Submission to Yoorrook Justice Commission
Land Injustice Investigation

It is with respect and a commitment to the pursuit of justice that I make this submission to the Yoorrook Justice Commission (**Yoorrook**) in response to its call for submissions to assist Yoorrook with its land injustice investigation. I make this submission in my individual capacity as a citizen of the State of Victoria, Australia (**State**). My submission is informed by my work as a current Victorian legal practitioner and my scholarly activities in property law and theory, which I undertake as a current PhD candidate at Southern Cross University. My submission has not been approved or endorsed by any person or organisation with which I am associated.

By my submission I hope to assist Yoorrook with its investigation of land injustice by sharing most particularly my views on property, human-land relationships, and how these are relevant to the notion of personhood. It is my submission that property is an appropriate paradigm through which to investigate the issue of land injustice and that the Personhood Theory of Property can be used both to understand the nature of property and how it interacts with personhood. Without being specifically directed to them, I consider that my submission may respond to the following priority themes and key issues (or elements within) as identified in Yoorrook's call for submissions:

- the centrality of country to First Peoples' identity, culture, language, physical and spiritual wellbeing and economic opportunities and the disconnection and devastation wrought by the forced taking of their country;

- the past and present benefits obtained by the colonising state, other entities, land holders and settlers through their dispossession of First Peoples of their country;

- ways to address violations of the right to self-determination and human and cultural rights and provide redress for past, present and ongoing injustice in relation to First Peoples' dispossession of their country now collectively known as the State;

- the way institutions, legislation, and policies have adapted over time to deny First Peoples' rights to their lands;

- the effectiveness of current recognition and legislative regimes including the *Native Title Act 1993* (Cth), *Aboriginal Heritage Act 2006* (Vic) and the *Traditional Owner Settlement Act 2010* (Vic) and their impact on the expression of First Peoples' rights, obligations and interests; and

- how rights of First Peoples might be reflected in State law, administration and practice.

In its current form my submission is not intended to offer firm or final solutions for the relief of land injustice. Rather, it is offered to Yoorrook as a contribution to our shared and evolving knowledge and as a means of communicating ideas that might warrant further consideration as part of Yoorrook's land injustice investigation and/or the broader treaty-making process.

ACKNOWLEDGMENTS

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I acknowledge and pay my respects to the First Peoples of the land, waters, sky and resources (collectively 'land') in what is now known as the State. I also acknowledge the importance of the connection between First Peoples and the land as 'country'[1] and that colonisation of the State, which generally operated to physically remove First People from the land and thereafter deny them access to it, disrupted this connection. I accept that cultural knowledge, practices, and customs of First Peoples have been significantly undermined by colonisation. I note the claim by Yoorrook that "First Peoples have never ceded their sovereignty to their land." I support the truth-telling process Yoorrook is facilitating and, more specifically and as a part of this process, its land injustice investigation. I also support the treaty-making process that is contemplated by the *Advancing The Treaty Process With Aboriginal Victorians Act 2018* (Vic) and associated legislation.

SUMMARY OF SUBMISSION

In summary and subject to my full submissions below, I respectfully submit to Yoorrook that:

1. the investigation should not characterise land injustice by reference to, or conflate it with, the issue of sovereignty. That First Peoples have (and may continue to) experience land injustice does not depend upon establishing that the State was otherwise than lawfully settled. The land injustice investigation should therefore proceed on the basis that sovereignty vests solely in the Crown in right of the State;

2. while First Peoples do not traditionally characterise their connection to land as 'property' in the typically understood Western sense of that term, property is a useful paradigm through which to consider the issue of land injustice. Property can be understood as being centrally concerned with the recognition and regulation of human-thing relationships including, relevantly, the relationship between humans and land. The human-land relationship is of fundamental importance to personhood. Personhood is the state of being in which the human can realise what she or he inherently is, and it is marked by a condition of freedom which manifests as, among other things, cultural and spiritual expression. As an all-pervasive institution of the State, property provides opportunities for the identification of land injustice and a means by which it might be addressed;

3. the Personhood Theory is useful for understanding the nature of property, how the relationship (connection) between humans and land can be recognised and regulated as property, and how the disruption of this relationship as a consequence of colonisation of the State has impacted, and may continue to impact, the personhood of First Peoples. The theory can also be used to identify ways for the restoration of First Peoples' personhood and, correspondingly, how the laws of the State pertaining to property might respond to support that outcome;

4. the Personhood Theory generally supports the conclusion that the disruption of the connection between First People and the lands in which they feel themselves to be constituted is a form of land injustice. The injustice is exacerbated, and indeed perpetuated, to the extent that institutions, legislation, and policies of the State operate to deny access to land and, by extension, to the opportunities for the expression of the cultural knowledge, practices, and customs of First Peoples. The Personhood Theory supports, and provides justification for, the reform of State legislation and policy to

[1] Martuwarra RiverOfLife *et al,* 'Yoongoorrookoo' (2021), 30(3), *Griffith Law Review,* 505 DOI: 10.1080/10383441.2021.1996882

the extent that it is identified as operating to deny or otherwise frustrate the expression of personhood by First Peoples; and

5. it is likely that the existing institutions, legislation, and policies of (or associated with) the State can be engaged to relieve land injustice for First Peoples.

CLARIFYING USE OF THE TERM 'LAND INJUSTICE' AND A COMMENT ON THE ISSUE OF SOVEREIGNTY

Yoorrook does not define the term 'land injustice' in its call for submissions except to note that it means "…systemic injustice experienced by First Peoples in relation to their land…". The term 'injustice' is key, and it generally connotes an absence of 'justice'. Neither of these terms have a precise or universally agreed meaning and are to some extent context dependent. With a view to ensuring that my submission is properly formulated and received, I wish to clarify how I have understood and used the term 'land injustice'.

The State, and the Federal Commonwealth of Australia of which it forms a part, is founded on the rule of law.[2] There are many tenets of this rule, including that the laws applicable to a jurisdiction are properly made, stated clearly and with certainty, and that they are properly administered and enforced. Equality before such laws is a fundamental tenet of the rule of law.[3] It is a philosophically informed political ideal that is intended to protect all citizens of the State[4] by the promotion of 'justice' for all citizens of the State.[5] The term 'justice', then, might be understood as being treated fairly in accordance with the laws of the State. It is an 'injustice' to be treated otherwise.

Such a meaning of 'injustice' proceeds on the basis, and indeed assumes, that the laws of the State are themselves 'just'. In the context of the State, assurance of the justness of laws is generally to be found in the democratic and legal processes by which the laws come into existence. It is acknowledged that, for First Peoples, such assurance may not equate to 'justice'. Indeed, by asserting a claim of sovereignty, as Yoorrook does, First Peoples necessarily dispute the democratic and legal processes through which laws of the State are promulgated because they do not wholly accept the universal sovereignty (and perhaps legitimacy) of the Crown in right of the State itself. By this submission I do not propose to deal in detail with the issue of sovereignty. It is a complicated issue that I accept is a matter of great and ongoing importance for many First Peoples.[6] It is necessary, however, to say something of the issue of sovereignty since it appears to me directly relevant to, and indeed necessary for, the investigation of land injustice by Yoorrook.

It is acknowledged that many First Peoples feel aggrieved by the act of colonisation and the circumstances by which it occurred in this State. It is my submission that these sentiments, certainly as regards to the circumstances of colonisation, are broadly shared by most other citizens of the State; it is increasingly well known, for example, that the act of colonisation involved the exploitation and subjugation of First Peoples using the most destructive, violent, and sometimes lethal of means. As Justice

[2] Richard Stewart, 'The self-represented litigant: a challenge to justice' (2011) 20(3), *Journal of Judicial Administration,* p150-151; see also Parliamentary Education Office accessible at: https://peo.gov.au/understand-our-parliament/how-parliament-works/system-of-government/rule-of-law/
[3] Rule of Law Institute of Australia, 'No One is Above the Law' https://www.ruleoflaw.org.au/principles/equality-before-the-law/
[4] Steven Rares, 'What is a quality judiciary?' (2011) 20(3), *Journal of Judicial Administration,* p133
[5] Peter Gillies, *Business Law*, (The Federation Press, 8th ed, 1997), p3
[6] Julie Cassidy, 'The Impact of the Conquered/Settled Distinction regarding the Acquisition of Sovereignty in Australia' (2004), 8, *Southern Cross University Law Review,* p3

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Blackburn acknowledged in *Milirrpum and others v Nabalco Pty Ltd,* "…everyone knows that the white race has a great deal to be ashamed of."[7]

That illegality was a feature of the way colonisation happened in this State and elsewhere cannot reasonably be doubted. That fact, however, does not of itself translate to the conclusion suggested by some that the colonisation of the State was from the outset illegal, or permit us to proceed on the basis that it remains so.[8] While issues pertaining to sovereignty might be explored as part of a broader discussion, including as a part of those associated with treaty, a meaningful investigation of land injustice by Yoorrook should proceed on the basis that sovereignty is a resolved issue in legal terms. It is my respectful submission that, at law, the issue of sovereignty is sufficiently known and clear and that land injustice should be investigated on that basis. Below, and in a manner too brief to explore the matter fully, I have set out my understanding of the current legal position on sovereignty of the Crown in right of the State.

THE ISSUE OF SOVEREIGNTY

The act of colonisation of the State must be considered in the geo-political and social context of its time. As is well known, it was a time when the seafaring peoples particularly from the northern hemisphere were in search of land in the southern hemisphere, and specifically the great expanse of the land now known as Australia. Motivated by commerce and the desire for wealth as much as anything else, these people were searching for new territory to control and exploit.[9] That these people would find the land of Australia and thereupon encounter the First Peoples who had lived here for thousands of generations was practically certain. And when proper is regard is had to the prevailing knowledge and attitudes of the time, which were reflected in the laws (and lore) at all levels and on all sides, the confrontation between northern hemisphere peoples and First Peoples was always going to be difficult, if not to the point of devastating, for all concerned.[10] The truth, which we must acknowledge, is that the British peoples of the mid-18th century were never going to recognise the First Peoples they encountered as their equals. They did not have the knowledge to recognise the highly developed social rules and customs by which First People lived[11] and, probably, they were not minded to do so since that would have been contrary to the benefits that colonisation clearly bestowed upon the British Crown. The British intended to claim this land and to take it. Despite the instruction to Captain Cook to take the land "…with the consent of the natives" [12] and that, per the commission subsequently given to Governor Phillip, they should be lived with without interruption "in amity and kindness",[13] history clearly shows that, in general terms, the British were never going to tolerate any form of resistance from First Peoples. Importantly, the law of the time did not require the British to do so.

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[7] *Milirrpum and others v Nabalco Pty Ltd and The Commonwealth of Australia* (1970) 17 FLR 141, p256
[8] See for example Tony Wright, 'A people torn apart by bloody dispossession and disease', *The Age*, 10 October 2021; Victorian Aboriginal Child Care Agency, VACCA Discussion Paper on treaty, self-determination and the Aboriginal community-controlled service sector, accessed from https://www.vacca.org/page/resources/treaty-resources, 16 November 2023
[9] Georg W. F. Hegel, *Philosophy of Right* (S.W Dyde, Trans.) (George Bell and Sons, 1896 (Original work published 1820), para 247; Jan Kociumbas, The Oxford History of Australia: Possessions 1770-1860, (Oxford University Press, 1992), p64
[10] Geoffrey Partington, 'Thoughts on Terra Nullius', (2007) 19, *Upholding the Australian Constitution: The Samuel Griffith Society Proceedings,* accessed at https://static1.squarespace.com/static/596ef6aec534a5c54429ed9e/t/5c9d76219140b781bed96b74/1553823268546/v19chap11.pdf
[11] Greta Bird, *The Process of Law in Australia*, (Butterworths, 2nd Ed, 1993), p10
[12] James Cook, *The Journals* Phillip Edwards ed.), (Penguin Books, 1999) Intro, p11
[13] British Government, Governor Phillip's Instructions (1787), Sydney: The Library Committee of the Commonwealth Parliament quoted in Raeburn T, Sale K, Saunders P, Doyle AK, 'Aboriginal Australian mental health during the first 100 years of colonization, 1788–1888: a historical review of nineteenth-century documents' 2022 33(1), *History of Psychiatry*. doi:10.1177/0957154X211053208

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In 1788, and still in 1835 when the infamous John Batman made his purported treaty with the Kulin Peoples,[14] the doctrine of discovery was a recognised and accepted principle of international law.[15] It provided a legal basis for mostly Christian European nations to claim sovereignty and associated rights and interests in and over the lands they 'discovered'. The doctrine of discovery has been asserted as a legal basis upon which Australia, and thus the State, was settled by the British.[16] While the doctrine remains a recognised legal principle it, much like the notion of *terra nullius* upon which it materially depends for its application, almost certainly does not command general support throughout the world today. But it had support at the time of colonisation of the State. At law, then, Australia (and thus the State) was legally 'settled' by its occupation by the British. It is thus unnecessary to find that First Peoples were either conquered or that they ceded to the British, these being other legally recognised ways of acquiring sovereignty.[17] The absence of any recognised treaty with First Peoples does not disturb the legal basis of British sovereignty. That sovereignty now vests in the Commonwealth of Australia as an independent and federal nation.[18]

Settlement by occupation is the legal basis of sovereignty of the British Crown and, as Yoorrook will be aware, this was confirmed by the High Court of Australia in *Mabo and Others v Queensland (No. 2)* [1992] HCA 23.[19] The High Court said in that decision that, from at least the time of the reading of the commission pursuant to which the colony of New South Wales was founded on 7 February 1788, there was a change in sovereignty.[20] At that time sovereignty was acquired by the Crown and, as Kiefel CJ observed in *Love and Thoms v Commonwealth of Australia* [2020] HCA 3, *Mabo* confirmed that all persons then present in Australia, including First Peoples, became subjects of the Crown.[21]

The rejection by the High Court of the fiction that, on settlement, the lands of Australia were *terra nullius* is widely known. The legal effects and consequences of that rejection appear to be relatively less so, and at times misunderstood.[22] It is now part of the law of the State that First Peoples inhabited the lands upon which the State is founded at the time of British settlement. As full persons before the law, First Peoples had, and it can be recognised that they continue to have, rights and interest in the lands of the State. The High Court confirmed in *Mabo* that these rights and interests "survived the change in sovereignty"[23] and, importantly, that they do not rely on the radical title of the Crown (which it obtained on its acquisition of sovereignty) or upon any grant the Crown makes on the basis of that ultimate form of title.[24] In *Mabo,* the High Court confirmed that the common law as it was received into Australia recognised the rights and interests of First Peoples to land; these rights and interests are typically known and referred to as 'native title'. From the outset, therefore, native title was thus a part of Australian common law, and it is expressly recognised as such in the preamble to the *Native Title Act 1993* (Cth).

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[14] Robert Kenny, 'Tricks or Treats: a case study for Kulin knowing in Batman's Treaty', (2008) 5(2), *History Australia* 38.1
[15] Robert Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, (Oxford University Press, 2010), Chapter 1
[16] Robert Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, (Oxford University Press, 2010), Chapter 7
[17] *Mabo v Queensland (No 2)* [1992] HCA 23 per Dean and Gaudron JJ, para [33]
[18] *Australia Act 1986* (Cth); *Australia Act 1986* (UK)
[19] *Mabo v Queensland (No 2)* [1992] HCA 23 per Dean and Gaudron JJ, para [4]; Ulla Secher, 'The Mabo Decision – Preserving the Distinction between Settled and Conquered or Ceded Territories', (2005) 24(1), *University of Queensland Law Journal,* p35; Greta Bird, The Process of Law in Australia, (Butterworths, 2nd Ed, 1993), p12
[20] *Mabo v Queensland (No 2)* [1992] HCA 23 per Brennan J, para [62]
[21] Love and Thoms v Commonwealth of Australia [2020] HCA 3, per Kiefel CJ, para [9]
[22] Ulla Secher, 'The Mabo Decision – Preserving the Distinction between Settled and Conquered or Ceded Territories', (2005) 24(1), *University of Queensland Law Journal,* p35
[23] *Mabo v Queensland (No 2)* [1992] HCA 23 per Brennan J para [62]
[24] *Mabo v Queensland (No 2)* [1992] HCA 23 per Brennan J para [48-49]

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Notwithstanding its status as a landmark decision which corrected past wrongs, particularly those which flowed from the offensive fiction of *terra nullius*, *Mabo* is a decision that is materially about, and which is confined to, rights and interests in land that may be held by First Peoples.[25] More specifically, *Mabo* explains the nature and extent of native title. Nothing in *Mabo* or any case since has disturbed the legal basis upon which Britain claimed sovereignty of the lands of Australia, including the State. Indeed the High Court confirmed in *Mabo* that no court of this land has jurisdiction to do so,[26] thus maintaining earlier decisions on this point, including *Coe v Commonwealth* [1979] HCA 68.[27] In that decision of the High Court, and on the issue of sovereignty specifically, Justice Gibbs held that *"[T]he contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain."* [28]

It is my respectful submission, therefore, that the land injustice investigation by Yoorrook should not conflate the issues of native title, colonisation, and sovereignty.[29] Land injustice can be identified and redressed without needing to successfully prosecute the claim of illegality of either colonisation or sovereignty. At law, sovereignty now vests solely in the Crown in right of the State. Neither the existence of the State nor the laws promulgated by it can properly be maintained as unlawful. It is not my submission to Yoorrook that the change in sovereignty by virtue of colonisation was morally or ethically 'just'; it is clearly the case that colonisation involved taking lands which belonged to First Peoples (and, perhaps more accurately, to which they belonged). I submit only that, based on the law as it currently stands, land injustice must be defined, identified, and redressed within the context of the lawfully settled and sovereign State.[30] As Father Frank Brennan has remarked, "sovereignty as defined in international law and as understood by Australian parliamentarians is non-negotiable…"[31]

In this submission I have understood and used the term 'land injustice' to mean the existence and/or effects of:

(a) institutions, legislation, and/or policies of (or associated with) the State which, by their operation or otherwise, prevent First Peoples from exercising their particular recognised rights and interests in respect of land (i.e. native title); or

(b) institutions, legislation, and/or policies of (or associated with) the State which, by their operation or otherwise, deny or frustrate the relation(s) between First Peoples and the lands in which they feel themselves to be constituted.

These two forms of land injustice may overlap although only First Peoples of the State can experience the first form of land injustice since native title can vest only in them.

PROPERTY AS A PARADIGM FOR THE CONSIDERATION OF LAND INJUSTICE

I acknowledge that, for First Peoples, the Western concept of 'property' as commonly understood seems an ill-fitting one. This is only truer of the concomitant notion of 'ownership', certainly as it relates to land.[32] It is my understanding that no system of law (or lore) maintained and practiced by First Peoples would include any such concepts for land because it is conceived as a "sacred

[25] Love and Thoms v Commonwealth of Australia [2020] HCA 3, per Kiefel CJ, para [45]
[26] *Mabo v Queensland (No 2)* [1992] HCA 23 per Brennan J, para [32]
[27] Robert Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, (Oxford University Press, 2010), Chapter 7
[28] *Coe v Commonwealth of Australia and The Government of the United Kingdom of Great Britain and Northern Island* [1979] HCA 68, per Gibbs J, para [12]
[29] Henry Reynolds, *The Law of the Land*, (Penguin Books, 1987), p176-7
[30] Frank Brennan, Sharing the Country, 1991, quoted in Greta Bird, *The Process of Law in Australia*, (Butterworths, 2nd Ed, 1993), p40
[31] Frank Brennan, Sharing the Country, 1991, quoted Greta Bird, *The Process of Law in Australia*, (Butterworths, 2nd Ed, 1993), p40
[32] *Milirrpum and others v Nabalco Pty Ltd and The Commonwealth of Australia* (1970) 17 FLR 141, p270

entity" and "the great mother of all humanity."[33] Mary Graham, a First Nations woman and scholar, has written that "for Aboriginal people, the land is the great teacher; it not only teaches us how to relate to it, but to each other; it suggests a notion of caring for something outside ourselves, something that is in and of nature and that will exist for all time." Evidence that First Peoples "…have a more cogent feeling of obligation to the land than of ownership of it" was accepted by Justice Blackburn in *Milirrpum and others v Nabalco Pty Ltd*.[34] First peoples belong to the land more than it belongs to them, his Honour found, such that it could not be alienated by them.[35] Graham conveys an Aboriginal Worldview of the land as a critical source of meaning. She says of the relationship with land that it is, for First People, the foundation upon which all else relies. And in this respect at least there is to be found some commonality with the Western Worldview of land.

George Shaw, the Irish playwright and activist whose work impacted Western culture for better or worse, wrote of land that it is the question with which we should always start since it was "…so fundamental that if we go wrong on it everything else will go wrong automatically."[36] Like Graham, Shaw recognised that land is critical for the human person. Our relationship to land shapes our being in the world; how we see, relate, and behave in the world and, importantly, if and how and to what extent we are able to move within and through it. It is upon the human-land relationship that, as Graham says, all else relies and it follows that, just as Shaw observed, if it is impaired so too will everything be. I submit to Yoorrook that in the matter of the relationship between humans and land there is to be found complete unity; all humans need a land connection.

Property is a human construct. It is created by humans and they, as they exist within each culture and society, are alone responsible for the forms it takes. In modern societies, property typically takes forms as laws which create rights and duties in respect of 'things'.[37] In the context of property, land can be considered a 'thing', by which is meant only that land is an entity in its own right, but not a human. This characterisation of land, and indeed of all other 'things', accommodates the fact that humans come into relation with the non-human things of the world, just as they do with other humans. While we do not conventionally use the term 'property' to describe relations between human and human, we do use it to so describe relations between humans and things. Property, I submit to Yoorrook, exists to recognise and regulate human-thing relationships.[38]

The human-thing relationship is not a construct.[39] It forms in all its various configurations as an essential element of the human condition. This condition is marked, at least as much as by anything else, by a predilection for things.[40] More than any other animal, humans seek to relate to, and behave with, the external things of the world. In my scholarship, I argue that this predilection is evident in, and can properly be inferred from, the fossil record as it pertains to our own kind. The predilection for things is, I argue, a human universal. As such we can observe it in all human cultures albeit with some degree of variation.[41] This explains why property, in some form or another and whether or not recognised as such, also exists within all human societies. It does so because

[33] Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (1999) *Worldviews: Global Religions, Culture, and Ecology*
[34] *Milirrpum and others v Nabalco Pty Ltd and The Commonwealth of Australia* (1970) 17 FLR 141, p270
[35] *Milirrpum and others v Nabalco Pty Ltd and The Commonwealth of Australia* (1970) 17 FLR 141, p272
[36] George Bernard Shaw, *Everybody's Political What's What*? (Constable and Company Limited, 1944), p7
[37] Richard Stewart, Michael B. Charles, John Page, 'A future with no individual ownership is not a happy one: Property theory shows why' (2023) 152 103209, *Futures,* https://doi.org/10.1016/j.futures.2023.103209.
[38] Richard Stewart, Michael B. Charles, John Page, 'A future with no individual ownership is not a happy one: Property theory shows why' (2023) 152 103209, *Futures,* https://doi.org/10.1016/j.futures.2023.103209.
[39] Richard Stewart, Michael B. Charles, John Page, 'A future with no individual ownership is not a happy one: Property theory shows why' (2023) 152 103209, *Futures,* https://doi.org/10.1016/j.futures.2023.103209.
[40] Richard Stewart, Michael B. Charles, John Page, 'A future with no individual ownership is not a happy one: Property theory shows why' (2023) 152 103209, *Futures,* https://doi.org/10.1016/j.futures.2023.103209.
[41] Steven Pinker, 'The Blank Slate' (2006) 41(1), *The General Psychologist*, p3

humans are conscious of the need to recognise, and very often to regulate within the societal setting, human-thing relationships.[42] Importance of the thing is generally commensurate with its degree of regulation as property and it is readily apparent that land, being essential to our survival, is "fundamentally different" to other things.[43] Property has thus emerged in modern society to regulate, perhaps more than anything else, the human-land relationship.

It is of course necessary to take great care in universalizing the human condition. The failure to do so can result in important aspects of culture being devalued or ignored[44] and, there is little doubt, that there has been a historical tendency to understand the human condition by reference to Western ideals.[45]However erroneous such a tendency might be, it does not make the existence of the human condition any less real. We all share the condition of humanity, of being human. We have a shared 'human-ness', and of it Graham observed that, for First Peoples, it is determined by "…the land, and how we treat it" and that "…the relation between people and land becomes the template for society and social relations."

Graham is right; there is a fundamental connection between land, what we are, how we behave as human persons, and how we live together as such. This connection is a relationship, a human-land relationship, and it is one that plainly has a particular cultural significance for First Peoples. But the human-land relationship can be observed and understood as a human universal – it emerges as part of our shared 'human-ness' and is therefore an aspect of the human condition. [46] The human-land relationship directly impacts the capacity for personhood and how much power we have (or do not have) as human persons. The regulation of power also explains something of why societies make rules concerning the human-land relationship. We can observe these rules, and understand them, as property.

In my submission, then, property is thus a useful paradigm through which to investigate land injustice.

THE PERSONHOOD THEORY OF PROPERTY

I submit that the Personhood Theory of Property (Personhood Theory) may assist Yoorrook to investigate land injustice through the paradigm of property.

A theory is a coherent idea or set of ideas with which to identify, describe, understand and/or critique some phenomena, such as property.[47] The role of a property theory is to explain what property is, the form it takes, how it operates (formally and otherwise), and why property is (or is not) justified.[48]

The Personhood Theory is a discrete theory of property law.[49] It has its genesis in the works of the German philosopher Georg Hegel, most particularly the *Philosophy of Right* which was first published in 1821. The Personhood Theory proceeds on the basis that, more than any other animal, humans relate to, and behave with, the external things of the world. It is by doing so, according

[42] Richard Stewart, Michael B. Charles, John Page, 'A future with no individual ownership is not a happy one: Property theory shows why' (2023) 152 103209, *Futures,* https://doi.org/10.1016/j.futures.2023.103209.
[43] John Page, *Property Diversity and its Implications*, (Taylor and Francis Group, 2017), p148
[44] Iris Marion Young, *Justice and the Politics of Difference,* quoted in M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 2001), p617
[45] Helena Norberg-Hodge, *Ancient Futures* (Local Futures, 2016), p2
[46] Donald Brown, *Human Universals*, (Temple University Press, 1991, p140
[47] Ted Fuller, 'Will small become beautiful' (2000) 32, *Futures*; Gregory Alexander and Eduardo Penalver, *An Introduction to Property Theory,* (Cambridge University Press, 2012), p6
[48] Margaret Radin, 'Property and personhood', (1982) 34(5) Stanford Law Review, p958 https://doi.org/10.2307/1228541
[49] Gregory Alexander and Eduardo Penalver, *An Introduction to Property Theory,* (Cambridge University Press, 2012), p57

to the theory, that the internally located and subjective human person externalises into the objective world that we experience as phenomena. That persons are constituted in things is a core tenet of the Personhood Theory.[50]

Some of the things in which the person feels themselves to be constituted become so bound-up with what and who the person is that to deny the person access to the thing is to deny, in a very real sense, the capacity of the person to exist at all. Personhood is the state of being a person. Simply put, being a person involves realising and developing that which is inherently within us as human beings, including the capacity for thought and contemplation, for cultural expression, for spiritual awareness, for connection to people, place, and all other life. Persons seek order from chaos; they seek meaning and purpose. Freedom is the defining feature of the person and thus of personhood. Persons choose life; they are active in life, they have agency, they make choices, and they bear the consequences of them. It has always been thus for human persons, and we are conscious of this reality. Persons thus know when their personhood is compromised; they feel it intimately, even if they do not fully understand it. And a compromised personhood can (and often will) manifest behaviourally and explain at least something of why a human has failed to flourish in the sense of realising innate potential.

Hegel believed that it was the highest aim of the human to be a person[51] and, centuries before, Aristotle offered that happiness resided in so being.[52] Both philosophers recognised that being a person depends on access to things. The Personhood Theory posits that it is a function of law generally, and of property law specifically, to assure persons access to the things in which they feel themselves to be constituted.[53] Property is justified by the Personhood Theory to the extent that it assures such access. While it maintains a notion of property that promotes classical Western liberal ideals, the Personhood Theory regards property as an institution that exists, at least as much as for any other reason, to promote personhood of individuals and the realisation of the freedom that is innate to that condition of being. Individual freedom is not the chief concern of the Personhood Theory but, rather, the realisation of the conditions within which freedom generally can manifest itself.

I submit that the Personhood Theory aligns particularly well to First Peoples and that it is useful to the consideration of the issue of land injustice by Yoorrook. It is apparent that the identity of First Peoples is "…always embedded in land and defined by their relationships to it…".[54] Land is sacred to First Peoples. It is their teacher, a source of life, of meaning, of right and obligation. Land mediates not just relations between First Peoples but also between them and all other living beings. First Peoples have nothing less than their being in the land, which is to say that they feel themselves to be bound-up with, and constituted in, the land. To be dispossessed of the land, then, was not merely to take some 'thing' away from First Peoples; it was to take them away from themselves, to dispossess them of their personhood.

It is a sad reality that the same acts which dispossessed First Peoples of their personhood fuelled the emergence of the personhood of the first British settlers and, indeed, of the nascent State itself. The devastation wrought upon First Peoples by the forced taking of their land was at least matched by the benefits that accrued to the Crown in consequence of such taking. Land, it can be observed, is central to these movements; as connections between First Peoples and the land were severed, new connections were forming between British settlers and the lands in which they would constitute themselves to become the persons

[50] Margaret Radin, 'Property and personhood', (1982) 34(5) Stanford Law Review, p957 https://doi.org/10.2307/1228541
[51] Georg W. F. Hegel, *Philosophy of Right* (S.W Dyde, Trans.) (George Bell and Sons, 1896 (Original work published 1820), para 35a
[52] Aristotle, The Nicomachean Ethics (H. Rackham, trans). (Wordsworth Edition Limited Aristotle, 1996), p275
[53] Margaret Radin, 'Property and personhood', (1982) 34(5) Stanford Law Review, p958 https://doi.org/10.2307/1228541
[54] Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (1999) *Worldviews: Global Religions, Culture, and Ecology*

they wanted to be. The history of the State is replete with accounts of broken and subjugated settlers escaping that position to emerge and flourish, and land was a key device by which they materially did so. Indeed, I argue, land was formally used for this exact purpose, and this is observable in the land grants by the Crown; its intended function to restore personhood to humans in whom it was considered lacking. The displacement of one peoples by another was not, therefore, merely a matter of number; it was, in a very real sense, a transference of personhood. It involved a deprivation of First Peoples and as much has been acknowledged in law.[55]More than any other theory of property law the Personhood Theory is able to recognise this reality and the land injustice that is a marked feature of it.

The Personhood Theory provides a theoretical basis, grounded in philosophy, law, and science,[56] for the claim that the disruption of the connection with land brought about by dispossession adversely impacts First Peoples. While such impact is not uniquely experienced by First Peoples, their particular cultural and spiritual connection with land means that disruption of the connection, and certainly the severance of it, impacts First Peoples at the most intimate level; it can and does leave First Peoples to exist in a physical world that may be bereft of recognition, meaning, unity and purpose. Alienation is thus an overarching theme of such an existence wherein the emergence and development of the personhood of First Peoples is likely to be undermined and inhibited. In this condition First Peoples are especially exposed, vulnerable, and particularly sensitive to experiencing cultural and social injury and other disadvantage. That First Peoples do experience such outcomes is borne out empirically.[57] To the extent that these outcomes are attributable to institutions, legislation, and/or policies of (or associated with) the State that deny First Peoples access to the lands in which they feel themselves to be constituted, they experience land injustice.

As a theory of property law, the Personhood Theory offers guidance on how the institution of property, which takes form in institutions, legislation, and/or policies of (or associated with) of the sovereign State, might respond to land injustice. The theory can also be applied to determine how competing claims to land, which are likely to emerge during any process of redress, might be determined.

ADDRESSING LAND INJUSTICE

I submit to Yoorrook that land is central to our forward movement as a reconciled peoples existing within the State. While the inherent rationality of the State as an entity is not to be found principally in its role of preserving persons and their property,[58] it is nevertheless a function of the State to do so. Via the institutions, legislation, and/or policies of (or associated with) of the State, land injustice can be addressed by assuring that First Peoples have a connection with the lands in which they feel themselves to be constituted and to which they culturally and spiritually belong.

Law is the principal means by which access to land can be assured. Apart from the common law of native title and Commonwealth legislation which recognises it, numerous statutes of the State deal with, or otherwise pertain to, land and/or rights to a connection with land. These include the following:

- Constitution Act 1975
- Charter Of Human Rights and Responsibilities Act 2006

[55] *Milirrpum and others v Nabalco Pty Ltd and The Commonwealth of Australia* (1970) 17 FLR 141, p256
[56] Richard Stewart, Michael B. Charles, John Page, 'A future with no individual ownership is not a happy one: Property theory shows why' (2023) 152 103209, *Futures,* https://doi.org/10.1016/j.futures.2023.103209.
[57] *Fisher v Commonwealth of Australia* [2023] FCAFC 106
[58] Georg W. F. Hegel, Philosophy of Right (S.W Dyde, Trans.) (George Bell and Sons, 1896 (Original work published 1820), para 277

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- Crown Land (Reserves) Act 1978
- Land Act 1958
- Property Law Act 1958
- Forests Act 1958
- Cultural And Recreational Lands Act 1963
- National Parks Act 1975
- Conservation, Forests And Lands Act 1987
- Heritage Rivers Act 1992
- Heritage Act 2017
- Catchment And Land Protection Act 1994
- Game Management Authority Act 2014
- Wildlife Act 1975
- Parks Victoria Act 2018
- Yarra River Protection (Wilip-Gin Birrarung Murron) Act 2017
- Aboriginal Lands Act 1991
- Traditional Owner Settlement Act 2010
- Aboriginal Heritage Act 2006
- Housing Act 1983
- Advancing The Treaty Process With Aboriginal Victorians Act 2018

One aspect of an assessment of these Acts for their capacity to address land injustice for First Peoples should be, I submit, their capacity to accommodate what property scholar John Page has called 'property diversity'. The 'property diversity' advanced by Page encourages us to see that "… a plethora of rights, uses and claims overlap, compete and co-exist amidst interconnective mosaics of private, public and common interests in land."[59] It is by seeing these diverse rights, uses and claims, or the potential for them, that we can likely identify opportunities to maximise land access for First Peoples whilst not materially undermining existing human-land relationships. An example of this approach is the amendment of the law in 2021 to generally remove the prohibition on camping on some public lands which have water frontages, thereby increasing access to such lands.[60] Almost certainly there are as yet unrealised opportunities to do similarly in other contexts and perhaps even to go further with a view to realising property diversity more fully.

The relief of land injustice does not require us to abandon property or any of its particular forms, including the notion of ownership. Rather, I submit, we need to see and understand property for what it is and, importantly, that with which property is centrally concerned. Property is comprised of the legal rights and duties in respect of human-thing relationships with an aim of regulating them.[61] Property is centrally concerned with these human-thing relationships, including relationships/connections with land, which

[59] John Page, *Property Diversity and its Implications*, (Taylor and Francis Group, 2017), p148
[60] *Parks and Crown Land Legislation Amendment Act 2020* (Vic)
[61] Richard Stewart, Michael B. Charles, John Page, 'A future with no individual ownership is not a happy one: Property theory shows why' (2023) 152 103209, *Futures,* https://doi.org/10.1016/j.futures.2023.103209.

are themselves diverse in their form, nature, and extent.[62] Different human-land relationships can co-exist and doing so may be conducive to both the wellbeing of humans and land. Mary Graham has suggested that it is by establishing human-land relationships which permit the land to be looked after and cared for is a means by which we can promote the movement forward. Without rejecting ownership as a property concept, Graham sees these connections being formed "…via locally-based, inclusive, non-political, strategy-based frameworks." I have argued elsewhere[63] that property and its concomitant ownership is broad enough to accommodate property diversity, including of the kind Mary Graham envisages. Despite the prevailing belief otherwise, ownership is about more than exclusive access. Moving forward, we can use property to recognise and regulate the types of human-land relationships not only to relieve land injustice for First Peoples, but to maximise the personhood of all citizens while at the same time taking greater care of the lands upon which we all live and to which we all connect, whether consciously or otherwise.

With restoring the connection between First Peoples and the land come the opportunities for the fuller (re)emergence of cultural knowledge, practices, and customs that are intimately founded in, and involve, the land.[64] This would likely have benefits for the State and all its citizens.

THE STATE AND OUR FORWARD MOVEMENT

My final submission relates more generally to the State and to the movement forward. It is trite to observe that the movement forward towards unity and reconciliation requires that we recognise historical injustice and correct for it to the extent possible. To this end, we should recognise the effects of colonisation on First Peoples and that, certainly as concerns their cultural knowledge, practices, and customs, these effects have generally been devastating. The disconnection of First Peoples from the lands to which they belong has been, and may continue to be, a significant cause of this effect and it has operated to undermine the personhood of First Peoples. The Personhood Theory helps us to understand why. Furthermore, we should recognise that the knowledge and attitudes that prevailed at the time of colonisation have infused the subsequent 200 years during which State and its institutions were formed. One consequence of this has been that non-First Peoples have not generally taken up opportunities to learn about, and from, First Peoples and their ways of being. This has been to our collective disadvantage. Despite this, however, there has been a movement forward. And, of course, First Peoples have endured the impacts of colonisation and remain a strong and viable peoples. These facts should be recognised and embraced.

In our continued movement forward we must endeavour to avoid the use of language which perpetuates any ideas of strict binaries, such as oppressor and oppressed, coloniser and colonised, etc. We must resist the urge to identify and characterise our own circumstances by reference to those of elsewhere in the world,[65] but rather seek to learn from such circumstances and work toward their relief and betterment where we can. We become a better force in the world, as a State, by being better. And we must recognise that however much the history of our State is marred by colonial violence, that is never the whole story. From the time of the instructions given to Cook and the commission given to Phillip, our history is replete with examples of demonstrable concern for, and goodwill towards, First Peoples, or at least an intention for it. None of it abrogates the reality of colonisation or its impacts, but it does matter, and we should recognise that this as part of the truth-telling process. It is by so recognising that we identify our

[62] John Page, *Property Diversity and its Implications*, (Taylor and Francis Group, 2017), p111
[63] Richard Stewart, Michael B. Charles, John Page, 'A future with no individual ownership is not a happy one: Property theory shows why' (2023) 152 103209, *Futures,* https://doi.org/10.1016/j.futures.2023.103209.
[64] John Page, *Property Diversity and its Implications*, (Taylor and Francis Group, 2017), p152
[65] Marcia Langton, 'Jews and Palestinians deserve Indigenous respect: Marcia Langton', *The Australian*, 15 November 2023, https://www.theaustralian.com.au/commentary/jews-and-palestinians-deserve-indigenous-respect-marcia-langton/news-story/c9320e0eada0d4f10159c469ec28e92e

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shared humanity and more fully engage it as we strive to move forward together. That First Peoples were, are, and may always be culturally different from settlers to the State is readily apparent, but we should not allow that fact to blind us to the sometimes less obvious similarities.[66] We should not forget our shared human-ness, because it is the ultimate source of our strength as human persons and of the State we now together form.

Hegel said of the political 'state' that it is not defined by its history.[67] It is not a work of art. It is, he said, "…in the world, in the sphere of caprice, accident, and error."[68] The State is not beyond the reach of evil because it is formed by, and represents, the universal will of the persons who together form it. The State is therefore capable of the same degree of malevolence, violence, and evil as any person is and yet, in spite of this, it is capable of assuring us all an environment within which we are most able to express the freedom that is inherent in our personhood.[69] Indeed, the State itself has personhood unto itself and is thus something more than civil society, a collection of persons living and ordering lives together.[70] The State has a spirit and, when it is realised, all citizens should see themselves reflected in, and advanced by, the personhood of the State. That is the point towards which we should always seek to move and so doing will be, I submit, necessarily conducive to the relief of land injustice.

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I thank Yoorrook for the opportunity to make this submission and very much hope that it assists in the investigation of land injustice, and with the goal of achieving truth, understanding and transformation more generally. I welcome contact should Yoorrook wish to have my further input or other form of assistance.

Yours faithfully,

[redacted]
Richard Stewart
17 November 2023

[66] Christoph Antweiler, *Our Common Denominator: Human Universals Revisited*, (Berghahn Books, 2016), p2
[67] Georg W. F. Hegel, Philosophy of Right (S.W Dyde, Trans.) (George Bell and Sons, 1896 (Original work published 1820), para 258
[68] Georg W. F. Hegel, Philosophy of Right (S.W Dyde, Trans.) (George Bell and Sons, 1896 (Original work published 1820), para 258a
[69] Georg W. F. Hegel, Philosophy of Right (S.W Dyde, Trans.) (George Bell and Sons, 1896 (Original work published 1820), para 260
[70] Georg W. F. Hegel, Philosophy of Right (S.W Dyde, Trans.) (George Bell and Sons, 1896 (Original work published 1820), para 270