIP actually goes much further than the wording of Article 27 ICCPR, when it recognises the right of Indigenous peoples “to revitalize, use, develop and transmit to future generations their (...) languages (...), and to designate and retain their own names for communities,

³⁶ See Scott Stephenson, 'The Rise and Recognition of Constitutional Statutes' in Richard Albert and Joel Colon-Rios (eds), *Quasi-Constitutionality and Constitutional Statutes: Forms, Functions, Applications* (Routledge 2019) 27.

³⁷ Giovanni Poggeschi, *I diritti linguistici. Un'analisi comparata* (Diritto e politica, Carrocci 2010) 30.

³⁸ Abdul Awal, 'The Evolution of Linguistic Rights throughout History and the Major Milestones' (2023) 2 Indonesian Journal of Advanced Research 1317, 1318.

³⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁴⁰ Freedom of expression can cover the free choice of language in a very broad range of “private” activities. See Human Rights Committee, *Views: Communications Nos. 359/1989 and 385/1989 (Ballantyne, Davidson, McIntyre v. Canada)*, CCPR/C/47/D/359/1989 and 385/1989/Rev1, 47th sess, (5 May 1993, adopted 31 March 1993) ('*Views: Communications Nos. 359/1989 and 385/1989 (Ballantyne, Davidson, McIntyre v. Canada)*'). Furthermore, the non-discrimination principle imposes the duty on states to provide a minimum of actual measures to safeguard minority language speakers; to honour its obligation to avoid unfair treatment, a state has to offer a certain level of protection to minority languages, because the state cannot ignore the impact that a monolingual policy would have on the entire population. See Fernand De Varennes, *Language, minorities and human rights* (International studies in human rights, Kluwer Law International 1996) 276.

⁴¹ Human Rights Committee, *Views: Communication No. 167/1984 (Ominayak v. Canada)*, CCPR/C/38/D/167/1984, 38th sess, (26 Mar 1990) para 32.2 ('*Views: Communication No. 167/1984 (Ominayak v. Canada)*'); Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, CCPR/C/21/Rev1/Add5, 50th sess, UN Doc HRI/GEN/1/Rev.1 at 38 (8 April 1994) ('*CCPR General Comment No. 23: Article 27*') para 3.2.

⁴² The question remains unresolved, and this is not the forum to discuss it in more detail. Among human rights scholars, the advocates of an interpretation in terms of positive obligations seem to be gaining the upper hand. See Dimitrios Jim Molos, 'Underappreciated resource or inadequate measure? Minority Protection under Article 27 of the International Covenant on Civil and Political Rights' (Master Thesis, Queen's University 2013) 136-138. In practice, though, the international legal system has not yet been very successful in enforcing minority or Indigenous language protection duties upon states. See Moria Paz, 'The Failed Promise of Language Rights: A Critique of the International Language Rights Regime' (2013) 54 Harvard International Law Journal 157.

⁴³ Human Rights Committee, *Views adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No 2950/2017*, UN Doc CCPR/C/124/D/2950/2017 (2 November 2018) 9.8 ('*Käkkäläjärvä et al. v Finland*'); Human Rights Committee, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No 3624/2019*, 135 sess, UN Doc CCPR/C/135/D/3624/2019 (22 September 2022) 8.13 ('*Billy et al. v Australia*'); Human Rights Committee, *Views adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2552/2015*, UN Doc CCPR/C/132/D/2552/2015 (21 September 2022) 8.6 ('*Campo Agua' Indigenous community*'); Human Rights Committee, *Views adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 3585/2019*, UN Doc CCPR/C/137/D/3585/2019 (15 March 2023) ('*Roy v Australia*').

places and persons.”⁴⁴ To some extent, language-related concerns of minorities and Indigenous peoples are also protected under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which prohibits discrimination based on language and ensures equal enjoyment of cultural rights.⁴⁵ The Committee on the Elimination of Racial Discrimination (CERD) has repeatedly urged states, including Australia, to take measures for the preservation of Indigenous languages, to ensure that Indigenous communities can freely practice and revitalise their cultural traditions and their languages.⁴⁶

In summary, despite the limited protection offered by international law, the idea of a right to Indigenous language maintenance and revitalisation seems to be gaining momentum. First and foremost, among human rights experts and advocates the consensus is growing that states which once allocated public resources to eradicate Indigenous languages now have a duty to allocate at least an equivalent amount in their revitalisation.⁴⁷

2.2 The weak consideration of Indigenous languages under Australian law

Australia, despite being a party to the ICCPR and the ICERD and having endorsed the UNDRIP,⁴⁸ does not have any central Commonwealth laws protecting Indigenous languages.⁴⁹ There is no mention of languages in the Constitution, with English being considered Australia’s de facto national language.⁵⁰

In the past, several proposals for constitutional recognition of Aboriginal people, cultures and languages have been presented.⁵¹ Notably, in 2012, the *Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* recommended in its final report to include a draft section 127A to the Constitution, to confirm the status of English as the national language and to recognise First Nations languages as “original Australian languages”.⁵² However, the then opposition leader and later prime

⁴⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 Sept 2007) (*‘United Nations Declaration on the Rights of Indigenous Peoples’*) Article 13. The article also calls upon states to “take effective measures to ensure that this right is protected.”

⁴⁵ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD). Article 5 guarantees the right to use one’s own language and participate in cultural activities without discrimination. For a discussion of the ICERD as “focal point for minority groups”, see David Keane and Joshua Castellino, ‘Is the International Convention on the Elimination of All Forms of Racial Discrimination the De Facto Minority Rights Treaty?’ in David Keane and others (eds), *Towards Convergence in International Human Rights Law*, vol 5 (Nottingham Studies on Human Rights, 2017).

⁴⁶ Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII, Rights of indigenous peoples*, 51 sess, UN Doc A/52/18 (18 August 1997) annex V at 122 (*‘General Recommendation XXIII, Rights of indigenous peoples’*), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 212 (2003); Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention. Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, 77 sess, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010) para 21 (*‘Concluding observations of the CERD: Australia, 2010’*); Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) para 36-37 (*‘Concluding observations on the eighteenth to twentieth periodic reports of Australia’*).

⁴⁷ Kristen Carpenter and Alexey Tsykarev, ‘(Indigenous) Language as a Human Right’ (2020) 24 *UCLA Journal of International Law and Foreign Affairs* 49, 71.

⁴⁸ In 2009, Australia revised its initial 2007 opposition and endorsed the UNDRIP as an ‘aspirational’ document. See Jenny Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (2009).

⁴⁹ Laura Beacroft, ‘Indigenous language and language rights in Australia after the “Mabo” (no 2) decision - a poor report card’ (2017) 23 *James Cook University Law Review* 113, 125.

⁵⁰ *Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311, 325-326 (*‘Nguyen v Refugee Review Tribunal’*). See also Beacroft, ‘Indigenous language and language rights in Australia after the “Mabo” (no 2) decision - a poor report card’ (n 49) 125.

⁵¹ For example, in the 2009 Social Justice Report, the “perilous state of Indigenous languages” was analysed, with a recommendation to “Commence a process to recognise Indigenous languages in the preamble of Australia’s Constitution with a view to recognising Indigenous languages in the body of the Constitution in future.” See Tom Calma, ‘The Perilous State of Indigenous Languages in Australia’, *Social Justice Report* (Australian Human Rights Commission 2009) 105.

⁵² “Section 127A Recognition of languages

(1) The national language of the Commonwealth of Australia is English.

(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.”

minister Tony Abbott, a constitutional conservative, opposed any provision “that might turn out to be a one-clause bill of rights”, referring in particular to the proposed section 116A on racial discrimination.⁵³ While the holding of referendum was postponed, during the legislature of the following Coalition government, the *Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* abandoned the languages provision.⁵⁴ The proposed section 127A was seen as potentially causing distraction among referendum voters, and as creating uncertainty and ambiguity, given its placement in the substantive text of the Constitution (and not in the Preamble), in contradiction to the Expert Panel’s intent for it to be read as mere declaratory provision.⁵⁵ Possibly, the consideration that future courts could deduce any implied positive rights or any constitutional obligation, e.g. to teach Aboriginal languages in schools,⁵⁶ also induced some decision-makers to treat the provision with high caution. Others also warned that constitutionalising English as the national language could negatively impact the existing use of Aboriginal languages.⁵⁷ Ultimately, the conservative opposition to mentioning languages in the Constitution won the upper hand.

Retrospectively, the failure of the 2012 proposal to recognise Aboriginal languages in the Constitution, in conjunction with a prohibition on racial discrimination, illustrates the complexity and pitfalls of establishing rights in Australian law, particularly in constitutional law. The reluctance towards and sometimes misapprehension of constitutional rights by decision-makers and the electorate make such reform attempts immensely difficult. Similar reasons contributed to the result of the 2023 Australia-wide *Voice* referendum: A majority of voters rejected a proposed constitutional amendment that aimed at recognising Indigenous Australians in the Constitution by establishing a consultative body to the Commonwealth Parliament called the “Aboriginal and Torres Strait Islander Voice”.⁵⁸ The landslide failure of the referendum, which had aimed at implementing the *Uluru Statement of the Heart*,⁵⁹ has stalled reform ambitions on Indigenous matters on constitutional and Commonwealth levels altogether.⁶⁰

It is true that discrimination on the grounds of language *can* fall under the scope of the *Racial Discrimination Act 1975 (Cth)*.⁶¹ One could argue that the lack of support for Indigenous languages constitutes racial discrimination, as language is a key aspect of cultural identity. In practice, however, it

See Expert Panel on Constitutional Recognition of Indigenous Australians (Commonwealth of Australia), *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Final Report, January 2012) 131-133.

⁵³ Alison Rourke, 'Australia set to recognise Aborigines as first people of continent' *The Guardian* (20 January 2012)

<<https://www.theguardian.com/world/2012/jan/20/australia-aborigines-race-discrimination-referendum>> accessed 24 January 2025.

⁵⁴ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (Commonwealth of Australia), *Progress Report* (Report, October 2014) 3. This was later confirmed in its *Final Report* (June 2015).

⁵⁵ Anne Twomey, 'A revised proposal for Indigenous constitutional recognition' (2014) 36 *The Sydney Law Review* 381, 410.

⁵⁶ *Ibid* 410.

⁵⁷ Alexander Reilly, 'Confusion of Tongues: Constitutional Recognition of Languages and Language Rights in Australia' (2019) 41 *Federal Law Review* 333.

⁵⁸ For more detailed analysis, see Anne Twomey, 'A Frozen Constitution in a Sunburnt Country - The Loss of Another Australian Referendum' *Verfassungsblog* <<https://verfassungsblog.de/a-frozen-constitution-in-a-sunburnt-country/>> accessed 14 November 2023; Nicholas Biddle and others, *Detailed analysis of the 2023 Voice to Parliament Referendum and related social and political attitudes* (ANU Centre for Social Research and Methods 2023); Bertus De Villiers, 'The Rejection of the Voice for Aboriginal People in Australia – A Postmortem of Causes of Failure' (2024) 10 *Constitutional Review* 266.

⁵⁹ The Uluru Statement from the Heart, issued in 2017, is a landmark document calling for substantive constitutional and structural reforms to recognise and protect the rights of Aboriginal and Torres Strait Islander peoples, including the establishment of an Indigenous Voice to Parliament and a Makarrata Commission to oversee processes of agreement-making (treaty) and truth-telling about Australia’s colonial history and its impacts. The statement was the result of extensive consultations and dialogues among Indigenous communities across Australia, culminating in the First Nations National Constitutional Convention held at Uluru. Read more on the website: <https://ulurustatement.org/history/the-journey-so-far/>.

⁶⁰ Also, government plans to establish a national truth-telling commission were dropped. See Tom Crowley, 'PM discards commitment to set up Makarrata body despite millions in funding' *ABC News* (4 August 2024) <<https://www.abc.net.au/news/2024-08-04/pm-discards-commitment-to-set-up-makarrata-body/104181696>> accessed 4 February 2025.

⁶¹ Yet, the caselaw has come to diverging findings in this question: In *Williams v Tandanya Cultural Centre* (2001) 163 FLR 203 [209], the notion of race was found to include 'national or ethnic origins or descent' where language can represent an indicator of membership of a race or particular people. Recently, this view was endorsed also in the case *Fisher v Commonwealth of Australia* (2023) 298 FCR 543, [94] (*Fisher v Commonwealth of Australia*), in opposition to the previous finding in *Sahak v Minister for Immigration and Multicultural Affairs* [2002] 123 FCR 514, (*Sahak v Minister for Immigration and Multicultural Affairs*), where language was considered a mere personal circumstance, not linked to race. See also *Hamzy v Commissioner of Corrective Services* [2020] NSWSC 414 (*Hamzy First Instance*).

is questionable whether this argument would be judicially successful, in view of the often-deplored deficiencies of the act.⁶²

An insightful example of the caselaw is the recent decision by the NSW Supreme Court (later confirmed by the NSW Court of Appeal) regarding the right of an 'extreme high-risk restricted' prison inmate to use a language other than English when communicating with his visitors.⁶³ The plaintiff, fluent in English and Arabic, was among the first extreme high-risk restricted inmates affected by 2015 NSW regulations that restricted prison communication (in-person, phone, and written communications) to English only. The controversial regulations were introduced in response to the 2014 terrorist attack in Sydney, known as the *Lindt Café siege*. The Supreme Court took an utterly restrictive stance towards linguistic rights: The judges reiterated that the right to freedom of expression does not hinder states from imposing language restrictions in the public sphere, if reasonable; yet, a very expansive notion of what is "public" was employed, to include also private communications whenever the state is involved or if they occur in state-run places, thus subjecting them to the state's language choice.⁶⁴ In the high-risk-detention context, security concerns cast out the individual detainee's language concerns. The case illustrates the insensitivity of Australian courts to the language needs of individuals and suggests that other interests, held by the state, are likely to prevail.⁶⁵

A differing, more favourable judicial approach, however, was followed in a recent judgement of the Supreme Court of Western Australia: In a case involving the socio-linguistic difficulties of an Aboriginal man in giving evidence in a criminal trial, the Supreme Court made a promising jurisprudential acknowledgement, stating

To deny the authenticity of a person's distinct linguistic identity or autonomy is to repudiate the authenticity of their cultural and perhaps spiritual essence; it is to impugn their sense of worth and value as a human being.⁶⁶

The trial judge had instructed the interpreter to stop interpreting and instead asserted that the accused was speaking in English, denying the distinctive character of Aboriginal English and Kriol. The Supreme Court found a miscarriage of justice caused by the trial judge's denial of the Aboriginal person's linguistic distinctiveness. The finding has considerable significance beyond the right to fair trial, because it affirms the value of linguistic distinctiveness, with unprecedented clarity.⁶⁷ Solomon J recognised the right to linguistic identity, in particular with regard to First Nations people. Furthermore, he used the Court's Reconciliation Statement as an interpretative tool to guide his judicial reasoning. The case paves the way for the "community standard" of "reconciliation" to enter the common law as a value to be upheld also in the courtroom.⁶⁸

Recently, the Full Federal Court of Australia observed that the freedom to use one's native or chosen language with family members – if considered a human right under the ICERD – does not need to be transposed into domestic law, because: "the common law permits that which is not prohibited".⁶⁹ The latter principle may appear as a strength of the common law system: rights do not need to be explicitly

⁶² Recurrent calls for law reform have been voiced. See Beacroft, 'Indigenous language and language rights in Australia after the "Mabo" (no 2) decision - a poor report card' (n 49) 123; George Williams and Daniel Reynolds, 'The Racial Discrimination Act and Inconsistency under the Australian Constitution' (2015) 36 *Adelaide Law Review* 241, 254.

⁶³ *Hamzy First Instance* (n 61); *Hamzy v Commissioner of Corrective Services* (2022) 400 ALR 507, ('*Hamzy Appeal*').

⁶⁴ For an elaborate discussion, see Alexandra Grey, 'Lawful limits on freedom of expression for private communications 'in public life'' (2023) 12 *Cambridge International Law Journal* 328.

⁶⁵ See Alexandra Grey and Alice Strauss, 'New limits on the right to freedom of expression from *Hamzy v Commissioner of Corrective Services*' (2022) 47 *Alternative Law Journal* 60, 63.

⁶⁶ *Murray v Feast* [2023] WASC 273, [171] ('*Murray v Feast*').

⁶⁷ *Ibid* [174]. The judgement relied on a study of the impact of language on public health outcomes: Leda Sivak and others, "'Language breathes life'—Barnjarla community perspectives on the wellbeing impacts of reclaiming a dormant Australian Aboriginal language' (2019) 16 *International Journal of Environmental Research and Public Health*.

⁶⁸ On the question of whether the concept of "reconciliation" does have legal value, see Antonio Buti, "'Reconciliation': Its Relationship and Importance to Law' (2018) 43 *University of Western Australia Law Review* 107.

⁶⁹ *Fisher v Commonwealth of Australia* (n 61) [84]. The section is probably to be read as 'obiter dicta'.

enshrined into statute to have value at common law, therefore the individual can assume that their basic interests are protected. One could say that the freedom to use and revitalise an Indigenous language is upheld by the common law, since the statute does not prohibit it. However, the weakness of this common law approach to fundamental rights is that it provides no guarantee of the level of protection that will be given to such an interest, let alone of a duty of the state to enact promotional measures.⁷⁰ Overall, the Australian jurisprudence regarding language concerns under the RDA has been very reticent and offers little ground for the judicial protection of languages.

2.3 Significant developments at state and territorial level

In contrast to the silence of the Commonwealth parliament, more legislative action is occurring in state and territory parliaments.⁷¹ Over the last two decades, all Australian state parliaments have passed distinct amendment acts to include a symbolic recognition of First Nations in the preamble to their respective state constitutions. For instance, in 2015, the Parliament of Western Australia passed an amendment to the WA Constitution in order to recognise its First Nations population in the preamble and to enshrine the Parliament's aim to attain reconciliation.⁷² More importantly for language rights, the New South Wales (NSW) parliament passed the *Aboriginal Languages Act 2017 (NSW)*. The purpose of this act is to enshrine the ongoing revitalisation of Indigenous languages in NSW into legislation, by establishing an "Aboriginal Languages Trust", tasked to ensure a coordinated and consistent effort in Indigenous language activities at local, regional and state levels.⁷³ In Western Australia, a grassroots movement came together in 2024 to campaign for a similar standalone WA Aboriginal Languages Act;⁷⁴ in October 2024, the group submitted a petition to the Legislative Council of Western Australia.⁷⁵

Moreover, the existing state and territory human rights acts favour a more sensitive approach of public authorities to language-related issues: Section 19 of the Victorian Charter of Human Rights and Responsibilities, for instance, enshrines the right of persons with a particular cultural, religious, racial or linguistic background to enjoy their culture, practice their religion, and speak their language. In addition, the distinct cultural rights of Aboriginal people are acknowledged, including the right to maintain and use their languages. The Victorian ombudsman has made use of section 19 of the Charter in a complaint regarding the right of a young detainee to use a language other than English with a teacher in a youth justice facility. The ombudsman informed the staff of the right of young people to speak in their language in youth justice custody, and the complaint was successfully closed.⁷⁶ Both the ACT and QLD

⁷⁰ Even though, common law and civil law systems share more features than is often assumed – as convincingly demonstrated by Holger Spamann, *Civil V. Common Law: The Emperor Has No Clothes* (Harvard Law School 2024) – the two legal families continue to diverge in their approach to human rights and fundamental freedoms. See Adam Chilton and Mila Versteeg, 'Legal Origins and Human Rights Law' (2023) 3 *Rutgers International Law and Human Rights Journal* 26.

⁷¹ Dani Larkin and others, 'Aboriginal and Torres Strait Islander peoples, law reform and the return of the states' (2022) 41 *University of Queensland Law Journal* 35, 57.

⁷² *Constitution Amendment (Recognition of Aboriginal People) Act 2015 (WA)*. A thorough discussion of the amendment act can be found in: Michael Mischin, 'Aboriginal Recognition and the Constitution of Western Australian' (Upholding the Australian Constitution - Twenty-seventh Conference of The Samuel Griffith Society, Canberra, 28–30 August 2015).

⁷³ François Kunc, 'Current Issues - ABORIGINAL LANGUAGES ACT 2017 (NSW)' (2017) 91 *Australian Law Journal* 946. See also Bridget Brennan, 'NSW introduces nation's first laws to recognise and revive Indigenous languages' *ABC News* (11 Oct 2017) <<https://www.abc.net.au/news/2017-10-11/nsw-passes-unprecedented-laws-to-revive-indigenous-languages/9039746>> accessed 29 October 2024.

⁷⁴ 'WA Aboriginal Languages Legislation Alliance (WAALLA)', *Wangka kanyira ngalipirniku - Preserving our Languages for all of us* (Webpage, 8 July 2024) <<https://wangka.com.au/waalla/>> accessed 29 October 2024.

⁷⁵ Aboriginal language legislation, Petition No 24-0044 (Presented to the Legislative Council of Western Australia on 9 October 2024) <[https://www.parliament.wa.gov.au/Parliament/LCePetitions.nsf/\(\\$All\)/BFE9DBF3C915760C48258BB10020AC65?opendocument](https://www.parliament.wa.gov.au/Parliament/LCePetitions.nsf/($All)/BFE9DBF3C915760C48258BB10020AC65?opendocument)> accessed 29 October 2024. The petition obtained 444 signatures and was tabled in the State Parliament of WA on 28 November 2024.

⁷⁶ The case stands in stark contrast to the above-mentioned NSW supreme court decision in the extreme-high-risk prison context in *Hamzy v Commissioner of Corrective Services* [2020] NSWSC 414. See Victorian Ombudsman, *Annual Report* (Report, 24 Oct 2019) 29.

acts include similar provisions – which are, of course, grounded on Article 27 ICCPR. How these rights will be implemented in these jurisdictions remains to be seen.

Remarkably, in 2023, South Australia (SA) became the first federal state to legislatively establish a First Nations Voice to Parliament, whose purpose is to provide First Nations people with an advisory, consultative, and advocacy platform to be heard by the Parliament and the Government of SA.⁷⁷ Despite the nationwide rejection of a federal Voice to Parliament, the state government upheld its commitment to a state voice, with elections having occurred in March 2024. The new body has taken up its work of advising the State institutions on the impact of legislative bills on First Nations people. Still, its future is uncertain, with the opposition threatening to potentially abolish it, if victorious at the next election.⁷⁸

Finally, a significant development worth monitoring is the Treaty process in Victoria: As the first Australian jurisdiction to engage in state-wide Treaty negotiations, the Victorian government has worked with First Nations peoples for the past eight years to lay the foundations for Treaty negotiations, including the passing of two acts of Parliament and delivering on policies across every level of government.⁷⁹ According to the jointly adopted negotiation standards, the process is meant to recognise Aboriginal lore, law and cultural authority, also by taking into account First Nations cultural practices, including language; “language” is also explicitly listed as “subject matter for negotiation”.⁸⁰ In November 2024, the democratically elected First Peoples’ Assembly and the State of Victoria officially commenced negotiations.⁸¹ However, following the failed nation-wide Voice referendum, the Victorian opposition withdrew its support for the state Treaty process; hence, similar to the South Australian Voice, its future after the 2026 state elections is uncertain.⁸²

2.4 Indigenous languages in policy

As opposed to the sparsity of legal provisions on language protection, an array of policy documents, strategies, reports and action plans have been released over the last 40 years, emphasising the importance of preserving and revitalising Australian Indigenous languages. For instance, both the 1987 *National Policy on Languages*⁸³ and the 1991 *Report of the Royal Commission into Aboriginal Deaths in Custody*⁸⁴, stressed the need to acknowledge, promote and revive Aboriginal languages. In 2009, the first federal Indigenous languages preservation strategy was adopted, which recommended targeted actions, including enhanced Indigenous language programs.⁸⁵

In 2020, the target to “increase the number and strength of Aboriginal and Torres Strait Islander languages being spoken” was listed among the “socio-economic outcomes” to be achieved under the

⁷⁷ Bertus De Villiers, 'Life after the Failed Voice: Options for Aboriginal Self-determination in Australia' (2024) *International Journal on Minority and Group Rights* 1, 28.

⁷⁸ Stephanie Boltje, 'South Australia's Voice to Parliament body delivers historic first speech' *ABC News* (27 November 2024) <<https://www.abc.net.au/news/2024-11-27/sa-voice-to-parliament-delivers-historic-first-speech/104655130>> accessed 23 January 2025.

⁷⁹ Harry Hobbs, 'Taking Stock of Indigenous-State Treaty-Making in Australia: Opportunities and Challenges' (2024) 47 *University of New South Wales Law Journal* 548.

⁸⁰ The “Treaty Negotiation Framework” can be accessed here: <https://www.firstpeoplesrelations.vic.gov.au/treaty-negotiation-framework>, accessed 24 January 2025.

⁸¹ In January 2025, a list of the first topics to be discussed included a proposal for a permanent First Peoples’ representative body. Benita Kolovos, 'Permanent Indigenous voice on the table as Victoria treaty negotiations ramp up' *The Guardian* (13 January 2025) <<https://www.theguardian.com/australia-news/2025/jan/13/victorian-government-voice-to-parliament-treaty-negotiations>> accessed 23 January 2025.

⁸² *Ibid.*

⁸³ Lo Bianco Joseph, 'Contrasting and comparing language policy: Europe and Australia' in Anne; Winter Pauwels, Joanne and Lo Bianco, Joseph. (ed), *Maintaining Minority Languages in Transnational Contexts* (Palgrave Macmillan 2007) **Error! Bookmark not defined.** 98-99.

⁸⁴ Royal Commission into Aboriginal Deaths in Custody, *National Report* (Commissioner Elliott Johnston, 1999) vol 2, 350 ('*RCIADIC National Report, Vol. 2*').

⁸⁵ Australian Government Department of Environment, Water, Heritage and the Arts, 'Indigenous Languages – A National Approach', *Social Justice Report* (Australian Human Rights Commission 2009), Appendix 3, 183.

National Agreement on *Closing the Gap*.⁸⁶ An *Indigenous Languages Policy Partnership* was initiated, as a platform for cooperation and consultation between government and Aboriginal communities to protect and promote traditional languages jointly.⁸⁷ More recently, the government elaborated in consultation with First Nations people *Australia's Action Plan for the International Decade of Indigenous Languages 2022–2032*, acknowledging the priority to “stop the loss” and committing itself to develop a coordinated national approach to support Australia’s first languages, including the adoption of legislation.⁸⁸ The 2024 federal budget set aside \$53.8 million over 4 years to support First Nations community language learning and new language centres.⁸⁹ Also, on state and territory level, there are several guiding documents referring to Aboriginal languages, such as “The Aboriginal Empowerment Strategy Western Australia 2021-2029”, which sets the target to “value, recognise and celebrate Aboriginal peoples’ cultures, languages, relationships to country, knowledge, and heritage”, including the “embedding” of Aboriginal languages into the classroom.⁹⁰ However, to date, all official policy documents or government targets to promote Indigenous languages have had limited impact.⁹¹ Time will reveal whether the latest commitments translate into meaningful outcomes.

2.5 Native title litigation and language rights

An alternative pathway to advance language rights might be under native title law. The recognition of native title in the landmark 1992 High Court decision of *Mabo*⁹² sparked initial hopes for the legal recognition of Aboriginal languages as well. With the *Native Title Act 1993* (Cth) (‘Native Title Act’) requiring an Indigenous community to prove continuing “connection” to country to have native title rights recognised, collecting evidence of linguistic continuity assumed a significant role.⁹³ For those communities which succeeded in court, important rights, related to the land, such as hunting, fishing and access rights, were acknowledged. By 2024, almost 50 per cent of Australia’s landmass was covered by various native title determinations.⁹⁴ However, the general jurisprudential trend in native title has not been very conducive to the recognition of language rights.⁹⁵ At the same time, the Courts have not yet explicitly addressed the question of whether native title can encompass the right to speak, maintain or revitalise an Aboriginal language.

Some early native title claimants have attempted to invoke linguistic interests, claiming the exclusive right to use a language.⁹⁶ In *Western Australia v Ward*, native title claimants argued for a right to

⁸⁶ Australian Government, ‘National Agreement on Closing the Gap’ (*National Indigenous Australians Agency*, 2020) Target 16 <<https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>> accessed 4 October 2024; see Alexandra Grey, ‘The plan to strengthen Indigenous languages’ *University of Technology Sydney News - Business and Law* (16 Nov 2021) <<https://www.uts.edu.au/news/business-law/plan-strengthen-indigenous-languages>> accessed 29 October 2024.

⁸⁷ Australian Government, ‘The Aboriginal and Torres Strait Islander Languages Policy Partnership Agreement to Implement. Partnership Agreement to improve outcomes under Closing the Gap for Aboriginal and Torres Strait Islander Languages’ (*Joint Council on Closing the Gap*, 2022) <<https://www.arts.gov.au/what-we-do/indigenous-arts-and-languages/aboriginal-and-torres-strait-islander-languages-policy-partnership>> accessed 4 October 2024.

⁸⁸ First Languages Australia and Commonwealth of Australia, *Voices of Country - Australia's Action Plan for the International Decade of Indigenous Languages 2022–2032* (Strategic Report, August 2023).

⁸⁹ Australian Government, ‘Budget 2024–25: Delivering better outcomes for First Nations peoples (Fact Sheet)’ (*National Indigenous Australians Agency*, 2024) <<https://www.niaa.gov.au/resource-centre/budget-2024-25-delivering-better-outcomes-first-nations-people-fact-sheet>> accessed 29 October 2024.

⁹⁰ Department of the Premier and Cabinet, Government of Western Australia, ‘The Aboriginal Empowerment Strategy - Western Australia 2021-2029. Policy Guide’ (*Wa.gov.au*, 2021) <<https://www.wa.gov.au/government/publications/aboriginal-empowerment-strategy-western-australia-2021-2029>> accessed 31 October 2024.

⁹¹ Nicholas Martin Nakata, ‘Indigenous languages & education: Do we have the right agenda?’ (2024) 51 *The Australian Educational Researcher* 719, 723.

⁹² *Mabo case* (n 10).

⁹³ *Native Title Act 1993* (Cth) s 223 (1)(b).

⁹⁴ The area covered by native title can be verified on the website of the Native Title Tribunal, which provides up-to-date maps of native title determinations across Australia: See National Native Title Tribunal, ‘Maps’ (*Commonwealth of Australia*, 2014) <<https://www.nntt.gov.au/assistance/Geospatial/Pages/Maps.aspx>> accessed 29 October 2024.

⁹⁵ Beacroft, ‘Indigenous language and language rights in Australia after the “Mabo” (no 2) decision - a poor report card’ (n 49) 127.

⁹⁶ John Henderson, ‘Language and Native Title’ in David Nash and John Henderson (eds), *Language in Native Title* (Native Title Research Series, Aboriginal Studies Press 2002) 9. For example, a group of applicants sought to be recognised as “the rightful indigenous practitioners of traditional Gayn:d’hay:ngara language, storytelling, cave-painting, dancing and Sacred Hand Lore - with a continuing legal right to practice this Traditional Business throughout the lands, waters and

"maintain, protect and prevent the misuse of cultural knowledge".⁹⁷ The High Court held that cultural knowledge lies beyond the scope of rights that can be recognised under the Native Title Act. The majority of the Court failed to see a connection between cultural knowledge and the denial or control of access to land. Only Kirby agreed that cultural knowledge was sufficiently "in relation to" the land, underlining the "inherent land-relatedness of Aboriginal culture".⁹⁸ Similar considerations hold for Aboriginal languages. In Aboriginal understandings of the world, a language is intimately connected to a certain territory, in the sense that "land and language are part and parcel—one and the same."⁹⁹ Languages are perceived as being "directly placed in the landscape by the founding acts of Dreamtime heroes."¹⁰⁰ This is in line with the views of the UN Expert Mechanism on the Rights of Indigenous Peoples, which recognises "the close connection between indigenous peoples' cultural and language rights and their rights related to their lands, territories and resources."¹⁰¹ The legal implications of this intertwining between land and language have not yet been drawn in Australia, but could yet present a pathway to establish language rights.

A further requirement under the Native Title Act is that a claimed right or interest must be recognised by the common law of Australia.¹⁰² To fulfil this criterion, a right must not appear to be "antithetical to fundamental tenets of the common law",¹⁰³ or "clash with the general objective of the common law of the preservation and protection of society as a whole".¹⁰⁴ A right to use, maintain or revitalise an Indigenous language does not seem to contradict any common law principle. Arguably, a promotion-oriented Indigenous language right would serve the goal of protecting a valuable asset of Australian society, namely Aboriginal languages and the identity and well-being of their speakers.

In this reasoning, a right to language maintenance and revitalisation could theoretically be deduced from native title. Ultimately, it depends on judicial interpretation of what 'connection to the land' means and whether the Australian legal system correctly apprehends the unique rights and interests traditionally held by Aboriginal people.¹⁰⁵ For 20 years, native title jurisprudence tended to circumscribe instead of broadening the scope of native title rights in a "disappointing retreat from the 'judicial activism'" of *Mabo*.¹⁰⁶ Most notable are cases where the High Court referred to the fragile condition of certain linguistic communities to *deny* their claim for native title rights, thereby echoing the former settler-colonial project of silencing Aboriginal languages.¹⁰⁷ The High Court has given a more moderated interpretation of the nature of native title in the 2013 *Akiba* ruling, conceiving native title as an underlying title, which enables the community to exercise certain "incidents" of it (such as fishing, hunting, etc.).¹⁰⁸ Following this line of thought, speaking or maintaining an Indigenous language could be considered an "incident" of native title.

sites, to the exclusion of others". See *Moran v Minister for Land & Water Conservation for New South Wales* [1999] FCA 1637, (*Moran v Minister for Land & Water Conservation for New South Wales*). The claim was dismissed for the lack of authorisation of the applicants (they did not sufficiently demonstrate the existence as a group, not merely an aggregation of individual claims).

⁹⁷ *Western Australia v Ward* (2002) 213 CLR 1, (*Western Australia v Ward*).

⁹⁸ *Ibid.*, [580] and [587] (Kirby J).

⁹⁹ Sivak and others, "Language breathes life" —Barngarla community perspectives on the wellbeing impacts of reclaiming a dormant Australian Aboriginal language' (n 67) 7.

¹⁰⁰ Alan Rumsey, 'Language and Territoriality in Aboriginal Australia' in Michael Walsh and Colin Yallop (eds), *Language and Culture in Aboriginal Australia* (Aboriginal Studies Press 1993), quoted in *Ward v Western Australia* (1998) 159 ALR 483, 525 (*Ward v Western Australia*).

¹⁰¹ UN Human Rights Council, *Role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples, Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/21/53 (n 14) 8.

¹⁰² *Native Title Act 1993* (Cth) (1) (c).

¹⁰³ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [77] (*Yorta Yorta case*).

¹⁰⁴ *Western Australia v Ward* (n 97) [21].

¹⁰⁵ The debate on the sui generis nature of native title rights remains unresolved, even though the interpretation given by Brennan J in *Mabo* (2) implies that the common law is expected to recognise 'novel' interests in land, which differ from proprietary rights enshrined in the common law. See Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (Cth) (ALRC Report No 126, 4th June 2015) 66.

¹⁰⁶ Bryan Keon-Cohen, 'From Euphoria to Extinguishment to Co-existence?' (2017) 23 *James Cook University Law Review* 9, 13-14.

¹⁰⁷ *Yorta Yorta case* (n 103) [65]. See Mark Harris, "We know that Indigenous languages do not have a place of power in Australia": recognition for the linguistic rights of Indigenous Australians? (2012) 18 *Australian Journal of Human Rights* 89, 104.

¹⁰⁸ *Akiba v Commonwealth* (2013) 250 CLR 209, (*Akiba v Commonwealth*). See Keon-Cohen, 'From Euphoria to Extinguishment to Co-existence?' (n 106) 14.

More promising is the approach adopted in the recent judgement *Love v Commonwealth*,¹⁰⁹ where the majority judges confirmed the “connection” between Aboriginal people and the land being not only of legal, but also spiritual, cultural and religious nature. Justice Nettle referred to the Crown owing a unique obligation of protection to Aboriginal people as ancestral inhabitants of the land. If taken up in the future, such a reasoning could lead to the recognition of additional obligations for governments.¹¹⁰ Overall, the judgement applies the principle of substantial equality and favours the understanding that a differential treatment for certain groups can be justified.¹¹¹ Judicial developments of this kind would be conducive to the recognition of Indigenous language rights.

The Australian Law Reform Commission’s current review of the Native Title Act (due in 2025) – despite being mainly concerned with the so-called “future acts regime” – could potentially be relevant for the cause of language rights, since the review includes an assessment of whether the current act is in line with the UNDRIP standards.¹¹²

3 Comprehensive settlements: a new avenue?

An alternative avenue to protect Indigenous language-related concerns in Australia may be through native title agreement-making.

Over the last two decades, several Indigenous communities have engaged in negotiations with state governments to achieve out-of-court agreements to native title claims. A variety of negotiated outcomes have been reached, providing the respective Aboriginal groups with more leeway to manage their own affairs, notably to exercise land rights, but also to offer a range of community services.¹¹³ These bottom-up pathways for attaining more self-determination for First Nations communities become even more relevant in the aftermath of the failed *Voice* referendum, when constitutional reform seems out of reach.¹¹⁴ A ground-breaking regional settlement is the Noongar agreement, concluded between the State of WA and the Noongar people, in effect since 2021.¹¹⁵ Described by constitutional law experts as “Australia’s First Treaty” with a First Nations group,¹¹⁶ the settlement contains elements of an Indigenous autonomy agreement.

Around the millennium, the Noongar people, comprising several sub-communities or family groups with around 14 dialects, lodged multiple native title claims over different parts of the south-west area, including the metropolitan area of Perth. In the early 2000s, these claims were united into a single Noongar claim. In 2006, Justice Wilcox recognised in his judgement that in 1829, prior to colonisation, the laws and customs across the claim area were those of a single community, with one common language.¹¹⁷ On appeal by the government of WA, the case was remitted back to a new single judge for reconsideration.¹¹⁸ Subsequently, the WA government and the South West Aboriginal Land and Sea

¹⁰⁹ *Love and Thoms v Commonwealth of Australia* (2020) 270 CLR 152, (*Love and Thoms v Commonwealth of Australia*). It should be noted that the case did not relate to a native title claim but raised the question whether the “aliens” power under Section 51(xix) of the Australian Constitution (including the power to “remove” non-citizens from Australia) applies to Aboriginal Australians who are not citizens of Australia but are citizens of another country. The plaintiffs argued that there should be an unexpressed limitation or exception for Aboriginal people due to their unique connection to the land.

¹¹⁰ Anne Twomey, ‘High Court decision in *Love and Thoms* case reflects Aboriginal connection to the land’ *ABC News* (11 Feb 2020) <<https://www.abc.net.au/news/2020-02-12/high-court-love-and-thoms-aboriginal-connection-to-land/1195466>> accessed 29 January 2025.

¹¹¹ *Love and Thoms v Commonwealth of Australia* (n 109), [453-454] (Edelmann J).

¹¹² Attorney-General, ‘Terms of Reference. Review of the Future Acts Regime’ 2024 <<https://www.alrc.gov.au/inquiry/review-of-the-future-acts-regime/terms-of-reference/>> 17 September 2024.

¹¹³ See Keon-Cohen, ‘From Euphoria to Extinguishment to Co-existence?’ (n 106).

¹¹⁴ See De Villiers, ‘Life after the Failed Voice: Options for Aboriginal Self-determination in Australia’ (n 77).

¹¹⁵ For a timeline of the settlement process, see Government of Western Australia, ‘South West Native Title Settlement timeline’ (*WA.gov.au*, 2019) <<https://www.wa.gov.au/government/publications/south-west-native-title-settlement-timeline>> 23 October 2024.

¹¹⁶ Harry Hobbs and George Williams, ‘The Noongar Settlement: Australia’s First Treaty’ (2018) 40 *Sydney Law Review* 1.

¹¹⁷ *Bennell v State of Western Australia* (2006) 153 FCR 120, (*Bennell v WA*).

¹¹⁸ *Bodney v Bennell* (2008) 167 FCR 84, (*Bodney v Bennell*).

Council (SWALSC), the representative body for the claimants, agreed to engage in negotiations. The resulting settlement agreement consisted of the Noongar people relinquishing all native title claims in exchange for a package of rights and benefits. This settlement, affecting around 200,000 square kilometres and approximately 30,000 Noongar people, is the largest native title settlement in Australia, covering the entire south-west of Western Australia.¹¹⁹

Officially named the “South West Settlement”, it consists of three core legal documents: the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016 (WA)* (‘Noongar Recognition Act’), the *Land Administration (South West Native Title Settlement) Act 2016 (WA)*, and six Indigenous Land Use Agreements, one for each sub-community.¹²⁰ Through the *Noongar Recognition Act*, the Parliament of Western Australia formally recognised the Noongar people as the traditional owners of the South West, as well as their identity and culture. It is the first Australian statute to carry an Aboriginal language title and to include a statement in an Aboriginal language, both followed by the English translation.¹²¹

In addition, the settlement installs a complex of ‘corporations’, formally registered as entities under private law; one for each of the six local communities, and a central services corporation (SWALSC). The corporations are legally set up according to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)* (‘CATSI Act’). Across Australia, more than 3000 Aboriginal corporations set up under the *CATSI Act* represent a modest system of localised Aboriginal governance.¹²² However, the Noongar corporations set a precedent in terms of their competences and scope.¹²³ The functions allocated to the Noongar corporations transcend native title rights; on top of land management powers, they enable the Noongar people to administer their distinct cultural, heritage and linguistic interests in a non-territorial manner.¹²⁴

Moreover, the settlement foresees the possibility for the corporations to engage in service agreements with the State or the Commonwealth. Through service agreements, the corporations can assume the responsibility to deliver certain public services, for example, in health, education, and conservation matters;¹²⁵ this could obviously include the teaching of the Noongar language and the promotion of language revitalisation projects. As specified in the Regional Corporation Guide, the regional corporations are tasked with maintaining, protecting, promoting, and supporting their culture, customs, heritage, identity, lore, and language.¹²⁶ Under the Community Development Framework (CDF), the regional corporations have the role of promoting the Noongar language through community development projects.¹²⁷ Moreover, the central services corporation is endowed with extensive powers to support the regional corporations, also in the promotion of the Noongar language.¹²⁸

The agreement includes a consistent financial package and binds the WA government to provide stable funding to the *Noongar Boojda Trust*.¹²⁹ The settlement has the potential to break new ground for the

¹¹⁹ Bertus De Villiers, ‘Privatised Autonomy for the Noongar People of Australia: A New Model for Indigenous Self-Government’ in Liat Klain-Gabbay (ed), *Indigenous, Aboriginal, Fugitive and Ethnic Groups Around the Globe* (IntechOpen 2019) 2.

¹²⁰ *Ibid* Error! Bookmark not defined. 19.

¹²¹ Julian R Murphy, ‘Legislating in language: Indigenous languages in parliamentary debate, legislation and statutory interpretation’ (2020) 43 *University of New South Wales Law Journal* 1006, 1012.

¹²² De Villiers, ‘Life after the Failed Voice: Options for Aboriginal Self-determination in Australia’ (n 77) 20.

¹²³ De Villiers, ‘Privatised Autonomy for the Noongar People of Australia: A New Model for Indigenous Self-Government’ (n 119) 9.

¹²⁴ *Ibid* 16.

¹²⁵ *Ibid* 23.

¹²⁶ Department of the Premier and Cabinet, Government of Western Australia, ‘South West Native Title Settlement - Regional Corporation Guide’ (*WA.gov.au*, 2023) <<https://www.wa.gov.au/system/files/2024-01/swsregionalcorporationguide.PDF>> accessed 30 October 2024.

¹²⁷ The Community Development Framework is a commitment between the Noongar People and the WA Government to a set of principles, priorities, and governance arrangement. Government of Western Australia, ‘Community Development Framework - Annexure T to the South West Native Title Settlement Indigenous Land Use Agreements’ 2015) <<https://www.wa.gov.au/government/publications/community-development-south-west-native-title-settlement>> accessed 30 October 2024.

¹²⁸ ‘The Rule Book of South West Aboriginal Land & Sea Council Aboriginal Corporation’, (Rule book, 12 December 2023)

<<https://www.noongar.org.au/formaldocuments>> accessed 30 October 2024.

¹²⁹ De Villiers, ‘Privatised Autonomy for the Noongar People of Australia: A New Model for Indigenous Self-Government’ (n 119) 25.

Noongar people, and for First Nations groups more broadly, in terms of self-governing powers and autonomy.¹³⁰ Critics have warned that the agreement proliferates the subjugation of First Nations' worldviews under a settler-colonial logic and legal structure.¹³¹ However, if implemented in a constructive spirit, the settlement framework presents considerable prospects to evolve towards a modest form of non-territorial autonomy. Whether it will be used to actively promote linguistic interests is yet to be seen, but scope for action is set. It seems too early to speak of the corporations as a "fourth level of government"¹³²; nevertheless, they represent a promising avenue for First Nations language-related concerns to find their way into the Australian legal system. Pragmatically speaking, such a decentralised approach may be the most expedient strategy to promote the linguistic rights of First Nations people in Australia.

Conclusion and way forward

Despite some recent developments on state and territory level, First Nations language rights have still not entered the Australian legal system. Partially, this can be explained by the absence of an Australia-wide Commonwealth human rights instrument. Fundamental rights need to be firmly established in a legal system, as a prerequisite for the respect of linguistic minority rights.¹³³ At the same time, general human rights provisions are not always the panacea to protect the rights of minority language speakers. Nevertheless, it has been argued that language rights intersect with many other fundamental rights; therefore, a legally enshrined principle of substantial equality, preferably in combination with a provision on cultural rights and spelled-out rights to education, freedom of expression and association, would offer more consistent legal protection to Indigenous language concerns. A domestic human rights instrument – whether constitutionally entrenched or legislated – seems foundational to pave the way for a more just and reconciled relationship between Indigenous and non-Indigenous people, including in terms of languages. However, under the current circumstances, any constitutional reform seems highly unlikely. Likewise, despite support from the Australian public for a human rights act,¹³⁴ the political chances for a human rights bill to succeed in Parliament are low.

In the absence of such a legal foundation, Australia's invisible language policy will continue to keep Indigenous languages at the margins, resulting in continuous decline.¹³⁵ Leaving the task of restoring Indigenous languages solely upon the community and private sector, will hardly suffice. The current picture of statutory provisions, read together with case law, presents small glimmers of hope for establishing a right to maintain and revitalise First Nations languages. Whether strategic litigation could bring meaningful results is an open question. The challenge is to identify common law principles that recognise the importance of language to cultural identity and equality. Some advocates hold that the "law of Australia is well able to accommodate the shifts in our conceptions of fairness that progress with our growing appreciation of systemic injustices that plague marginalised members of our society,

¹³⁰ Bertus De Villiers, 'Breaking New Ground for Indigenous Non-territorial, Cultural Self-Government: The Noongar Settlement in Australia' in Bertus de Villiers (ed), *Navigating the Unknown: Essays on Selected Case Studies about the Rights of Minorities* (Brill | Nijhoff 2022) 138; Bertus De Villiers, 'Chasing The Dream – Self-Determination on a Non-territorial Basis for the Noongar Traditional Owners in the South West of Australia' (2020) 27 *International Journal on Minority and Group Rights* 171.

¹³¹ Paul J. Dornan, 'Australian Indigenous Policy in the Neoliberal Age: Reassessing "Indigenous" Responsibility' (PhD, Swinburne University of Technology 2020) 145-146.

¹³² De Villiers, 'Life after the Failed Voice: Options for Aboriginal Self-determination in Australia' (n 77) 23.

¹³³ Giovanni Poggeschi, *Language Rights and Duties in the Evolution of Public Law*, vol 23 (Schriftenreihe der Europäischen Akademie Bozen, Bereich »Minderheiten und Autonomien«, 1 edn, Nomos Verlagsgesellschaft mbH & Co. KG 2013) 272.

¹³⁴ Chen, 'If at First You Don't Succeed... A Critique of the Australian Human Rights Act Proposal and the Inquiry into Australia's Human Rights Framework Thematic Developments in Rights, Freedoms and Accountability' (n 28) 366-367.

¹³⁵ Adriano Truscott and Ian Malcolm, 'Closing the policy-practice gap: Making Indigenous language policy more than empty rhetoric' in John Robert Hobson and others (eds), *Re-awakening languages: Theory and practice in the revitalisation of Australia's Indigenous languages* (Sydney University Press 2010).

including many First Nations people.”¹³⁶ Gradual change through judicial interpretation may be possible, but at a very slow pace.

The finding of the Constitutional Commission in 1988 seems still valid, namely that “(...) the faith which many people appear to have in the common law as a safeguard of their freedoms is misplaced.”¹³⁷ Ultimately, it seems indispensable to enshrine at least a basic provision about the fundamental value of Aboriginal languages, as a guiding principle, to facilitate the recognition of language rights in the common law. Enacting ordinary legislation at the state and territory level can be an important step. Following the example of New South Wales, advocating for language legislation at the state and territory level may indeed be a promising strategy, under the current circumstances. The Aboriginal Languages Act 2017 (NSW) is a unique example in the Australian context for how to legally acknowledge the government's role in the loss of First Nations languages and to enable First Nations to protect and revitalise their languages. Another path could be to promote the implementation of the relevant provisions on cultural rights in the state and territory human rights acts. In the meantime, however, Aboriginal corporations such as the Noongar corporations might become the pioneers for language rights in practice. Of course, further research into the implementation of negotiated settlements is needed to assess this possibility.

Finally, to bring the Australian legal system in line with international human rights, the right to use and revive First Nations languages needs to be considered in the public arena of competing rights. From a human rights perspective, this requires enshrining Indigenous language rights into the law – initially, at least at the subnational level, but as enforceable rights that First Nations people can exercise on the ground, not as mere aspirational goals. Arguably, the future of First Nations languages depends on whether a coherent, systematic and rights-based framework is adopted. In line with the definition of language rights by Mancini and De Witte cited earlier, a constitutional instrument or an ordinary legislation which implements international law on language rights would be best suited to provide long-term protection of such an invaluable asset of Australian society. However, taking a pragmatic approach, what cannot be achieved at the moment at the constitutional or Commonwealth level, may be possible on the state and territory or regional level: Implementing stronger forms of First Nations cultural autonomy and self-governance could enable better language protection and revitalisation through Aboriginal corporations – and give hope for transforming the law from a bottom-up perspective.

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¹³⁶ *Murray v Feast* (n 66) [172] (Solomon J).

¹³⁷ Australian Constitutional Commission, *Final Report of the Constitutional Commission* (Report, 1988) vol 1, para 9.102.

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