



TREATY

TALKS

Talks given at the ESORA and NAIDOC Week Forums *Treaty! Let's Get It Right!*

by

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WITH MARCIA LANGTON'S INAUGURAL PROFESSORIAL LECTURE

Foreword by

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FOREWORD

By Linda Burney, MP

Treaty Talks is a collection of speeches given at a series of public meetings held in 2000 and 2001. The specific meeting on the subject of a treaty was held at Paddington Town Hall on the 16th May 2001. I was invited to chair the gathering. The room was packed to the rafters. The evening had an air of expectation. It was also an evening of emotion, intellect and humour.

The evening epitomised the fact that in the late 1990s early 2000s, there was a healthy and vibrant public dialogue taking place in our nation about how we saw ourselves and where reconciliation in its fullest sense fits.

Reconciliation is about three things. Firstly, it is about Truth. Secondly, it's about social justice. Without social justice for the First Peoples, there cannot be reconciliation. And finally, it is about rights. The capacity for Aboriginal people is to enjoy not only Citizenship and Human Rights, but also our inherent rights as First Peoples.

A fundamental part of the dialogue was about a settlement between the Australian Government and Aboriginal and Torres Strait Island people. Call it treaty if you wish. In fact this is one of the six recommendations of the final report (which continues to gather dust) of the National Council for Aboriginal Reconciliation to the Federal Parliament.

Clearly, the notion of a treaty at this point is not part of the political landscape. Clearly the dialogue of our collective future identity as a just and decent nation is not being had. But my friends take heart; the debate will never go away. Political leadership changes, public debate and opinion move. Nations must face their Truth. You have just got to hang in, stay involved.

Thank you to ESORA for hanging in, staying involved and pursuing public debate.

This book is testament to your tenacity.

PREFACE

ESORA, the Eastern Suburbs Organisation for Reconciling Australia, was founded in 1997 in response to the Australian Reconciliation Convention's call to all Australians:

not to stand on the sidelines but to demonstrate a commitment to reconciliation by becoming personally involved in reconciliation activities in their neighbourhood, their communities, and in their workplace.

ESORA is a community of people who are committed to supporting Aboriginal people in their struggle for justice. In the Eastern Suburbs of Sydney we acknowledge the traditional custodians of this land, the Cadigal people, who are part of the oldest continuous surviving culture in the world. Our objectives are to promote reconciliation and social justice through personal development and political activism, including education of ourselves and the wider community about Aboriginal issues; building links between Aboriginal and non-Aboriginal people; and the dissemination of information to the wider community.

As part of our many activities over the years, ESORA has organised several large public meetings to help develop community understanding about major issues affecting Aboriginal people. One of these meetings dealt with the subject of Treaty and was held in Paddington Town Hall on 16th May 2001 and chaired by Linda Burney. The speakers were Aden Ridgeway, Sarah Pritchard, Shelley Reys, Jack Beetson, Jason Field and the actor John Howard. It was attended by a standing-room-only crowd and formed part of an active debate that was taking place at the time under the motto *Treaty! Let's Get It Right!* Other meetings that were staged around this period in New South Wales included the NAIDOC Week forum held on 13th July 2001, and similar events at Marrickville, Lane Cove, Newcastle, Hastings, and the University of Technology, Sydney. The previous year, in 2000, Marcia Langton gave her Inaugural Professorial Lecture at the University of Melbourne, which formed a precursor to the 2001 Treaty Forums as well as providing an important overview of the background of Treaty internationally.

These public gatherings succeeded in raising the awareness of Australians about the possibilities and limits of Treaty, probably for the first time since the 1980s when there were various calls for a treaty by Aboriginal people. It is hoped that this book, as a record of some of the talks from both the ESORA and NAIDOC Week *Treaty! Let's Get It Right!* Forums, and Professor Langton's Lecture, will serve to continue a debate which will not go away until justice is finally achieved for Indigenous Australians.

ADEN RIDGEWAY

Tolerance and respect – Australia's reconciliation process

Talk given at the ESORA *Treaty! Let's Get It Right!* Forum, Paddington Town Hall, Sydney, 16 May 2001

Australia, as a Nation, has been struggling with the idea of 'reconciliation' and of dealing with 'unfinished business'. The majority of Australians have indicated their willingness to start afresh in their relationship with Indigenous people, and to re-examine the history of our shared country since colonisation by the British over two centuries ago. There is no question that the concept of reconciliation has been well and truly embraced in Australia after a decade of work by the Council for Aboriginal Reconciliation, which was established by the national Parliament in 1991. Part of that journey was to talk to ordinary Australians, our ancestors and our forefathers – to speak to them to help us in dealing with present day dilemmas.

What has been difficult has been giving some meaning to the ideals of tolerance, respect, understanding and acceptance. And if we are to fully come to terms with these ideals and their relevance to the past it requires a willingness to learn and be prepared to challenge the stereotypes and prejudices that have been handed down over generations. Australia must engage in a new dialogue and begin a new debate concerning a new relationship based upon the idea of cultural diversity, social harmony and the promotion and protection of what is different, not guaranteeing what is the same.

It is at this point that many of the harder issues associated with recognising and giving effect to the broader and fundamental implications of reconciliation emerge. Only a minority of Australians are prepared to countenance real equality which would include:

- The negotiation of a formal agreement or treaty between the government and Indigenous peoples to resolve a range of outstanding matters; and
- The recognition and protection of other fundamental Indigenous rights relating to land and culture in our laws and our Constitution.

In other words, non-Indigenous Australians are keen to embrace the rhetoric of reconciliation, so long as it doesn't require them to take effective action to share the country's abundant resources and political power. Most are not prepared to make any significant adjustments in how they live their lives, or how they see their future. National public polling reveals that few are prepared to really look within themselves to challenge their beliefs and values, for fear of what they might find and for fear of what they think they might lose. Consequently, the *terra nullius* of the Australian mind is alive and well, and nothing other than real political leadership and effective community education is likely to change that.

Whilst the Council for Aboriginal Reconciliation's decade of awareness raising and grassroots campaigning is reaping rewards, advancements in terms of political leadership have not kept pace. Some would argue that Australia is turning away from its fundamental

values of equality and social justice for all, especially when it comes to its own Indigenous peoples and, more recently, immigrants and refugees. Australia's record in relation to the following issues is further testament to just how much more we need to do to overcome racism:

- *The Stolen Generations*¹ – the imperative of full reparations, starting with a formal apology by the Australian Parliament and the establishment of a reparations tribunal to ensure a humane and just response is delivered to the individuals, families and communities affected.
- *Mandatory sentencing laws*² – which the Australian Parliament should immediately overturn on the basis that they breach our obligations under several international treaties to which we are a party.
- *Aboriginal deaths in custody*³ – it is simply unacceptable in a first world country like Australia, that one in every five inmates in our gaols is Indigenous – or that nationally, the rates of Indigenous imprisonment are fifteen times higher than for the non-Indigenous population.

Few Australians would dispute Indigenous peoples' claims to citizenship rights, and yet this is frequently the point at which we try to have dialogue to fix many of the ills within Indigenous communities. However, Indigenous Australians did not have basic citizenship rights until as late as 1967. It is only as a result of a national referendum in that year that we have been counted in our national census and able to be specifically included in national legislation. It is therefore *only* in current living memory that Indigenous Australians were acknowledged and recognised as legally equal. Even here in New South Wales, up until 1972, it was still possible for school principals to prevent children from attending school on the basis of race.

We may now have a *Racial Discrimination Act* and a Human Rights Commission, but as CERD (Committee on the Elimination of Racial Discrimination)⁴ recently pointed out, 'there is no entrenched guarantee against racial discrimination in Australian law'. And while the objective of securing citizenship rights has been one where there have been achievements, from:

- Full voting rights in all elections,
- Entitlements to welfare benefits, and
- Support for the delivery of services by Indigenous organisations, through to
- The adaptation of programs in some circumstances such as school curricula and bilingual education, and to

¹ See Glossary

² See Glossary

³ See Glossary

⁴ See Glossary

- The development of special work programs as substitutes for payment of unemployment benefits.

Still, citizenship must be re-defined and extended to embrace cultural identity and the special rights available to Australia's Indigenous people within the framework of human rights and co-existence.

In this context we should be having a vigorous and robust debate about:

1. The principle of *self-determination* underscoring all government policy at the local, regional, state and national levels. By recognising and implementing the demands for effective decision-making control, Indigenous individuals and communities will be able to move away from dependency and its negative economic, cultural, social and psychological consequences.
2. Political representation, including *dedicated seats* in Parliament.
3. *Constitutional recognition.*
4. The enactment of a *bill of rights*, defining the rights and responsibilities of all citizens. It could be a mechanism to provide:
 - protection against racial discrimination, and
 - a defined power to make laws for the benefit of Indigenous peoples, and
5. *Economic empowerment initiatives* to replace welfare dependency.
6. *A treaty* to resolve the unfinished business that stands in the way of reconciliation and social harmony in Australia.

Dealing with ‘unfinished business’⁵ – the Reconciliation Bill

The process of reaching this reconciliation is very much about dealing with ‘unfinished business’. And what is crucial to defeating racism is promising that the past does not live in the present on access to the full range of rights. Nevertheless, if reconciliation and a new dialogue are going to have true meaning in any country, they must be action-oriented and they must become the vehicle for real change in attitudes and actions – not just something that is at best aspirational.

That is why my first Private Senator's Bill (5th April, 2001)⁶ concerns the reconciliation process, and more particularly proposes a framework for a treaty negotiation process. It is based on the model legislation proposed by the Council for Reconciliation in its Final Report to Parliament in 2000. After conducting its own deliberations, public consultations and seeking expert advice, the Council decided that legislation would be an appropriate means of giving effect to the progress already made towards reconciliation.

⁵ See Glossary

⁶ See the Appendix I for the full text of the Bill

The Reconciliation Bill is designed to further advance reconciliation between Aboriginal and Torres Strait Islander peoples and all other Australians by establishing processes to identify, monitor, negotiate and settle the unresolved issues for reconciliation. It is Australia's first legislative commitment to the achievement of real and lasting national reconciliation but it needs other political support, particularly from the other parties. The majority of Australians have clearly demonstrated they want to see these issues satisfactorily addressed and resolved, and this is what this bill aims to do.

Some of the key aspects of the Bill include:

- The recognition of the unique status of Aboriginal and Torres Strait Islander peoples and the incorporation of the *Australian Declaration Towards Reconciliation*⁷ in legislation.
- A series of National Reconciliation Conventions to be held every three years over a twelve year period to provide a forum for vigorous debate, and allow for the development of strategies to prioritise and overcome those matters that stand in the way of reconciliation. Similar conventions should be held at local, regional and state level. The Aboriginal and Torres Strait Islander Commission (ATSIC)⁸ is identified as the most appropriate body to organise these conventions at the national level – and clearly other Indigenous organisations (such as the Land Council⁹ networks in most states) would need to be involved in meetings at the state, regional and local levels.
- A process that allows Aboriginal and Torres Strait Islander peoples and government to immediately begin negotiations to develop an agreement or treaty that clearly sets out how the nation will address the unresolved issues for reconciliation.
- A three-pronged public monitoring and reporting process involving the Aboriginal and Torres Strait Islander Social Justice Commissioner, a Joint Parliamentary Committee and an independent body. This will ensure that the legislation paves the way for *real* action to occur.

Conclusion

Finally, the question of racism has perhaps been the ugliest phenomenon to ever visit our societies; it incited the drawing of the colour-line in the ‘White Australia’ policy, drove people from their traditional lands and disenfranchised people from their children, culture and future. Part of the challenge in having rationality in a race debate is to build relations across the dividing line so that full human rights and substantive equality are restored. It also requires that we recognise that modern forms of racism thrive on its denial under the guise of ‘political correctness’.

⁷ See Appendix II for the full text of the Declaration

⁸ See Glossary

⁹ See Glossary

It is further necessary that we challenge our history and the idea that we should fit into the straight jacket of a mono-cultural society. The 21st century is not a place for a contest about our various depictions of the past or about winners. It is a place that must engage the past in order to work out our future. We must also vehemently challenge those who seek to enlist the politics of blame, revenge and resentment when asserting the rock-solid nature of a colonial inheritance and privilege, which is now long gone. At the same time, though, there must be recognition that where there is a growing under-class, overcoming their disadvantage is crucial to avoiding the compounding effects of racism for Indigenous peoples. Backlash itself is the product of inequity and a new dialogue must have as its prime objective a resolution of unfinished business, not to the type or standard as required by some, but which respects needs and difference.

A treaty should promote social harmony and give us all a chance to applaud its outcome. Otherwise it is a wasted exercise if only a few of us see success in its making and clap alone to what might be. An agreement of unfinished business is about defining the Nation and it should inform the future because the past has never been forgotten.

SARAH PRITCHARD

Unfinished business: reaching for a treaty. Some legal and constitutional perspectives

**Talk given at the ESORA *Treaty! Let's Get It Right!* Forum,
Paddington Town Hall, Sydney, 16 May 2001**

Introduction

I have been asked to provide some legal and constitutional perspectives on the current treaty debate. I do so with some trepidation, aware of the complex philosophical, jurisprudential and political questions which treaties and framework agreements raise. I am also mindful that there is justifiable scepticism, as well as considerable differences within Indigenous communities as to the desirability of treaty-making in contemporary Australia.

My purpose this evening is not to advocate any particular processes or outcomes, rather to provide some information on the historical constitutional and legal background in Australia, comparative developments in other first world countries and at the UN, and options which have been canvassed for treaties in contemporary Australia.

Historical background

Whilst recent months have seen renewed calls for a treaty or framework agreement with Indigenous Australians, the idea is not new. For example, in 1841 in *R v Bonjon*, Justice Willis reasoned that Aborigines remained ‘unconquered and free, but dependent tribes.’ Their rights ‘as distinct people’ had not been ‘tacitly surrendered.’ As they were ‘by no means devoid of legal capacity’ and had ‘laws and usages of their own’, ‘treaties’ should be made with them. The views of Justice Willis caused consternation in colonial legal and political circles and did not prevail.

However, Justice Willis had raised issues to which Australian courts would one day return. In 1992 in *Mabo (No 2)*,¹⁰ the High Court recognised a concept of native title founded in the traditional laws and customs of Australia’s Indigenous peoples. The High Court’s recognition that Australia was inhabited by peoples with pre-existing rights challenged two hundred years of Eurocentric constitutional, legal and political history. Notwithstanding that the High Court has rejected Indigenous assertions of sovereignty as non-justiciable, it is not surprising that in the aftermath of *Mabo* Indigenous calls for a negotiated settlement have multiplied.

¹⁰ *Mabo v Queensland [No 2]* (1992) 175 CLRI. Available at:
<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/HCA/1992/23.html?query=title%28mabo+%20near+%20queensland%29>

Comparative experiences

Since the early 1970s Indigenous Australians have been active in the international movement of Indigenous peoples. This has led to greater awareness of ‘modern treaties’ or contemporary agreements which have been negotiated between other Indigenous peoples and States, and the ways in which these have been afforded constitutional and/or juridical protection.

In Greenland, the Inuit have exercised home-rule since 1978. Since 1979, Greenland has been governed by all-Inuit cabinets. There are Sami Parliaments in Finland, Norway and Sweden. Constitutional reforms in Norway have resulted in recognition of the country as bi-cultural – Norwegian and Sami – and a guarantee to the Sami people of means to maintain their distinct culture. In Aotearoa/New Zealand, the Waitangi Tribunal investigates claims of infringements of Maori rights under the 1830 Treaty of Waitangi. In the United States, European colonial powers and later the United States entered into treaties with Indian nations. US courts have upheld Indigenous sovereignty, and affirmed inherent powers of self-government. In 1994, President Clinton confirmed the commitment of the US Government to respect ‘the rights of self-government due the sovereign tribal governments.’

In Canada, there have been several rounds of treaty negotiations. The first round resulted in the early Indian treaties to 1929. A second round has seen treaties negotiated in areas not covered by historical treaties. Amongst these is the 1998 Nisga'a Treaty which aims to reconcile the Aboriginal rights of the Nisga'a people and the sovereignty of the Crown, and to provide the basis for future dealings between the Nisga'a, the province of British Columbia and Canada.¹¹ The Nisga'a Treaty addresses land title, public access, roads and rights of way, forest resources, fisheries, environmental assessment and protection, Nisga'a government, dispute resolution and fiscal relations. Whilst federal and provincial laws apply to Nisga'a lands and people, there are also areas of concurrent jurisdiction. A third round of treaty negotiations in Canada has produced a series of Northern agreements, including the 1993 Nunavut Final Agreement which created a new Indigenous territory in Northern Canada.¹²

In 1996, the Canadian Royal Commission on Aboriginal Peoples made detailed recommendations in relation to processes for making new treaties, matters for negotiation, treaty institutions and public education about treaties with Indigenous peoples. The Canadian Government recently reported that steady progress is being made in modern treaty negotiations: ‘Settling claims does take time as it is important to get it right... modern treaties provide an important springboard to economic and political growth.’

¹¹ The Nisga'a Final Agreement. Available at:
<https://www.nisgaanation.ca/sites/default/files/Nisga%27a%20Final%20Agreement%20-%20Effective%20Date.PDF>

¹² “Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada”. Available at:
http://www.tunngavik.com/documents/publications/LAND CLAIMS AGREEMENT_NUNAVUT.pdf. Also see Glossary.

In 1978, processes of constitutional reform were initiated in Canada. A coalition of Indigenous organisations negotiated amendments which became law in 1982. Constitutional reform has meant that Aboriginal and treaty rights can only be altered or terminated by consent or by constitutional amendment. Section 35(1) of the *Constitution Act 1982* provides: “The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.” Laws contravening s 35(1) can be set aside under s 52(1) of the *Constitution Act*. Section 35(2) provides that the reference in s 35(1) to ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired. This provision has provided the basis upon which regional agreements negotiated by Aboriginal peoples in Canada have been invested with constitutional status.

Decisions of the Canadian Supreme Court have provided a firm legal basis for the recognition and protection of Aboriginal and treaty rights. In 1990, in the case of *Sparrow v The Queen*, the Supreme Court held that section 35 constitutionalises at least part of the rights traditionally associated with the common law of Aboriginal title, including practices that form an integral part of an Aboriginal community’s distinctive culture (in that case, sea fisheries). The 1992 Charlottetown Accord would have entrenched in the Canadian Constitution recognition of the ‘inherent right of self-government.’ The Accord was rejected when put to a referendum in October 1992. However, the Canadian Government has stated that the rights protected in section 35 include the ‘inherent right of self-government.’ *Aboriginal Self-Government; The Government of Canada’s Approach to implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa 1995) provides that:

The Government of Canada’s recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in matters that are internal to their own communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and resources.

Developments at the United Nations

As ATSIC Chairperson Geoff Clark noted at Corroboree 2000 on 27 May 2000, such developments in national legal systems have been accompanied by a recognition of the distinct rights of Indigenous peoples in international fora. In UN standard-setting activities, Indigenous representatives have consistently emphasised the significance of treaties and agreements. In 1993, the UN Working Group on Indigenous Populations (WGIP) adopted a Draft Declaration on the Rights of Indigenous Peoples. Article 36 of the WGIP’s Draft Declaration provides:

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

In 1989, the UN appointed a Special Rapporteur on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations. The Special Rapporteur has since described a ‘constructive arrangement’ as ‘any legal text and other document which are evidence of consensual participation by all parties to a legal or quasi-

legal relationship.' The most important element is 'proof of the free and informed consent of all parties concerned to the arrangement'.

More recent Australian developments

In recent years within Indigenous Australia there has been vigorous discussion of the need for constitutional, political and legal settlement between Indigenous and non-indigenous peoples. Significant events have included:

- The establishment of a tent embassy outside Federal Parliament House in Canberra in January 1972, demanding land rights, compensation and recognition of Indigenous sovereignty;
- The 1979 proposal by the National Aboriginal Congress (NAC) for a Makarrata or treaty to be negotiated between the Commonwealth and Aboriginal peoples of Australia, and in which sovereign Aboriginal nations are recognised as equal in status as the Commonwealth of Australia;
- Kevin Gilbert's 1987 draft treaty written in consultation with the Sovereign Aboriginal Coalition;¹³
- The 1988 Barunga Statement presented to former Prime Minister Bob Hawke by the Chairpersons of the Northern Territory Land Councils calling on the 'Commonwealth Parliament to negotiate with us a Treaty or Compact recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedoms'.

It was with reference to such calls for a settlement of outstanding historical questions, that in early 1994 the previous Federal Government asked the Council for Aboriginal Reconciliation to consider whether there should be a formal place within the reconciliation process for 'a document or documents of reconciliation'. Other speakers have provided an update on more current efforts by the Council and ATSIC to promote discussion of treaty-related matters. These include the establishment by ATSIC of a National Treaty Support Group, a national 'Think Tank' to assist the Treaty Support Group.

What sense can we make of treaties in contemporary Australia?

What sense can we make of the concept of treaties in contemporary Australia? At a fundamental level, a treaty is an agreement between two or more parties who seek to define the terms and parameters of their relationships with one another. In principle, there is no reason that a national treaty, or a framework of agreed national standards, would be incompatible with treaties and agreements concluded between Indigenous communities and relevant local, regional, State and Territory partners. Thus, a national document could set standards for local or regional treaties. ATSIC Chairperson Geoff Clarke has expressed

¹³ See Gilbert, Kevin (1993), *Aboriginal Sovereignty, Justice, the Law and Land*. 3rd edition. Canberra: Burramunga Books, p. 52 and following.

his conviction that a national treaty must be put in place before there is any devolution to local or regional treaties. The concern is to avoid uncoordinated negotiation, producing unequal and uneven results, and uncoordinated demands.

But why a treaty or treaties in Australia?

There may be legal reasons. In the developing law of native title, the courts have encouraged the resolution of Aboriginal issues by negotiation rather than more costly, adversarial and ill-suited processes of litigation.

There may be social reasons. The social conditions of Indigenous communities in Australia remain dramatically behind that of the Australian population in general. Recognition and the transfer of responsibility and control to Indigenous communities through negotiations can be an essential step towards positive change.

And there may well be economic reasons. Outstanding native title issues and other unfinished business create uncertainty in relation to the use and management of land and resources. A goal of treaty negotiations can be to establish certainty over lands and resources to provide a more secure climate for investment and economic development.

Thus, treaty processes can facilitate:

- Recognition, including legal and Constitutional recognition, of the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia, and of the distinct rights and aspirations which flow from such status;
- A framework of agreed national standards to assist the development of local or regional treaties and agreements;
- More constructive and equitable relationships between Indigenous people and Australian governments;
- The development of self-governing institutions, and achievement of greater economic independence and social well-being in Indigenous communities.

Substantive matters for negotiation might include Constitutional recognition, self-determination, including self-government, regional or local agreements, political representation, comprehensive land claims settlement processes, recognition of customary law, heritage protection, cultural and intellectual property rights, and economic development.

However, it is clear that the a priori enumeration of a list of substantive matters for negotiation is doomed to failure.

The preferred approach must be to promote informed discussion of the many challenging issues surrounding treaty-making.

Such discussion must take place amongst Indigenous Australians and between Indigenous and non-Indigenous Australians. Key focus areas will cover processes for determining parties mandated to negotiate and enter into a treaty or treaties, negotiation processes, matters for negotiations, procedures for arriving at agreement, and mechanisms for implementation.

In relation to constitutional recognition, we need to be sceptical about the feasibility of developing a detailed treaty for inclusion in the Constitution. Instead, it might be more constructive to think about a two-pronged approach which seeks:

1. To secure protection for those Indigenous rights which have been recognised, as well as those which are recognised in the future;
2. To build in some mechanism to ensure that there is informed and far-reaching debate of Indigenous rights, that any agreements which are negotiated are secured constitutionally.

In this regard, the following options for constitutional reform merit debate:

1. Remove any remaining provisions which discriminate against people on the ground of race; in particular section 25, which anticipates the disqualification of persons of a particular race from voting.
2. Insert in the Preamble paragraphs recognising Aboriginal and Torres Strait Islander peoples as unique peoples with distinct identities and histories, as well as their prior occupation and ownership, continuing dispossession, and particular status in contemporary Australia.
3. Secure protection of Indigenous rights which are now recognised (such as native title rights), as well as rights which might be negotiated and recognised in the future (through treaties, agreements and decisions of the High Court amplifying *Mabo No 2* etc).
4. Insert in the Constitution a commitment to constitutional conferences or other processes to discuss Indigenous rights. A provision similar to section 105(A) might be inserted to vest in the Commonwealth power to make an agreement/agreements with the Indigenous peoples of Australia on a range of subjects. Such a provision might provide, like section 105(A), for the agreement/agreements to override other laws. This approach would obviate the need to put to referendum an extensive catalogue of rights or detailed arrangements and formula and provide, at the same time, a source of Constitutional authority for such an agreement/agreements.
5. Such a constitutional conference/s might include an agenda item on mechanisms to secure greater participation of Indigenous peoples in the structures of government and to recognise Indigenous structures of governance. Possibilities include the dedication of Indigenous seats in Parliament, based on an Indigenous electoral roll. Other proposals have referred to constitutional recognition of the right of self-determination including the right of self-government in principle, or in relation to specific regions.
6. Affirm the central role of the Federal Government in relation to Indigenous rights; in particular, delete the race power in section 51(xxvi) and possibly replace it with an express Commonwealth power to make laws for the benefit of Aboriginal and Torres Strait Islander peoples.
7. Insert in the Constitution a general guarantee of equality and freedom from discrimination.

Conclusions

With renewed calls for a negotiated agreement or treaty, we are asked to grapple with complex issues which are the subject of serious debate and movement in the international arena. It is not just in Australia that Indigenous peoples are calling for new constitutional and legal relationships within the limits of existing nation-States. In many countries Indigenous peoples are (re)establishing new constitutional and legal relationships within the limits of existing nation-States. These developments show that there are many ways to accommodate different peoples and resolve long-standing grievances.

Whilst there is much comparative experience to draw upon, there is no simple or uniform template. If one conclusion can be drawn from comparative experience it is that processes are as important as from and content of any document or documents which may result.

Comparative experience suggests, if anything, the importance of grounding processes in the particular, in geographical realities, in specific historical experiences, in daily lives and priorities.

And in the current discussion in Australia, it will be important to avoid narrow definitions which hinder creative thinking about the potential for negotiated agreements in renewing relations between Indigenous and non-Indigenous Australians, and in enhancing the legitimacy of the Australian polity.

SHELLEY REYS

Dealing with unfinished business: reconciliation and a treaty

Talk given at the ESORA *Treaty! Let's Get It Right!* Forum, Paddington Town Hall, Sydney, 16 May 2001

Introduction

In the last six months of 2000, we saw one million Australians walk for reconciliation in cities and towns across the length and breadth of our land. Together they walked across bridges in the largest public demonstration for a cause in Australia's history.

That outpouring of public support we saw last year showed that reconciliation truly had become a people's movement with an unstoppable momentum. The challenge for all of us now is to translate that momentum into tangible outcomes which will make a real difference to the lives and circumstances of Aboriginal and Torres Strait Islander peoples. Such outcomes will be the measure of our progress towards true reconciliation.

So how do we that – where do we go from here?

Priorities for reconciliation

I am speaking tonight as the co-chair, together with Fred Chaney, of Reconciliation Australia, which is the independent, non-profit organisation established to provide and encourage an ongoing national focus for the reconciliation process, following the end of the Council for Aboriginal Reconciliation. The Council stressed that the work of reconciliation must continue, and established Reconciliation Australia to provide a continuing national focus for the process, working with the various components of the people's movement at State, Territory and local levels.

The Board of Reconciliation Australia has identified three key priorities for its work over the coming period:

- Ensure that the social and economic disadvantage of Indigenous peoples is fully addressed;
- Facilitate public discussion on the rights of Aboriginal and Torres Strait Islander peoples, and the issue of a treaty and or/agreements; and
- Work cooperatively with all parts of the people's movement to develop partnerships and projects which deliver tangible reconciliation outcomes.

The first point recognises that reconciliation will not be achieved until we fully address the issue of social and economic disadvantage. It does not diminish the significance of symbols and commitments, such as last year's walks, to say that true reconciliation will

become a reality only when it delivers tangible outcomes for Aboriginal and Torres Strait Islander peoples.

The third point recognises that, as always, Australia's journey towards true reconciliation lies in the hands of the people, and all the community organisations, peak bodies and governments which represent them and are responsible to them.

And the second point is what we're discussing here tonight: the need for a treaty, settlement or agreement which honestly acknowledges the past, recognises the legacies of the past in the present – our unfinished business – and establishes a framework for a shared future.

Before talking in more detail about Reconciliation Australia's approach to this issue, I would like to briefly cover some background to the current discussion about a treaty or agreement.

The background

During the whole process of British colonisation and settlement which dispossessed Aboriginal and Torres Strait Islander peoples from their lands, not once did Britain or the colonial authorities conclude a formal treaty or agreement with the original inhabitants. Australia is the only Commonwealth country that never signed an official treaty with Indigenous peoples.

In the first part of the 19th century, various eminent people in the colonies in Sydney, Hobart, Perth and Adelaide argued that, for example, treaties should be entered into with Aboriginal people and that their rights to land should be respected. Such arguments were ignored, and Aboriginal and Torres Strait Islander people were never formally recognised as the original inhabitants of this continent.

Yet Indigenous peoples never gave up their own yearnings for recognition, rights and justice. In 1963, the Yolngu people of Arnhem Land presented Federal Parliament with their Bark Petition in protest at a government decision to grant leases for bauxite mining on land excised from their reserve. In 1972, the Larrakia people of the Darwin area requested treaties. In the late 1970s, and again in the late 1980s, attempts were made both by independent committees and at Government level to initiate moves towards a treaty, agreement or compact which could represent a formal settlement of the unresolved issues of our past – to put to rest the past not yet dealt with so that we could all move forward together into a better future.

For example, in June 1988 the Chairmen of the Central and Northern Land Councils, Wenten Rubuntja and Galarrwuy Yunupingu, presented the then Prime Minister, Bob Hawke, with the Barunga Statement. This called for Aboriginal self-management, a national system of land rights, compensation for loss of lands, respect for Aboriginal identity, an end to discrimination, and the granting of full civil, economic, social, political and cultural rights. The statement also called on the Commonwealth Parliament:

to negotiate with us a Treaty or Compact recognising our prior ownership, continued occupation and sovereignty, and affirming our human rights and freedoms.

In response, the Prime Minister and the then Minister for Aboriginal Affairs, Gerry Hand, signed a five-point statement which included:

- The Government affirms that it is committed to work for a negotiated Treaty with Aboriginal people.
- The Government sees the next step as Aborigines deciding what they believe should be in the Treaty.

Unfortunately, Australia was not ready for such a formal settlement at those times, and broad agreement could not be reached, either in Parliament, the wider community, or among Aboriginal and Torres Strait Islander peoples.

However, in 1991 the Commonwealth Parliament showed vision, leadership and unity when it voted unanimously to establish the Council for Aboriginal Reconciliation and a formal process of reconciliation to take place over the decade leading up to the centenary of Federation in 2001. The Parliament noted that there had been no formal process of reconciliation to date, and that it was ‘most desirable that there be such a reconciliation’ by the Centenary of Federation.

Although the hope of achieving true and lasting reconciliation by 2001 – and a formal settlement – was not achieved, the ‘decade of reconciliation’ witnessed some truly remarkable achievements. The most visible were those walks for reconciliation but we should remember that they were the final result of the efforts of many thousands of Australians who have worked long and hard to make reconciliation a reality in their communities, workplaces and organisations.

Australians from Aboriginal, Torres Strait Islander and wider communities not only walked together over all those bridges, they also worked together on many projects – big, small and in between – to achieve real change and definite reconciliation outcomes.

The outcomes of the formal reconciliation process are set out in three key publications of the Council for Aboriginal Reconciliation. Two of them are the reconciliation documents handed to the nation’s leaders and all Australians at Corroboree 2000 last May. They are:

- The *Australian Declaration Towards Reconciliation*;¹⁴ and
- The *Roadmap for Reconciliation*.¹⁵

These documents were finalised after one of the most extensive and inclusive processes of public consultation on such an important matter of public policy.

The third publication is the Council’s final report, aptly titled *Reconciliation: Australia’s Challenge*.¹⁶ This outlines the work of the Council and many other Australians during the reconciliation decade, and sets out the Council’s conclusions and final recommendations to the Parliament.

¹⁴ See Appendix II for the full text of the Declaration

¹⁵ See Appendix III for the full text of the Roadmap

¹⁶ Available at: www.austlii.edu.au/other/IndigLRes/car/2000/16/contents.htm

These documents provide a summary of what has been achieved so far, a record of commitments made by governments and organisations to continue the work of reconciliation, and an outline of the things which remain to be done towards the goal of true reconciliation.

As I said earlier, the challenge now is to build on the foundations provided by the all these outcomes so far and to make the changes necessary for Australians to be able to say with truth and pride that we have achieved true and meaningful reconciliation.

A formal settlement

In its final report, the Council made six recommendations to the Prime Minister and Parliament, further to the documents which it handed to the nation at Corroboree 2000.

Recommendation 5 said that each government and parliament:

- *recognise that this land and its waters were settled as colonies without treaty or consent and that to advance reconciliation it would be most desirable if there were agreements or treaties; and*
- *negotiate a process through which this might be achieved that protects the political, legal, cultural and economic position of Aboriginal and Torres Strait Islander peoples.*

Recommendation 6 said:

That the Commonwealth Parliament enact legislation (for which the Council has provided a draft in this report) to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved.

In considering its response to the Council's recommendations, Reconciliation Australia has identified constructive public discussion on all aspects of the Indigenous rights agenda and the approach to a treaty and/or agreements as one of its three key priorities, as I said earlier.

A formal settlement of the legacies left to this nation by over 200 years of British colonization and dispossession is essential so that all of us can resolve the 'unfinished business' and move forward together.

However, if a framework agreement or treaty to settle the unfinished business of reconciliation is to be negotiated and finalised, it will require the widespread support and efforts of a great many Australians. To date there has only been a very limited examination and objective debate in the wider Australian community regarding these issues.

Reconciliation Australia welcomes ATSIC's initiative in launching a nation-wide consultation of Indigenous peoples to seek their views about a possible treaty between Aboriginal and Torres Strait Islander peoples and the nation as a whole.

Reconciliation Australia supports broad community discussion about these issues – first and foremost, by Indigenous peoples who need to determine our own views.

The wider Australian community should respect the right of Indigenous peoples to determine their own views on this issue free from interference. However, it is important that the wider community should also hold a constructive and informed discussion about these issues – it should not simply wait passively to see what Aboriginal and Torres Strait Islander peoples say before discussing what other Australians think.

The issues involved in a formal settlement of the relations between Indigenous peoples and the wider community will not go away if we just ignore them. It is far better to deal with them as a community and with goodwill than to sweep them under the carpet.

Reconciliation Australia will be raising the need for informed discussion on these issues with governments and other key stakeholders and bodies in the wider community. We are prepared to work with all interested bodies to help facilitate an open, informed and constructive discussion about a possible agreement, settlement or treaty.

In the first instance, we are seeking a response from governments, oppositions and other parliamentary political parties in relation to Recommendations 5 and 6 of the Council's final report, dealing with agreements or treaties.

Without seeking to pre-empt the outcomes of the ATSIC process, Reconciliation Australia will encourage objective and informed discussion and debate within the wider community about the potential benefits, form and content of any agreement or treaty.

To that end, Reconciliation Australia is proposing to work in partnership with key institutions and bodies, including governments and ATSIC, to convene a series of forums to critically and objectively examine the issues relating to an agreement or treaty as a means of progressing reconciliation.

Finally, I'd just like to comment on one of the difficulties we're going to encounter here, and that's the word *treaty* itself. Those who oppose any formal settlement or even a framework agreement to set in place a process for negotiating one have used and will use scare tactics to create obstacles and diversions. One of these relates to the word 'treaty' and the claim that a treaty implies two nations within one. Those of us who support a formal settlement – whether called a treaty, agreement, compact, or whatever – should be ready to argue the substance of the issue and to counter such scare tactics.

The substance is the need for a formal settlement which acknowledges the facts of history and the wrongs of the past, recognises the rights of Aboriginal and Torres Strait Islander peoples, and provides a framework for a shared future which both sides mutually agree on, without duress.

The issue of the precise form and content of such a settlement will be determined by the public discussion in the months ahead: in the first place, by the views of Indigenous people which will be expressed in the process currently being organised by ATSIC. The name of any such settlement will also be a matter for such public discussion.

As to the term *treaty*, I liked the way Mick Dodson put it in a television forum just after Corroboree 2000. He pointed out that there was nothing anybody should fear in the concept of a *treaty*, as by its very nature it was something which both sides would have to agree to, and each party would have a veto over. As he put it: 'If the blackfellas don't like what's in it they won't agree to it, and if the whitefellas don't like it they won't agree.'

And we could add: if we both like it, we'll both agree.

JASON FIELD

Talk given at the ESORA *Treaty! Let's Get It Right!* Forum, Paddington Town Hall, Sydney, 16 May 2001

If asked whether I think that at some time in the future a treaty will guide the relationship between Indigenous peoples and other Australians, I would have to answer, yes. As to when this might happen, I am not so sure. Sooner rather than later might be preferable, but our desire to seek a reasonably quick resolution must not compromise either the outcome or the process.

In saying this, it is quite apparent that the process, at least informally, has already begun. However, it does have to be acknowledged that not all Indigenous peoples personally support the idea so all future attempts to progress this issue must be guided by this fact.

Synopsis

While giving my personal support for the idea of a treaty, the central theme of this presentation is that the success or failure of the current evolving process will largely shape any final agreement.

There is support for this view in a statement contained in the final report of the United Nations *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*.¹⁷ Here the Special Rapporteur Miguel Alfonso Martinez states:

The way in which such a negotiation process is organized and conducted may well be the true litmus test eventually of the merits of ... the viability of the structure proposed in a given socio-political context.

In many respects Senor Martinez is stating the obvious. But that does not necessarily ensure an appropriate and constructive process will be established in Australia.

Agreements and other constructive arrangements

Before I address some specific points regarding the process of negotiating a treaty, it is worth briefly discussing what an agreement can provide for. In this context there is legitimacy and value in asking why there is need for a treaty? Professor Marcia Langton, in her Inaugural Professorial Lecture,¹⁸ stated:

¹⁷ Martinez, Miguel Alfonso (rapporteur) (1999). *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations. Final Report*. United Nations, Commission on Human Rights. Available at: <https://digitallibrary.un.org/record/276353?ln=en>

¹⁸ For the complete text of the lecture, see copy in this volume.

The lack of consent and absence of agreements or treaties, remains a stain on Australian history and the chief obstacle for constructing an honourable place for Indigenous Australians in the modern state.

To my mind Langton's statement suggests there are both symbolic and practical outcomes that can be addressed within a treaty framework. In the Australian context, the symbolism is in the acknowledgement that Aboriginal and Torres Strait Islander peoples did not 'consent' to the European settlement of their lands. On a practical level, Langton rightly acknowledges that the ongoing absence of this consent is an impediment to advancing the well-being of all Australians.

Therein lies the critical argument for a treaty in Australia. But again it comes back to the issue of process.

If there is one sincere ambition that is consistently held by all but the most hardened racist elements in Australia, it is that we want to see better outcomes for Aboriginal and Torres Strait Islander peoples. We want to see improvements in the socio-economic conditions and experiences of Indigenous peoples. The question is: how do we achieve this?

In my limited understanding, I consider Treaty as being a device that can establish a negotiated framework that facilitates the achievement of agreed social justice outcomes. The outcome of a treaty would not therefore constitute the end of a process. In many respects it is a new beginning.

The ultimate outcome from the current process is still subject to consideration, negotiation and endorsement. The options for change are only limited by our imaginations and willingness to accept certain possibilities. These options can range from no change at all to a re-inventing of our nation's legal, economic and political wheels.

My personal perspective is that the tyres are worn and need to be replaced if we are to have any hope of getting where we want to go.

I do acknowledge that being too radical in our approach to change can have the effect of turning away people who might otherwise be sympathetic to the issue and wanting to openly consider the options. At the same time the outcomes should not be allowed to compromise Indigenous peoples' values and aspirations, particularly with respect to our distinct rights.

Process

For those of us who wish to actively engage in the treaty process from the perspective of having a limited understanding about them, we will soon come to learn about their complexity. Seeking resolution on matters where there are competing interests in itself creates enormous practical difficulties.

We can, however, learn from the experiences of similar processes in other countries. The Nisga'a Treaty in Canada is one such experience.¹⁹ While I do not have the level of understanding about this experience to provide an informed perspective on this agreement, it would seem that there are obvious lessons that we can learn.

In Australia we already have a number of procedural options to consider, some of which, such as the ‘treaty think-tank’ established by ATSIC, have already been put into place. Other ideas to facilitate the process include:

- An audit of past agreements involving Indigenous peoples in Australia;
- The establishment of a treaty commission;
- A national forum; and
- The development of a framework agreement.

All of the above options have merit; however, it must be recognized that they do also have flaws. Perhaps the best way to approach the issue of process might be to employ elements of a range of options within a framework agreement.

But will one procedural framework agreement be sufficient? I raise this question, particularly with Indigenous peoples in mind and to reinforce the point that not all of us support the idea of a treaty.

While ATSIC is the peak representative body for Indigenous peoples in Australia that does not necessarily mean, in my view, that ATSIC has the mandate to negotiate a treaty on behalf of Indigenous peoples. This is in no way intended as criticism of ATSIC. It is simply a personal observation that not all Indigenous peoples will feel secure about ATSIC representing their interests on this issue. The same could be said of Land Councils and a variety of other Indigenous organizations.

As Indigenous peoples we must acknowledge that the treaty issue has the potential to exacerbate existing tension, just as the process can be affected by that tension. There is a responsibility on the part of Indigenous organisations to facilitate effective dialogue within our communities. There is also a need for individuals to engage in that dialogue in a spirit of good-will and a focus on what is in the best interests of all people in our respective communities.

While this presents a great challenge for Indigenous peoples, communities and organisations, it is one that we are more than capable of facing. An even greater challenge, and one that I feel we are again able to address, is engaging non-Indigenous peoples in the process.

¹⁹ The Nisga'a Final Agreement (2001). Ottawa: Parliament of Canada, Virtual Library. Available at: <https://www.nisgaanation.ca/sites/default/files/Nisga%27a%20Final%20Agreement%20-%20Effective%20Date.PDF>

If we want to create the critical mass of support for a treaty that is needed to drive the political will of the major parties, we must engage non-Indigenous peoples in a way that is consistent with the collective values we uphold as Australians. Like most other high profile political debates we are, for better or worse, fighting for the ‘middle ground’.

While we do not want to compromise the integrity of the process it is worth exploiting those values that Australians hold so dearly. The most obvious that I can think of is that classic notion of a ‘fair-go’ for all. Also, we should wherever possible promote the adoption of sound democratic principles in any autonomy arrangements that might arise out of a treaty.

Developing the most effective framework for Indigenous peoples must remain at the forefront of our thinking. However, if we deviate too far from those democratic principles we run the risk of alienating many supporters. This raises both opportunities and potential problems for Indigenous peoples.

Self-determination

The right to self-determination is one that Indigenous peoples uphold in spite of the opposition of governments in Australia. On a practical level, it means that Indigenous peoples, collectively, are denied opportunities to determine their social, economic and political interests. In effect we remain subject to the political whim of the governments of the day, in waiting for formal recognition of this right.

But it seems to me that if we collectively maintain we have the right to be self-determining, waiting for formal recognition of governments contradicts our own assertion to this right. I am not suggesting that we should refuse to abide by the laws of the land and government and parliamentary decisions. However, I do support the idea of Indigenous peoples being more active in developing the models of autonomy and other arrangements that will best accommodate our aspirations.

The treaty process provides a rare opportunity for Indigenous peoples at the community level to explore and develop possible models. But we should embark on this in an atmosphere of good faith with non-Indigenous peoples. We cannot afford to compromise our rights and aspirations; however, we can and should make every effort to clearly explain to non-Indigenous peoples the rationale behind the models we may develop.

Conclusion

At the beginning of this presentation I expressed the view that the outcome of a treaty was inevitable – that it was a case of *when* such an outcome *will* take place. If it is not going to be current generations who see this process through, it will be future generations.

In saying this, I am mindful of the level of change in mainstream attitudes towards Indigenous peoples and issues that has taken place in only the last decade. Admittedly, during this period Australians have been confronted with findings such as the existence of

Native Title,²⁰ the cause and effects of Indigenous peoples' over-representation in the criminal justice system and the stolen generations, to name just a few. But then, consider also the perspective and understanding that mainstream Australia had about Indigenous Australians at the start of the 1990s. For example, how many people could say that before 1996, they knew that as recently as the early 1970s Indigenous children were systematically taken from their families? How many of our young people know about these issues now?

If as a nation of peoples we hold dearly to our ideal of a 'fair-go' that is so much a part of our national identity, and if we encourage our young people to do likewise, I cannot help but believe that they will take up the challenge if we fail to do so.

While it is still early days, this country has now embarked on the process of Treaty. Recent comparative experience suggests that this is a long-term process. Let *us* get it right – for the benefit of current and future generations.

²⁰ See Glossary

JOHN HOWARD

**Talk read by the actor's wife Kim Lewis on his behalf at the
ESORA Treaty! Let's Get it Right! Forum, Paddington Town Hall,
Sydney, 16 May 2001**

Statement on a treaty

In his book *Kakadu Man* Bill Neidjie says about Law:

*Law never change
Always the same
Maybe it hard,
but proper one for all people
Not like European law
always changing.
If you don't like it
you can change it.
Aboriginal Law never change
Old people tell us
'you got to keep it'
It always stays.*

In 1788, the Law of Nations was well known to the British. It said that land occupied by people could only be acquired by the consent of those people or by conquest. In Australia's case the land was obtained by neither. Though there was brutal warfare, there was no declaration of war and thus no conquest. Though land was taken and its traditional owners run off or killed, no consent was sought or given.

How could consent have been given when, in the words of Bill Neidjie again:

*Ground
we hang on
this earth for us
just like mother, father, sister.*

Who of us here would *consent* to our mother, father, sister being taken?

And so this dispossession relied not on the Law of Nations or any other law. It relied on the legal fiction of *Terra Nullius*. In other words, 'I can take your land because neither you nor your law or your customs exist.'

And though this absurd notion was overturned by the High Court in the 1992 Mabo case, and described as 'the darkest aspect of the history of this nation', still the court refused to recognise the original sovereignty of the Indigenous owners or to examine the British claim of sovereignty. I agree entirely with Geoff Clark when he said recently:

In my view, the right to our traditional lands is an inherent one. It flows from our sovereignty as the first peoples. It cannot be taken away without consent.

This is, as Justice Woodward said almost 30 years ago, 'A matter of simple justice.'

The question for us non-Indigenous Australians is:

- Do we have the will to redress these injustices as our Kiwi and Canadian cousins have done?
- Do we have the desire to build a society based on justice and fairness?

We can change our law. Uncle Bill Neidjie is right when he says:

*European law,
always changing.
If you don't like
you can change...*

And many, many of us have the desire to see justice done – look at how many of us attended reconciliation marches. Look how many of us signed ‘Sorry’ statements.²¹ If we can make these symbolic gestures of support for our Indigenous brothers and sisters, surely we have the will to act. Surely we have the desire to reform *our* law so that it guarantees Indigenous peoples’ status, rights and obligations as the original owners of this land. Surely we are generous enough in spirit to respect the right of Indigenous Australians to practise and enjoy their Law, Custom, Language and Culture in freedom.

All of us have profited from the dispossession of our Indigenous cousins either directly or by inheritance for well over 200 years. Surely we can see that we have, in all justice, a duty to share the fruits of this plunder with the dispossessed. We can rightly enjoy a just future if we are willing to share.

We can, through our government (which we elect) negotiate a treaty or treaties, agreements, covenants – call them what you will – that will allow, in our law, for real self-determination for Indigenous people at a national level. A treaty might allow for Indigenous seats in Parliament at State and Federal level. It might deal with the way that customary laws and customs can co-exist with Australian law. It might confer direct authority on local Indigenous communities. It might complement a Bill of Rights that applies to all of us.

Whatever this *treaty* is, it must be openly and justly *negotiated* between the Indigenous peoples of this country and *our* Australian Government. It must have the surety of permanence in our law, so that like our Constitution it could not be easily changed or repealed or watered down at the whim of the government of the day.

We are a curious people. So often we desire change and yet we often fear it. But we can be wise if we wish. And if we wish to be wise in this instance, and give our children a just society to give their children, then we will overcome our fears and act. It’s up to us. We have the power.

In the words of Bruce Dawe from his poem ‘Nemesis’:

*We cannot call the Turrbul back
And guilt's a slippery thing*

²¹ See Glossary

*If all it feeds is speeches
And songs that poets sing
When the Kalkadoons stopped running
And charged, and charged again
They fell as fell the tribesmen
On earlier hill and plain.
And we who wrote their finish
Must turn and write a start
If we would turn from running
and face our thundering heart.*

JACK BEETSON

Talk given at the NAIDOC Week ‘Behind the Mic’ Treaty! Let’s Get It Right! Forum, ABC Eugene Goosens Hall, Ultimo, 13 July 2001

I think this is a topic that needs a lot of discussion, needs a lot of exploring. And I suppose my view is not to head down the road so quickly. I, as much as many others in this country, am very aware that we need to move on and we need to try and settle the dispute. But I’m particularly concerned with getting it right.

I feel very humble that I’ve spent some 24 years celebrating NAIDOC²² Week in Cadigal and Eora country and I feel very humble every time I speak on their land. I left my land Ngembaa country,²³ some 27 or 28 years ago now, as a political refugee. And I left there because I was in doubt – and am still in no doubt - that had I stayed in that country, I wouldn’t have been here today, such was racial relations and police violence in that community.

There’s a lot of questions about a treaty, and one of the reasons that I don’t jump in and support treaty negotiations commencing, is that there’s not one treaty on the planet that people can hold up – given the few years’ duration that they can claim to have worked or, indeed, been honoured by those signing the treaty. With the Maori or the Native North American Indian people – and many of those people I’ve spoken to over the years – every time you talk of a treaty, they almost shudder. I was only talking to a Maori woman the other day up on the farm and we talked about a treaty and my position on that. And currently her community is negotiating a buy-back of the treaty by the New Zealand Government, and I would hate to think that we would be down that line in 50 years time. I won’t be. I’ll be fertilising a gumtree somewhere for sure. But at the end of the day, that’s my fear.

I don’t particularly concern myself with how long the discussion needs to happen. But what I do concern myself with is this: my forebears fought and died for their sovereign rights to be recognised in this country. If at some point in time, as part of treaty negotiations, a negotiated treaty comes about, I want to be quite conscious about the fact that I am signing away what they fought for. I want to be able to go and sit down somewhere and cry about that. I want to be able to go and sit somewhere, if necessary, and bleed for that, and bleed for the work that they’ve done before me.

Something that I concern myself with is my children and grandchildren. What right have I, as an individual, got to be signing away their sovereignty or their rights? People can talk about a document that might be dynamic and can be changed in the future to cater for the changing scene of things, or the changing needs and aspirations of Indigenous peoples. But if 100 years ago in this country women had signed an agreement with men, I would hardly like to think where you would be today in terms of equity and so on. And it’s those sorts of analogies that we can draw on.

²² See Glossary

²³ Ngembaa country is in the Brewarrina District in north-western New South Wales

The other thing that alarms me is the fact that non-Indigenous Australians very quickly jump on to the war cry of a treaty. I think, personally, that once again places Indigenous people in this country into a third or fourth world situation, as I call it, where the agenda is not really ours. It's those of non-Indigenous Australians deciding for us, that they will promote that path of going down the treaty line. My view is that I'm not convinced it's as simple as that.

But non-Indigenous Australians, if they truly support the Indigenous movement and the Indigenous struggle in this country, may find themselves supporting a whole range of different positions. The position the Ngembaa take on the treaty may be different than the Wiradjuri or the Pitjantjara or the Walpiri. The positions may be very different. Some Indigenous communities and nations will want to go down the treaty road, and they have that right. That's what we fought for, for the last 214 years, that right to self-determination. But that right to self-determination for one community can't take away the right for self-determination of another...

And we can talk about technically about how we might go into negotiating treaties, and what shape it might take, and what might be in it – and there's a plethora of things that will be in a treaty. And the problem with itemising what might go in it – and I won't even begin to do that – is the fact that you may forget something before you sign it, and it may become apparent later. If thirty years ago we were signing this treaty, we might not have talked about information technology, for example, as being part of how Indigenous communities may be resourced under that treaty.

We live in a country that is very reluctant to change. You only need to look at history of referenda in this country being voted down. So even if a document is ever produced, what guarantees that it will change? We may come back to the table and renegotiate things because it fits with the times and it fits with the technology and the social attitudes of the day. But there's absolutely no guarantee that those negotiations will be fruitful or come down on the side of Indigenous people.

And I'll come back again to the point again of this fourth worldness. I would personally ask non-Indigenous Australians particularly not to jump on the bandwagon of a treaty. But if you do, and if you must, then jump on it as nation states. Don't jump on it on behalf of me and my families, and don't jump on it yet on behalf of the Ngembaa, because we haven't discussed this as a community properly. And until we make that decision – which road we want to go – *then* we'll come and call for your support.

I agree with probably every Aboriginal person in this country: there needs to be some agreement. There needs to be some process. There needs to be an improvement in the lives of Aboriginal people around this country. We know that. There needs to be an enormous amount of social and economic development in our Aboriginal communities. We know that. We just don't know what the vehicle might be to achieve that. And let's not jump into something that has a history of not working worldwide.

The reality is for me that I probably won't be here if a treaty does get negotiated. The reality is for treaties that they're at least thirty to forty to fifty years in the process of reaching agreement. Many of us here won't be around to benefit from it, or whatever. But that doesn't matter. What does matter is our contribution to it; and what I do agree with is getting it right. And it has to be gotten right, because I don't think we're going to have a whole lot of opportunities in the future to come back to it and try and get it right if we make mistakes in it. And I don't care how long that takes. I don't care if it takes another two hundred years. We're already two hundred and thirteen or fourteen years down the track. If it takes another two hundred, then let it take that time.

I don't feel I'm at war with people any more. I feel that we're working towards a solution. But we'll get to a point – you can bet your life – where somebody will want to put a timeline on this of five years or ten years or fifteen years. And the minute that you restrict anything by time, you are limiting what can be achieved. The amount of time applied to getting it right – whatever format that may take – it's critically important that we allow the time it takes.

Therefore I suppose I'm submitting to you that, at this point, I certainly don't agree with the treaty. I agree with the discussion continuing. I agree with people's right to support whatever they support, whether it be a treaty or some other form of an agreement. But I support *my* right to disagree with going down that line at this particular point in time.

And regardless of who throws up the ideas, it doesn't matter. We can't point to an elected arm in Australia – and this is no attack on those elected representatives that have been elected by sections of our community. But the reality is that nobody can totally claim to be an elected representative of us, whether it be at council or ATSIC or wherever. The reality is that most Aboriginal people that are eligible to vote still don't in either of those elections. So nobody can claim that mandate, that they're speaking as an elected representative of the Aboriginal community. Because there's no such thing as the Aboriginal community. There are Ngembaa communities. There are Wiradjuri communities. We are living in a country that is almost – and I suppose if I can just draw this analogy as my final statement – that we're living in a country that is like a black Europe. And it really is about time that Indigenous people and non-Indigenous people in this country acknowledged the fact that we're not one homogenous group. We are different. We come from different nations, with different laws. We've been affected differently by colonisation and so on in this country. The effects of that, the nature of it has been vastly different, and we need to be treated differently. And I think if we go down the line of a treaty, that's where the lines will be drawn and nation states will stand up and identify themselves.

TONY MCAVOY

Talk given at the NAIDOC Week ‘Behind the Mic’ *Treaty! Let’s Get It Right!* Forum, ABC Eugene Goosens Hall, Ultimo, 13 July 2001

ATSIC and the NSW Aboriginal Land Council have been pushing discussions in the Indigenous Community and more broadly on the possibilities a treaty might hold. The Prime Minister has adopted the view that treaties will be ‘divisive’.

The approach from both sides appears to be some attempted analysis of what affect a treaty will have. The analysis is occurring before the negotiations have commenced.

To my mind the question is not if Indigenous peoples and Government should negotiate a treaty or treaties. The question is when will we do it.

Some people will say that the discussion that is currently going on is necessary to allow people time to consider the ramifications of travelling down that path and to self determine. To decide whether that is the road they want.

I say to those people there is no alternative. We will not see constitutional reform in this country that enshrines Aboriginal rights in the manner of the Canadian Constitution.

The Canadian Constitution provides at Section 35 that ‘the existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed’.

Our constitution, fortunately or unfortunately, does not make major change a simple affair.

Nor can the judiciary deal with what is essentially a political issue. It must be by way of an executive act.

For it is the executive that makes the decisions to engage in and withdraw from conflict.

I can see that at some levels Aboriginal people and non-Aboriginal people are learning to get along. The Reconciliation process has done an enormous amount in opening the communication channels. But the reconciliation walks were not just a demonstration that vast numbers of people had been able to communicate with each other. They were anti-war demonstrations. The people were saying they had had enough. They do not want to live in a demilitarised zone where at any time they may be wounded by guilt; they do not want to have to see the skirmishes break out on the news every week.

The history of war tells us that the invaded Aboriginal peoples will never lay down all their weapons while the invaders impose a system that doesn’t allow for the full respect of their inherent rights. Timor, Ireland, North and South America, Vietnam: there are many obvious examples.

It is my view the skirmishes that happen every week in Australia between the State and Aboriginal people will continue. Whether it is kids in Redfern responding to harassment from the coppers, Murray Islanders forcibly taking fish from commercial fishermen, or elected Aboriginal representatives spiking legislation in the corridors of Parliament, the resistance will continue.

I say, let's start the peace negotiations. I can assure you that Aboriginal people have gotten bored with the war, in as much as people can get bored with funerals, or bored with visits to the jail, or bored with poverty. Let's start the peace talks.

To get the peace talks underway we need a number of things. They are:

1. Identify the parties/authority (Aboriginal nations/Governments).
2. Identify the parameters (social services/human rights/land, sea and resource rights/compensation). Modern treaties attempt to cover the field. For example, the Nunavut Agreement,²⁴ which included \$1.1 billion to be paid out between 1993 and 2007, and 1.9 million square kilometres of land and water.
3. Identify the funding sources to pay for the negotiations.

However, once started the road is long and riddled with potholes. It is useful to take some heed of the observations from someone who has been there. I read a passage from John Amaqoalik, an Inuit leader, describing his experience. You may see some similarities with the path that Australian Aboriginal people must follow:

He said,

The last 30 years have seen incredible changes for the Inuit of Nunavut. These changes, mostly for the better, have been the result of pioneering work by Inuit leaders who were determined to improve the lives of their people. This work has demanded the dedication and sacrifice of these people as they struggled to secure land and political rights for their children.

In the early 1970s, being an Inuk leader working in land claims was sometimes a lonely feeling. Explaining to the older generation why it was necessary to 'claim' our homeland was not an easy task. Trying to explain what a modern treaty might contain was just as difficult.

The Inuit leadership also had to face hostile governments and a Canadian population largely ignorant of Inuit, their homeland, and their history. Inuit negotiators also had to break new ground in their land claim talks. Governments did not have any policy in many areas that Inuit felt had to be part of any final deal. The negotiations were stalled many times as governments struggled with things like royalties, offshore rights, self-government institutions with real legal powers, and new political entities. The process was grindingly slow and frustrating.

There is only one way out. Life has changed irrevocably for Aboriginal people. While people still pine for the old ways there is no turning back. But we do not have to continue down the same path either. The losses to both sides are too great. Let's end the war and start the peace. Now.

²⁴ "Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada". Available at: http://www.tunngavik.com/documents/publications/LAND CLAIMS AGREEMENT_NUNAVUT.pdf. Also see Glossary.

MARCIA LANGTON

A treaty between our nations?

Inaugural professorial lecture, Chair of Australian Indigenous Studies, 11 July 2000, University of Melbourne, Melbourne

Introduction

At the end of the twentieth century, the public culture of Australia remains, as it has for the previous two centuries, riven by disputes as to the status of Indigenous people in Australian civil society. I argue here that it remains the case that the Australia polity is devoid of a clear and just status for Indigenous people within its ambit. Further, this continuing dispute is a loose hanging thread in the web of our civil society.

The modern nation constituted at Federation in 1901 excluded Indigenous people from the State, and such exclusion continued until the 1960s. In the twentieth century the problem became more acute: Aborigines having been dispossessed, the new state then excluded them from the status of citizen, and Aborigines inhabited a political no-man's land for nearly seventy years, from 1901 to 1967. The public debates about the place of Aboriginal people in the nation have focussed on the problem of how to incorporate Aboriginal people into the ambit of the nation state by various means: assimilation, integration, self-management, self-determination, reconciliation and, throughout years, the call for a treaty could also be heard.

Following legislative reforms in the 1970s, Aboriginal land rights were recognised in statutes. Whereas the lands returned under these statutes were acts of grace by the Crown, the common law recognition of native title by the High Court of Australia in 1992 found customary rights to land that has pre-existed and, under certain conditions, survived British sovereignty. The subsequent codification of native title in the *Native Title Act* of 1994 aimed, amongst other things, to resolve the retrospective effects of this discovery at law of an underlying title which had the potential to cause the invalidity of titles issued since annexation. The High Court decision in the Wik case found that native title and pastoral leases could coexist, with some qualification, and this finding was the grounds for amendments to the Native Title Act. In breach of international law on acts of racism these amendments substantially stripped Aboriginal people of their customary property rights. It is this sequence of events in the deterioration of Aboriginal rights that has caused Aboriginal people to consider the legacy of the frontier in Australia as a continuing and profoundly racist exclusion of Aboriginal people from the Australian polity.

Then doctrine of *terra nullius* as argued by Blackburn J was found by the Mabo High Court to be inconsistent with modern standards of human rights. That judgment relied on the proposition that 'not only did the civilized nations acquire sovereignty by their "discovery" of lands but the right of inhabitants to continue to possession must receive executive or legislative recognition before it can be admitted to exist.'

However the High Court's judgment in *Mabo and others v. The State of Queensland* unanimously confirmed that the validity of the acquisition of sovereignty by the Crown is not justiciable in municipal courts. The acquisition of sovereignty is an Act of State cannot

be reviewed. The decision in Mabo confirmed the position in *Coe v. The Commonwealth*, and it is now settled law that no challenges to the validity of Australian sovereignty will be entertained before an Australian court. Further, as Noel Pearson observed in his 1993 Evatt Foundation Lecture, ‘as a matter of international legal theory, the validity of the acquisition of sovereignty over Australia by the British Crown is a moot point.’

Even so, it is generally agreed in the literature on this problem that ‘there is no way that the issue will ever be entertained at the international level.’ Further, he explains:

As a matter of law the decision of the High Court in Mabo has established that the conflation of sovereignty with land ownership... the law now recognises Aboriginal law as a source of law and as the basis for the Indigenous right to land.

Pearson’s lucid refutation of arguments within the Aboriginal community on issues of sovereignty as a useless diversion was accompanied by his eloquent demand in that lecture for fruitful alternatives to the concept of sovereignty as then argued by the Aboriginal Provisional Government. He conceded, however, that:

a concept of sovereignty inhered in Aboriginal groups prior to European invasion insofar as people have concepts of having laws, land and institutions without interference from outside of their society. This must be a necessary implication of the decision in Mabo against terra nullius.

Justice Blackburn in *Milirrpum v. Nabalco* had ruminated on the question of the existence of Aboriginal government, laws, and perhaps, as had Chief Justice Marshall in 1832, the sovereignty of those who occupied the land before British sovereignty when he said:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called ‘a government of laws, and not of men’, then it is that shown in the evidence before me.

In accordance with the Mabo finding on native title arising from particular ‘traditional laws and customs’, Pearson suggested that, with the development of standards of human rights relating to Aboriginal people at international law, ‘Recognition of ... “local Indigenous sovereignty” could exist internally within a nation-state, provided that the fullest rights of self-determination are accorded.’

He also noted that the Australian state:

has consistently failed to understand and to accept the right of its Indigenous peoples to be allowed the fullest rights of self-determination. It is little wonder that calls for a separate nation find ready adherents in the Aboriginal community.

Australian judicial decisions on these issues make interesting reading. In the end, it must be concluded that the denial of the existence of Aboriginal nations in Australia by this case law accords our nation the status of an anomaly among the settler colonial states. No treaties or agreements were concluded with Aboriginal people. The monstrous injustice of the seizure and dominion involved, and the lack of consent and treaties, remains a stain on Australian history and the chief obstacle to constructing an honourable place for Indigenous Australians in the modern state. That place must be found beyond the limits of the legal discursive framework that dehumanises and dehistorises Aboriginal people rendering us as the mere wandering brutes of Hobbesian and Rousseauian fame.

In a protracted public debate during the year 2000, following national consultations over a ten-year period, the Council of Aboriginal Reconciliation presented to the Prime Minister the Rt Hon John Howard the Draft Document of Reconciliation.

His rejection of this document on the spurious grounds that only ‘practical reconciliation’ can ameliorate the ‘problems of the Aborigines’ has been interpreted as his rigid refusal to recognise Indigenous societies as pre-existing entities with rights and entitlements. His rejection of this innocuous document was followed by a counterproposal from Aboriginal leaders for a renewed treaty commitment. The idea of a treaty between our nations thus requires to be explained, as I hope to do here.

In Australia, there has been an almost comprehensive rejection of the idea that Aboriginal peoples might be self-governing within the limits of Australian law. The exceptions are minor, such as the right to practise narrowly interpreted ‘traditions and customs’ on Aboriginal land in some demarcated areas, some limited rights under local governance statutes, and the narrow recognition of native title under ‘traditional laws and customs’ as pertaining only to the internal incidents of native title in the Native Title Act of 1994. The Australian Law Reform Commission recommended a limited means of recognition by amending some statutes, but the recommendations have largely been ignored. In a limited way, the judiciary has adopted its advice on the relevance of customary law in evidence and sentencing.

So, how can it be explained that native title to land that pre-existed sovereignty and survived it, as the High Court of Australia has explained, has been recognised, and yet the full body of ancestral Indigenous Australian laws and jurisdiction are deemed by a narrow, historically distorted notion of sovereignty to be incapable of recognition.

In this lecture, it is possible only to touch on some of these issues. In setting out some of the evidence here, I provide an interpretation that shows that it was the failure of colonial governments to make treaties with our ancestors and the subsequent body of justification for that failure, both judicial and political, that deprive Australian Indigenous peoples today of the dignity of exercising fully the body of ancestral law in coexistence with the sovereign state. The idea of sovereignty on which this conclusion lies is a fictive account of settlement, a fictive account of dominion and a distortion of more than four centuries of the exercise of sovereignty by the British Crown in the New World.

Of the *terra nullius* proposition, it was said in Mabo [No 2][469]:

The facts as we know them today do not fit the ‘absence of law’ or ‘barbarian’ theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory. It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty’s Indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands.

Thus, I argue that, just as British sovereignty did not wipe away Aboriginal title, neither did it wipe away Aboriginal jurisdiction. Aboriginal government under the full body of Aboriginal customary laws, must by the same logic as the discovery of native title at common law, survive annexation of Australia by the Crown, even if in some qualified way:

The plain denial of justice in the suppression of Aboriginal customary laws and jurisdiction results from the one-dimensional notion of sovereignty that has developed as a defence of the indefensible.

Let me explain what I see as the relevance of treaties to this continuing dispute in Australian society about Indigenous people. I will first consider the nature of treaties; second, the historical uses and characteristics of treaties; third, the history of agreement-making between Indigenous and non-Indigenous Australians; fourth, the debates about a treaty in Australia; and finally, the issues of relevance to our society in this account of treaty-making.

Treaties in historical perspective

According to the records, the British have used treaties for the settlement of disputes since the thirteenth century. Elsewhere as well, they have been common practice between nations and states, either in the form we now know them at international law or in different forms which stem from past customary law practices.

In the entry on ‘treaty’ in the Oxford Historical Dictionary, we find the claim made by Haydn that the first formal and written treaty made in England was made on 11 September 1217, between Henry III and the Dauphin of France.

HAYDN Dict. Dates s.v., The first formal and written treaty made in England with Henry III and the dauphin of France...II Sept. 1217. 1874 BANCROFT Footpr. Time viii. 195 A treaty of alliance with France...

The Treaty Rolls preserved in the Public Record Office in London commence at February 27, 1235, during the reign of Henry III. The catalogue of the British Library lists boxes of material relating to treaties dating from 1131 in the case of Papal Bulls (1131 to 1533).

There is an abundance of treaties and treaty documents in the records of the Public Records Office in London covering a period of several centuries. They can be divided into two distinct types: formal documents (protocols and ratifications), and administrative papers. Treaties in the Public Record Office concern matters as diverse as defence, border disputes, trade, marriage, environmental issues, etc.

Clearly the word ‘treaty’ is a catch-all term for a variety of types of documents that are agreed between parties for a wide range of purposes.

When the British and other European imperial powers entered the New World, treaties and agreements with Indigenous people ensued.

Following the War of Independence in the United States of America, Chief Justice Marshall of the US Supreme Court explored the dilemma of the conflicting rights of settlers and Indigenous people and adopted the compromise known as native title at common law. The Chief Justice reviewed the practice of Europe which developed after the 1537 Papal Bull, and declared that the:

...rights of the original inhabitants were in no instance entirely disregarded... They were admitted to be the rightful occupants of the soil, with legal as well as just claims to retain possession of it.

The fundamental rationale was equality as a principle of the rule of law, as Richard Bartlett has noted. This is a celebrated but not unusual instance of the recognition of Indigenous peoples as the rightful occupants of the soil. As we shall see, the history of treaty-making in the New World extended over four hundred years for the British and French and over five hundred for the Spanish, Dutch and Portuguese with divergent outcomes throughout the colonies.

Imperial powers found it necessary in various situations to justify acts of domination for judicial purposes. The reasoning of Blackstone in relation to *terra nullius*, that is, wasteland or uninhabited lands, is famously such a case of justification of domination for juridical purposes. Fisch noted that for practical purposes, the assumption of ‘might makes right’ prevailed otherwise. Historians are turning in larger numbers to analysing the various ideas that sustained the colonisers’ beliefs in the righteousness of their dominion over others, and in Australia the extraordinary array of evolutionary theories about Aborigines come to mind in that regard.

The starting point for European expansion in the fifteenth century was the nearly total absence of relations with extra-European peoples. Thus, after initial contact had been established, the potential approaches of the imperial entities to regulate relations included all of those from unilateralism to reciprocity. Between these two extremes it was possible to develop variants that expressed relations, equality and inequality.

‘rightful occupants of the soil’

In 1823, in the United States Of America, a decision recognising the ‘rightful occupants of the soli’ and ‘domestic dependent nations’ was delivered by Chief Justice Marshall in *Johnson v. McIntosh* 8 Wheat 543 (1823).

Professor Richard Bartlett, in *Native Title in Australia*, says of *Johnson v. McIntosh*:

However, the equality declared by Chief Justice Marshall was tempered by a regard for pragmatic considerations. In Johnson, the United States Supreme Court upheld a grant by the United States over claims of private purchase from Indian tribes of the same lands. Marshall CJ declared that ‘discovery gave title’ to the ‘discovering’ nation and rejected the application of the ‘law which regulates ... the relations between the conqueror and the conquered’. The court declared that the circumstances required ‘resort to some new and different rule, better adapted to the actual state of things’: 8 Wheat 543 at 591, 599; 5 L Ed 681 at 693, 695 (1823). The Indians were recognised as the ‘rightful occupants of the soli’, but their title was ‘necessarily, to considerable extent, impaired’: (1823) 8 Wheat 543 at 574; 5 L Ed 681 at 688. The impairment the Chief Justice referred to was the denial of power to alienate upon vesting of the underlying title in the ‘discovering’ nation. The denial of the power to alienate affirmed the validity of grants made to settlers, ‘subject only to the Indian right of occupancy’: 8 Wheat 543 at 574, 591; L Ed 681 at 689, 693 (1823).

The Chief Justice thereby recognised but also diminished Indigenous rights to traditional land in the course of reconciling Indigenous rights with title in the Crown. ... The court did not suggest that such a diminished recognition of Indigenous rights was just. Rather, it opined that it was the only possible accommodation of the interests of settlers and of the Indigenous people. (p.6)

Bartlett further notes that:

Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States

This policy was first recognised in Johnson v. McIntosh and has been repeatedly reaffirmed ... Indian right of occupancy is considered as sacred as the fee simple of whites.

The Supreme Court emphatically denied ‘that a tribal claim to any particular lands must be based upon a treaty, statute or other formal government action’: 314 US 339 at 347 (1941).

Martinez notes of the extraordinary contradiction in the findings of President Judge Marshall in the famous *Worcester v. Georgia* case of 1932:

Nothing better illustrates what is at stake than the inherent contradiction in the reasoning behind the famous sentence handed down by the United States Supreme Court – in the words of its President, Judge Marshall in the famous WORCESTER V. GEORGIA case of 1932. On the one hand, Marshall reasons as follows: ‘America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.’ On the other hand, he advanced the thesis that the United States of America possessed rights over those very same nations, on the basis of their ‘discovery’ by Great Britain, and by virtue of its status as political and territorial successor of the British.

This case led Fisch to argue that when, in practice, one party establishes its supremacy over the other, or seeks to achieve hegemony, it becomes necessary – for a variety of reasons – for it to seek legal justifications, particularly to uphold claims against other contending parties or to counter domestic criticism.

General justifications played a crucial role in European overseas expansion. They had inherent universal applicability and included such well-known terms as ‘the right of conquest’, and ‘humanitarian (or civilizing intervention’. Significantly, moreover, such justifications referred to rights that were specifically claimed by the European powers, such as the right to propagate the faith unhindered. Formally established juridical relations coexisted alongside claims to rights which the European powers never succeeded in securing in practice or which could only be secured at a much later stage.

It is thus not possible to reduce the international relations between the Europeans and Indigenous peoples as a whole to a single pattern. For a long period, a number of variants of international law coexisted, and were employed by the Europeans depending on the various circumstances and their diverse interests. Those relations never existed within a legal vacuum either in theory or practice – and during the whole era of European expansion – international law was taken to be universal and its norms were considered to be applicable to the whole world. The bone of contention was determining who were subjects of such a universal system of norms.

Special Rapporteur Martinez submits, that, contrary to ‘conventional wisdom’, ‘from the very beginnings of that relationship, the Indigenous nations were considered as capable of preserving peaceful or warlike relations and of entering into treaties with the European Powers.’

Further, he emphasises that the heart of the problem is that international law currently constitutes a system encompassing entities that are juridically equal, but which must at the same time face considerable *de facto* inequalities, which cannot be done away with merely by proclaiming equality. He argues, therefore, that the international juridical order is

compelled to take those inequalities into account by granting them special rights to guarantee minimum applicable standards. Scholars of legal history are more and more coming to similar conclusions.

Richard Falk refers to the problem as one of entrapped nations, entrapped within the structure and framework of the sovereign state:

We need to understand the extent to which there exists in all parts of the world now, an awareness that one of the great current problems of world order, is the plight of what I would call entrapped nations, nations that are entrapped within the structure and framework of the sovereign state. An enormous juristic fraud has been perpetrated on modern political consciousness by confusing national identity with the power political reality of state sovereignty.

Writing on the manner in which courts, when dealing with issues of sovereignty, hide behind the act of state doctrine, Brian Slattery argues:

Whatever the merits of this argument in other contexts, it is doubtful whether it should induce modern Canadian or American courts to accept fictitious accounts of the manner in which their countries came into being, accounts that accept even the most extravagant imperial claims at face value and ignore the historical presence and viewpoints of Indigenous peoples.

Despite the findings at law as to Indigenous nations being the ‘rightful occupants of the soil’, the doctrine of discovery was interpreted as an exercise of dominion that impaired the status of these Indigenous nations. Nevertheless, such domestic dependent nations continue to exist in North America within the dominion of the United States of America.

Globally, Indigenous peoples have brought to international attention the monstrous injustice of these self-justifying claims to dominion and developed various models for the negotiated settlement of rights in their ancestral property and jurisdiction. Legal scholars have supported their rejection of the fantastic nature of settler states’ claims to legitimacy and the alternative arrangements developed. In some parts of the world, such arrangements have removed the cloud on the encapsulating settler states and the titles issued by their governments.

Treaties and agreements in common law settler states: United States of America, Canada, and New Zealand

The United States of America

In North America from the time of first settlement, in the years 1533 to 1789, that is, prior to Independence and the Marshall cases, the administrators of British colonies treated with Indian nations as equal sovereigns. They were relationships ‘between sovereign nations’ that ‘accorded tribes an equivalent status to that of the colonial governments.’

For pre-Independent English-speaking North America, Dorsett and Godden describe the situation as follows:

in many cases the British Imperial Government instructed colonial administrators that land could only be acquired by purchase from the Indians. The policy was formalised, and applied uniformly to all the North American colonies in the Royal Proclamation of 1763. The Royal Proclamation prohibited all private purchases of

lands covered by the Proclamation. This gave the Crown the sole right to purchase Indian lands.

After Independence, from 1789 to 1871, the United States government assumed the role of the British and Spanish governments and continued the earlier British policy of treating with the Indians as members of sovereign nations.

These treaties were made under the authority of the federal treaty making power. United States Constitution, Art. II(2) provides, inter alia, that the President: ‘... shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur’. Treaties provided not only guarantees that the government would protect traditional lands, but also for the provision of specific services to the Indian nations, which can be analogised today to provision of social welfare services.

It was during this period that the ‘Marshal Trilogy’ of cases were decided: *Johnson and Graham’s Lessee v. M’Intosh*, 8 Wheat. 543, 21 U.S. 543 (1823) and *Worcestser v. Georgia*, 31 U.S. (6 pet.) 515 (1832), already discussed; and, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). These early decisions determined both the relationship of the United States Government to the Indian nations, and the parameters of subsequent judicial developments. ‘The two latter cases established the status of the Indian Nations as domestic independent nations and the resulting Federal-Indian trust relationship.’

In 1871 treaty-making with the Indian tribes was discontinued as it was seen as an impediment to the assimilation of Indians into white society. In that year, in a rider to the Appropriations Act, Congress declared that no more treaties could be made with the Indian nations. Thereafter, ‘agreements’ rather than ‘treaties’ were made with Indian peoples. Between 1911 and the 1970s, Congressional practice was to obtain some kind of consent from the Indians for any action it was considering which might affect them. Current practice is to use negotiated settlements as a means of dealing with complex issues.

Canada

Treaties in Canada proceeded from a different basis from those in the United States of America. Prior to Confederation, almost 40 treaties, the majority being peace treaties, were negotiated between First Nations and the British Crown during the period 1693 to 1862. In Canada, however, Indian peoples were not considered sovereign powers as determined by *R v. Bob and White* (1964) 50 D.L.R. (2d) 613. ‘Later treaties tended to follow a pattern of surrender of lands in return for particular rights, for example continued hunting and fishing rights, supplies of monetary payments’.

After Confederation, the Canadian Federal Government still maintained the treaty-making process, although it changed significantly. These later treaties are known as the ‘numbered treaties’ as they are consecutively numbered Treaty 1 (1871) to Treaty 11 (1921). All of the numbered treaties contain the same core provisions and thus, in exchange for surrendering all their right and title to their lands, the Indian peoples were to receive monetary annuities in perpetuity and reserves.

These treaties are known as *sui generis* in nature. They ‘are not the same as a treaty created in accordance with international law.’ They ‘do create enforceable obligations’, however. Further, they ‘do not create new rights’. Rather they ‘recognise pre-existing rights’. While treaties in Canada do not have primacy over of the Confederal law, they are supreme in relation to provincial laws under the provisions of S. 88 of the Indian Act.

Section 35 was inserted into the *Constitution Act* in 1982 at the time of the patriation of the Constitution. It stands outside the *Canadian Charter of Rights and Freedoms*, and provides that ‘The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.’ Further, at subsection 3, it includes land agreements as ‘treaty rights’ in order to achieve ‘greater certainty’. In addition, Section 25 provides that:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights of freedoms that pertain to the aboriginal peoples of Canada including:

- ... any rights or freedoms that have been recognised by the Royal Proclamation of October 7, 1763; and
- ... any rights or freedoms that now exist by way of lands claims agreements or may be so acquired.

Section 35 is designed to protect Aboriginal rights and treaty rights that had not been extinguished in 1982 at the time of the insertion of this section into the Constitution (p.24). Under Sparrow it was held that Section 35 provides constitutional protection to those Aboriginal rights which were not extinguished prior to the coming into force of the Constitution Act, 1982.

New Zealand

The Treaty of Waitangi, signed in 1840, between the Maori and the British colonial government, is recognised as the founding document of New Zealand and ‘resides in the constitutional file’ of its system of government. The treaty is in two versions: English and Maori. Because they vary in meaning quite substantially, there were problems of interpretation such that the English version had been privileged over the Maori. Only recently, legislation has been enacted providing that the Maori version is to be used when dealing with interpretation. The authors explain that:

... according to the English text version, sovereignty passed to the British Crown and then subsequently to the New Zealand government. However the Maori text speaks of granting a right of governance rather than sovereignty. Under the principles of international law operative at that time, the British Crown acquired sovereignty over New Zealand by way of cession.

The Treaty established the right of the Crown to govern in New Zealand and the terms of a peaceful settlement. In exchange, Maori rights to their lands, resources and *taonga* were affirmed and Maori were granted the rights and privileges of ‘British citizenship’. When New Zealand became constitutionally independent from Britain the Treaty obligations of the British Crown were transferred to the Crown in New Zealand. Unlike Australia, New Zealand has a unitary rather than federal structure of government, and while it is a constitutional monarchy it does not have a written constitution. The government’s power to deal with Maori affairs derives not from a nominated head of power as under the Australian Commonwealth Constitution, but from the inherent plenary power arising from sovereignty itself.

However, the Treaty can only give rise to legally enforceable rights when incorporated into domestic New Zealand law. Many Maori want to see the Treaty incorporated into law as a fundamental constitutional document to strengthen claims to greater control over their own affairs, and to obtain protection of Maori culture and compensation for Treaty breaches.

The Treaty provided that the Crown's right to govern was dependant upon it meeting its obligations to Maori people under Articles of the Treaty. Recently the Treaty has been considered in a number of land mark cases dealing with Maori rights.

In interpreting the Treaty, the courts historically held the Treaty to be of no legal force, in itself, without incorporation into domestic New Zealand law. A passage frequently cited on this subject in the case of *Hoani Te Heu heu v. Aotea District Maori Land Board*:

It is well settled that any rights purporting to be conferred by such a 'treaty of cession' ... 'cannot be enforced in the Courts, except insofar as they have been incorporated in the municipal law'.

Dorsett and Godden explain that over the last ten years there has developed a significant body of case law which has clarified the treaty obligation of the Crown. Of particular importance in marking a change in the attitude of the Court was the above mentioned *Maori Land Council Case* where the Court found that the Treaty should be interpreted in a broad manner and as an evolving instrument taking account of international human rights norms. A number of treaty principles were elucidated in the course of that decisions including: sovereignty was exchanged for the protection to *Rangatiratanga*; the treaty established a partnership imposing on the partners a duty to act reasonably and in good faith; and, Maori are to retain *Rangatiratanga* over their resources and *taonga*.

Ideas about and attempts to negotiate treaties with Indigenous people in Australia

Throughout Australian history, entrepreneurial, evangelical, and other humanitarian figures in our history have attempted by various means, including attempts at treaties, to resolve the hostile relationship between the Indigenous and settler Australians.

No treaty documents or treaty proposals were officially recognised and judicial decisions declared Australia uninhabited wasteland. Consequently, the large body of law centred upon these treaties and their interpretation, which has developed in the USA and Canada, has not developed in Australia.

In the following part of this lecture, I survey some of the attempts at settlement and offers of settlement.

Henry Reynolds examines the evidence of treaty-making in Tasmania in his book, *Fate of a Free People*: in the early years of the first colonial settlement in Tasmania a Treaty with the 'Chiefs' of the Aboriginal 'tribes' had often been discussed and considered. It was suggested that a treaty should have been entered into in order to restrain and prevent the extermination of the Aborigines by settlers. In Governor Arthur's correspondence, Reynolds finds explicit discussion of the need for treaties:

While reflecting on what had gone wrong in Tasmania, Arthur urged the Colonial Office's officials to negotiate treaties and arrange for the purchase of Indigenous lands in all future colonizing ventures. He pushed this policy in letters written in 1832, 1835 and 1837. 'On first occupation of Tasmania', he observed in 1835, it was 'a great oversight that a treaty was not, at the time, made with the natives and such compensation given the chiefs as they would have deemed a fair equivalent for what they surrendered'. Arthur believed they would have been satisfied with 'a mere trifles'. But even a trifles would have amounted to a clear acknowledgment of prior ownership.

But significantly this process of negotiating treaties between the settlers and Indigenous people was not new. As has been noted previously, treaties had been concluded elsewhere in the New World. Reynolds observes:

From an international perspective, Arthur's interest in treaties was not surprising, particularly as he had spent eight years in the Americas. Treaties had been negotiated with American Indigenous since the seventeenth century and continued to be the normal way of arranging the relations between settlers and Indigenous people until the 1870s.

Arthur, as Reynolds argues, was concerned enough to communicate his desire that the Colonial office deal with negotiating a treaty of some kind with the Aborigines:

Arthur frequently referred to his desire for negotiation in dispatches to the Colonial Office and in other official documents. His proclamation of 1828 contained references to an 'intended negotiation'; to his plan for a 'negotiation with certain chiefs of aboriginal tribes'. But how to conduct such a negotiation was another matter altogether. Neither side seemed to offer scope for conciliation. The Aborigines fled out of the sight of Europeans, who in turn feared the silent spear. Enquiries made by Arthur through the magistrates in December 1827 failed to produce any one at all 'willing to incur the hazard of attempting to open a conciliatory communication with the Aborigines'. Arthur wrote to Governor Darling six months later, expressing his lack of success in the attempt to 'induce them to listen to any specific terms of accommodation'.

Secretary of State Hukisson wrote to Arthur in May 1828 approving Arthur's attempt 'to confine their limits' but warning that the 'restless character' of the Tasmanians would make it difficult to 'confine them to any particular limits within the Colony'.

Yet the idea of a treaty still preoccupied the mind of Arthur and, later, George Augustus Robinson, who was commissioned by Arthur to negotiate with the Aborigines:

Governor Arthur was equally concerned about his ability to control Europeans or 'although the respectable class of settlers might be depended upon in maintaining the treaty', the servants, runaway convicts, stock-keepers and 'all that class of characters who ... are under no special control' would continually encroach on Aboriginal land.

Reynolds concludes:

Robinson was negotiating what was, in effect, a treaty. The political reality was that the colonists had failed to impose a military solution and were forced to offer terms. After significant negotiation, during which the terms were modified and then accepted, there was then a strong obligation to meet the conditions of the treaty. This was at the very heart of the complaints made by the petitioners in 1846, who knew that what Robinson had done was to 'make for us and with the Colonel Arthur an agreement which we have not lost from our minds since and we have made our part of it good.'

His evidence shows that treaty-making was well understood among the Tasmanian tribes. For instance,

Kickeroller told Robinson about conflict between the Pardarererne people of the north-east and the Luggermairerner Big River tribe of the central plateau. It arose because the latter had broken a treaty – they had received beads as payment for

red-ochre but had not delivered as promised. Such agreements were necessarily verbal. But the expectation was that they would be honoured. Robinson appreciated that the Tasmanians 'look for and expect a fulfilment of such promises as are made to them'. And this applied to white men as well as black, Robinson observing that they 'relied with implicit faith on the fulfilment of the promises I made to them on the part of the Government'.

Robinson admitted his failure to deliver one of the conditions of 'the compact made to the Aborigines', and this admission is interesting in itself. Reynolds observes that Robinson's journal entry:

... confirms the story related to Calder that Robinson was often heard to express regret that the promises 'made them on which they surrendered their liberties, were so faithlessly kept'. In the most critical negotiating – that with Manalargenna – Robinson said nothing about permanent exile, as his own journal entry indicates:

This morning I developed my plans to the chief Manalargenna and explained to him the benevolent views of the government towards himself and people. He cordially acquiesced and expressed his entire approbation that there was a need for treaties when dealing with Indigenous peoples. of the salutary measure, and promised his utmost aid and assistance. I informed him in the presence of Kickerterpoller that I was commissioned by the Governor to inform them that, if the natives would desist from the wonted outrages upon the whites, they would be allowed to remain in their respective districts and would have flour, tea and sugar, clothes etc. given to them; that a good white man would dwell with them who would take care of them and would not allow any bad white man to shoot them, and he would go with them about the bush like myself and they then could hunt. He was much delighted.

The conclusion can be drawn from journal entries that Robinson had been negotiating on the basis that he was authorised to make such 'promises', and that he interpreted the negotiations to be in good faith on the basis that his interlocutors placed trust in him, and in his words.

Reynolds also turns to the views of the Governor Arthur to understand the nature of these events. In correspondence, Arthur wrote:

The proposal to allow Aborigines to remain on their land was prompted by Chief Justice John Pedder in the Executive Council meeting of February 1831. He wondered whether some treaty could not be made with these people, by which their chiefs should engage for the tribes not to pass certain lines of demarcation which might be agreed upon, and that it should be proposed to them to allow an European agent to reside with or accompany each tribe.

Governor Arthur concluded from his Tasmanian experience that there was a need for treaties when dealing with Indigenous peoples. When writing to the Colonial Office in 1837, he explained that the idea had been much on his mind while he was still on the island and that he discussed the idea 'at great length with Mr. Robinson'. Both Arthur and Pedder formally raised the question of treaty at meetings of the Executive Council. Arthur's problem was not whether a treaty was appropriate, but whether either side would conform to it. The respectable settlers might be depended on, but not the riff-raff. The chiefs might be negotiated with, but they lacked influence and little dependence could be placed on 'the observance of any treaty' by the Aboriginal population as a whole.

Reynolds concedes that we may never know with any certainty whether Robinson negotiated a treaty on behalf of the government. The conditions were not written down. However, does conclude that the evidence suggests that he did reach an agreement similar to the treaties with native American tribes in North America, although the terms of the agreement were not honoured.

Batman in Victoria

The well-known but ill-fated Batman treaty concerning an area of land now encompassing Melbourne was firmly rejected by Governor Bourke in 1835. The entrepreneurial Batman negotiated and signed a Treaty with the Koori of Victoria June 6, 1835. ‘there were two treaties, each executed on parchment in triplicate.’

The first was titled, ‘Grant of Territory called DUTIGALLA, with livery of Seisin endorsed, Dated 6th June 1835’. It covered an area some forty miles in length or 500,000 billot notes of the settle00 acres. This was the ‘Melbourne’ treaty. The second treaty ‘ceded 100,000 acres of the Geelong Indented Head area, and is similar in all respects except for the details of the land.’

Billot notes of the settler parties to these documents, Batman, Wedge and Gellibrand, that they, ‘believed in the value of the treaties: at least, always gave strong indications of their faith in them’, even though:

It was not, of course, expected that the treaty would be considered binding on the English government, but on previous experience, such action was considered to be proof of bona fides, and would justify approaching the home government for authorisation of settlement, thus over-riding the local Sydney authorities.

Australian history has many gaps and work remains to be done. Whether agreements were sought in the following decades as the frontier violence raged across the continent, I do not know. Accounts by anthropologists, Donald Thomson, RM and CH Berndt, and Ian McIntosh tell of a series of events in Arnhem Land in the Northern Territory from the 1940s. Thomson was commissioned by the Australian government to investigate the situation of Aboriginal people in the north eastern part of that region after the killing of several Japanese fishermen and a police constable by Aboriginal people. Thomson trekked with Riawulla north along the coastline from the Roper River to find Wonggu, whose three sons had been imprisoned in Darwin, carrying the maak, or carved message sticks that the young men had carved as a message to their father, which Thomson passed to Wonggu when he finally made contact. Thomson negotiated a peace agreement with Wonggu, Wonggu promising to desist from killing and Thomson committing himself to pursuing his case for land, peace and protection with the Australian government. The Yolngu then became engaged in various types of negotiation with the many strangers who came to their lands.

Ronald Berndt documented what he called the Arnhem Land adjustment movement that came into being late in 1957. In 1962, the clan leaders at Elcho Island prepared a demonstration in full view of all the residents of the mission, Aboriginal and mission staff alike, of sacred poles to protest to the missionaries the existence of their own religion. Such public revelation was unprecedented in Aboriginal life. He describes the events as follows:

a memorial was set up near the old mission church at Elcho Island. A small, open enclosure held a display of formerly secret-sacred religious emblems that were being made public for the first time: the central tr to additional post had a Christian

cross at its apex. We need not go into the reasons for this movement's establishment, or its aims. It is sufficient say that in this context it emphasised traditional religious equality with Christianity, and had wide socio-political implications the undoubted stimulus for Aborigines was to put their relations with Europeans on a new footing ...

This was followed in 1962 by the creation of two panels of clan emblems by each of the clan leaders of northeast Arnhem Land at the mission at Yirrkala, Dhuwa and Yirritja. These were placed on either side of the altar, and again represented the most sacred and secret of the clan *wangarr*, or Ancestral origins and meanings, never before revealed in public. These events involved months of negotiation between the clan leaders at their respective mission settlements and represented a turning point in the relationship between Aboriginal people and the missionaries at Yirrkala. In protest at the excision of their lands for bauxite mining by the federal government, the Yolngu clan leaders prepared the famous Bark Petition in 1963, prepared in ritual fashion and signed in English fashion, and submitted to the Parliament in Canberra. The meetings of elders to prepare the petition was the precursor to their subsequent litigation in *Milirrpum v. Nabalco*.

The parliamentary inquiry into the acquisition of the Yolngu land for mining followed in 1964. In 1973, Mr Justice Woodward was appointed to carry out a Commission of Inquiry into how Aboriginal land rights might be recognised in Australian law.

In March 1972, the Larrakia people whose traditional territories covered the coastal area in which the city of Darwin is located in the Northern Territory, sent a petition to the Prime Minister, Billy McMahon, requesting a treaty process be established. It read in part:

When the first settlers came to the Northern Territory, the tribes fought them with wooden and stone weapons.

Hundreds of our people were shot.

The Gwalwa Daraniki is a group of proud blacks who will keep fighting for the land (as our grandparents did) until:

- *The government appoints a Commission to go around to every tribe and work out a treaty to suit each tribe.*
- *Each tribe will have legal assistance, and help from anyone else they wish.*
- *All members of the tribe shall come together to vote and decide if the finished treaty is fair.*
- *If the treaty is rejected, then that tribe will go on fighting for their land rights.*
- *If the treaty is accepted, then all the tribe will sign it and make it good for all time.*
- *The treaties will also be signed by the Prime Minister, his Cabinet and the Governor-General.*

We invite all people of Aboriginal descent to join the tribe of their ancestors.

These are the demands of the Gwalwa Daraniki, and we shall not stop until the treaties are signed.

The petition was signed by five men of the Larrakia tribe, including Bobby Secretary, and a report on it was published in the Northern Territory News on 30 March 1972. As Judith Wright tells the story:

Little was heard of this petition in the troubled days of 1972 which followed, and it was not until June that Mr McMahon replied. It was not appropriate, he said, to negotiate with British subjects as though they were foreign powers; and the reason that treaties had never been negotiated with Aborigines was partly that of the difficulty of identifying the people and groups with whom negotiations could be conducted.

A proposal for a treaty was raised by the late Kevin Gilbert in correspondence with Prime Minister Malcolm Fraser in 1979, at which time Gilbert had established a second Aboriginal Tent Embassy in an encampment at the site of present Parliament House. Gilbert's impassioned arguments, published in several editions from 1987, set out his ideas on an Aboriginal Sovereign Position and were accompanied by various versions of a Draft Treaty. His approach had little effect on the formulations of the problem as it was perceived by the Aboriginal Treaty Committee and The Makarrata proposal by the National Aboriginal Conference.

In April 1979, the Aboriginal Treaty Committee held its first meeting. Its inaugural members were Dr Coombs, the first chairman, Dr Judith Wright-McKinney, Stewart Harris, Professor Charles Rowley and Professor WEH Stanner. There was agreement to the content of the Committee's first document sent out in November 1978, which canvassed issues such as a treaty as providing a kind of constitutional basis for the relationship of Aboriginal Australians to the Commonwealth and Australian society generally. Wright's account noted that the difficulty for the Committee lay, not in convincing Aborigines of the worth of these proposals – Aborigines had been demanding the same for some forty years at that stage – but, in Wright's own words, 'with the attitudes and prejudices – and apathy – of the dominant Australian community.'

For five years this Committee tried to educate and persuade non-Aboriginal Australians to the idea of a national treaty to be negotiated between Aborigines and governments with the objective of settling wide-ranging historical, political, economic, social and 'land-rights' grievances, while charting anew course for the future. Judith Wright sets out her belief in a treaty between Indigenous and non-Indigenous Australians in the introduction to *We Call for A Treaty*, the publication that formed a report to the public on the work of the Committee:

Ultimately, therefore, there must be some instrument such as a treaty which will confirm for all time equal and just treatment for Aboriginal Australians wherever they live, putting their land and their rights beyond the reach of sovereign parliaments. There is no security for Aboriginal people in Acts of Parliament, which can be repealed or amended.

The Committee used many advocacy tactics: advertisements, the publication of a book *Its Coming Yet* by Stewart Harris, radio speeches, the formation of local Aboriginal Treaty Committees and seminars and the treaty proposal won support from many Australians, including people regarded as 'prominent'.

The Committee members did not purport to speak on behalf of Aboriginal people. This is left to Aboriginal people to do for themselves. The main representative body for the Aboriginal people at that time was the Government's elected advisory body, the National Aboriginal Conference, a non-statutory advisory body established to advise the Minister

for Aboriginal Affairs with the twofold role of expressing Aboriginal opinion through elected representatives and of providing formal advice to the Minister when requested.

In June 1979, the National Aboriginal Conference called for a treaty between the Commonwealth and Aborigines.

The Prime Minister's reply to the Conference proposal for a Makarrata did not refer to the question of overriding the states. 'In view of the fate of his own Act when he had attempted to come to the rescue of Aurukan and Mornington Island, and other failures, it was a sore topic.' Wright noted, 'in his letter, he stated that he "would be pleased to discuss the concept of a treaty with the National Aboriginal Conference at a mutually convenient time, if they wish to do so". In November 1979, the Hon Senator Chaney, the then Minister for Aboriginal Affairs, welcomed the initiative and the Government funded the NAC to consult Aborigines around Australia on the idea, not of a treaty, but of a 'Makarrata'. This is a Yolngu word signifying an end of a dispute between communities and the resumption of normal relations, made known in WEH Stanner's ABC Boyer Lectures in 1969, *Whither The Dreaming?* Stanner's description of the duelling ordeal undertaken by disputant parties in the Makarrata ceremony used phrases such as 'blow for blow' and 'the drawing of blood', and it was clear that a public servant who had listened to the lectures had passed on a sanitised version of the term to his Ministerial masters.

Asked for an opinion on the legal possibilities inherent in a treaty in 1980, the Attorney-General relied on the decision in *Coe v. The Commonwealth of Australia*, which denied that the Aboriginal people of Australia (on whose behalf the case was brought) could be considered as a domestic dependent nation organised as a 'distinct political society separate from others which had been uniformly treated as a state'. This decision also denied that they had legislative, executive or judicial organisations by which sovereignty might be exercised. If such organisations did exist they would have no powers unless these were conferred by Commonwealth, State or Territory legislation. As to the claim to land, it was, said the majority judgment, 'fundamental to our legal system' that the Australian colonies became British possessions by settlement and not by conquest'. Clearly a reference to the *terra nullius* doctrine rejected by the High Court 12 years later.

For many Aboriginal leaders, the proposal for a 'Makarrata' was already a dead letter. And yet, despite the Attorney-General's opinion, following the influential advocacy of the Aboriginal Treaty Committee for a national treaty, the National Aboriginal Conference supported the proposal.

The NAC's interim report on July 1980 reported doubts in the minds of Aborigines about what benefits a 'Makarrata' might bring. In August 1981, the National Aboriginal Conference issues a draft Makarrata document, subsequently referred to as 'The 24 Demands'.

The National Aboriginal Conference took seriously the idea of a Makarrata as an attempt to reach, by way of a negotiated and perhaps entrenched agreement between the Commonwealth and Aborigines, a new beginning in many areas of concern, including land rights. Legal scholars Keon-Cohen and Morse recount that the National Aboriginal Conference drew attention to five principles:

Firstly, the protection of Aboriginal identity, language, law and culture, that is an all-embracing set of notions....

Secondly, the recognition and restoration of rights to land ... by applying throughout Australia the recommendations of the Woodward Commission....

Thirdly, the conditions governing, that here should be principles in this Bill of Rights, concerned with conditions concerning mining and exploitation of other natural resources on Aboriginal land.

Fourthly, compensation to Aboriginal Australians for the loss of traditional lands and for damage to those lands and their traditional way of life....

Fifthly, the right of Aboriginal Australians to control their own affairs and to establish their own associations for this purpose

The additions made to each of these principles by Keon-Cohen and Morse – to update them in terms of present day human rights standards – should be a warning about the naïve prescriptions formulated during this period by Aboriginal people. Human rights standards evolve continually and the advances in understanding the status of encapsulated Indigenous nations in terms of international legal documents have been substantial since the time of the Makarrata debates. The authors attach the following comment to the first principle: ‘And in the language of the last day and a half you might read that as self-determination’; to the second, ‘We might today rephrase that by saying by applying the Commonwealth Principles as enunciated in Mabo Number 2’; to the fourth, ‘and we might add propositions concerning the Stolen Generation’; and to the fifth principle, they add ‘again perhaps expressed today in terms of self-determination’.

The National Aboriginal Conference sought to negotiate solely with the Federal Government, first for ‘Agreement in Principle’, possibly to be entrenched in the reformed Constitution, and second, the negotiation of more detailed agreements for various regions. The proposed deadline for constitutional reform was 1988.

Concerned about the continuing dispossession of Aboriginal communities in the rush for minerals at that time, the Treaty Committee researched the historical treaties and agreements in the hope that some instruments that might be acceptable to settler Australians could offer some hope for the protection of Aboriginal societies.

In a comparison of Indigenous land rights in Australia and Canada, the authors, Bryan Keon-Cohen and Bradford Morse, note that both countries have had to face up to ‘an age-old conflict in a modern but still acute form’:

the conflicting needs of an energy-hungry industrialised society and of a subsistence-dwelling, often traditional, and environmentally sensitive Indigenous community. There is a cyclical element in this conflict not devoid of irony: it represents the modern version of competition for land and resources originally encountered on first colonisation, and originally resolved largely by force.

During this period there were widespread demonstrations against the Western Australian government’s use of force to send a drilling rig onto an Aboriginal-owned pastoral lease to drill, on a sacred site, for oil. But as Wright noted:

The Argyle diamond venture, with its glitter of international profit, absorbed the major attention of the Australian newspapers thereafter. The Kimberley Land Council remained unfunded, and the dispossessed Aborigines of the Kimberleys remained virtually without a champion.

And Noonkanbah had ... set off a further reaction in the ‘settler’ community. Not even the supporters of Sir Charles Court could stomach quite such a blatant show of force as that event represented.

Judith Wright's record of their concerns tells us much about her passion and that of her fellow committee members to find a workable solution to Australia's frontier inheritance:

We were uncertain ourselves of the legal implications of the term The question of what the final agreement might be called did not concern us much; what mattered was that it should be seen by the dominant society as binding, in the same way as any international agreement, on the Commonwealth.

Wright gives an indication of the loss of goodwill between governments and Aboriginal people at that following the signing of the Ranger Uranium Agreement in highly questionable circumstances, as she says, 'we continued to doubt whether Commonwealth legislation would prove trustworthy in the face of what had happened in the Northern Territory case.'

The Senate Standing Committee on Constitutional and Legal Affairs, in its report *Two Hundred Years Later*, tabled in 1983, rejected the idea of a treaty because the Aboriginal peoples were not a 'sovereign entity' and so could not enter into a treaty with the Commonwealth. Instead, the Standing Committee was in favour of a compact which could eventually be inserted into the Constitution by referendum.

In the end, the Aboriginal Treaty Committee considered the divided opinion among government circles and organised Aboriginal groups, and wound up after proposing a parliamentary resolution asking the Commonwealth Government to negotiate a Treaty with Aboriginal Australians.

Dr Coombs wrote to the Prime Minister on 21 February 1984, announcing the end of the Aboriginal Treaty Committee, putting a range of matters as to the idea of how a treaty with Aboriginal people would be advanced. The National Aboriginal Conference was wound up in June 1985.

The lasting contributions of the Aboriginal Treaty Committee were the arguments propounded by its members against the findings of Blackburn J. in the *Milirrupum v. Nabalco* case, and in support of an underlying Aboriginal title, or the just right of occupancy of Aboriginal peoples that demanded recognition. In the end, they were proven right by the High Court decision in *Mabo No. 2*. As well, they have left us with another legacy – a challenge to the courts, the legal scholars and all those who care about the fabric of Australian civil society. Judith Wright argued:

Yet it could be argued that the apparently unique position of Australian Aborigines, in which Britain claimed to have acquired inhabited territory simply through annexation and occupation, with accompanying violence by the 'settlers', was the result of an act of seizure which could not be justified in international law either of the time, or later.

Bob Hawke and the Barunga Statement

In the lead up to the Bicentennial celebrations, in September 1987, the then Prime Minister Bob Hawke said that he would like to see the Bicentenary produce some sort of understanding or 'compact' with Aboriginal people whereby the Australian community recognised its obligations to rectify some of the injustices of the previous 200 years. A statement of Indigenous aspirations was presented to Mr Hawke at the Barunga Festival in June 1988. The Prime Minister responded by calling for a treaty to be negotiated between the Aboriginal people and the Government of Australia. The use of the term *treaty* ignited much public interest, but in July 1988, Mr Hawke said:

It's not the word that's important, it's the attitudes of the peoples, attitudes of the non-Aboriginal Australians and of the Aboriginal Australians if there is a sense of reconciliation...whether you say there's a treaty or a compact is not important, but it is important that we do it.

In the end, nothing was done and the idea of a compact disappeared from public debate.

While support for a treaty was not unanimous, there was wide political support for reconciliation. Through 1990 and 1991, cross-party support developed for a formal process of reconciliation to be led by a council of prominent Australians, and the Council for Aboriginal Reconciliation was formally established on 2 September 1991. The ten years of educative and consultative work of the three terms of the Council, two under the Chairmanship of Patrick Dodson, and the last under Evelyn Scott, have caused a fundamental change in the terms of the debate. Reconciliation is a key word in Australian political and social life, and a significant proportion of Australians support the idea, according to the various polls and the estimated 400,000 people who walked across Sydney Harbour Bridge during the final public plenary of the Council at Corroboree 2000 in May. In September, Prime Minister John Howard made it clear that any kind of agreement that his government would consider would be a reiteration of the policy of assimilation and would make no mention of an apology to the 'stolen generations', a continuing right of occupancy, or any special rights or measures.

Patrick Dodson introduced the idea of a 'framework agreement' in his Vincent Lingiari Memorial Lecture at the Northern Territory University in 1999, some months after the passage through the federal Parliament of the Native Title Amendment Bill.

The frustration and anger of many Aboriginal people at the relentless efforts of governments to dispossess Aboriginal people were heard clearly in Dodson's summary of the outcome of the recognition of common law native title. Native title is fragile and largely theoretical because of its vulnerability to statutory extinguishment, as was so comprehensively achieved in Howard's *Ten Point Plan*, expressed in hundreds of pages in these amendments to the Native Title Act.

In his lecture, Patrick Dodson set out the idea of a Framework Agreement as a process for the settlement of the outstanding inequalities in the relationship between the first peoples and the settler state. This proposal was communicated by a delegation of Aboriginal leaders, including Dodson, to Prime Minister John Howard following his rejection of the Draft Document of Reconciliation at Corroboree 000. The Prime Minister likewise rejected the idea of the Framework Agreement.

His rejection of yet another offer from Aboriginal people for resolution of our outstanding grievances is only of minor historical importance, however. History will record and future generations will know that Aboriginal people have continued to assert the right to negotiate just terms and conditions of the seizure of their territories and resources and the proscription of customary laws, governance and ancestral jurisdiction.

Agreement-making and the potential for the settlement of disputes between Indigenous and other Australians

Despite the formal rejection of a document of reconciliation by the Prime Minister, the outcome of the reconciliation process pursued in the last ten years necessitated an audit of agreement-making with Aboriginal people in recent times. Since the first agreements signed under the provisions of the Aboriginal Land Rights Act in the Northern Territory

more than twenty years ago, there has been an astonishing proliferation of agreements between Australian Indigenous people and resource extraction companies, railway, pipeline and other major infrastructure project proponents, local governments, state governments, farming and grazing representative bodies, universities, and many other institutions and agencies. Some are registered under the terms of the Native Title Act. Others are simple contractual agreements that set out the framework for future developments, such as the Cape York Heads of Agreement between the Cape York Land Council, the Australian Conservation Foundation and the Cape York Graziers' Association.

There is a growing confidence in the process of agreement-making with Indigenous people, and, at the same time, there is an increasing understanding of the flaws in the process that arise from the intransigence of State and Federal governments in recognising these agreements. This intransigence prevents the formalisation of critically important aspects of these agreements such as their ability to run with the land. Such uncertainty is precisely the outcome desired by Federal and State governments in order to discourage agreement-making with Aboriginal people.

These developments in relations between Indigenous and non-Indigenous Australians are evidence of creative thinking by those involved in grappling with the legacy of the Australian frontier. While the many attempts at treating with Aborigines in colonial times and in the early twentieth century were not translated into enduring outcomes, it is clear that the need for agreements is both desirable and appropriate for several reasons, although there is formidable resistance to agreement-making with Aboriginal people. The agreements negotiated since the 1970s are evidence of a willingness to do what the 'colonial settlers' were unable to countenance, and that is acknowledge that another group of people were the owners and custodians of the lands and waters of Australia, and that their descendants have a right to the possession, use and enjoyment of those lands and waters and to govern, within the limits of Australian law, their use and access by others, and to benefit from that use and access by others, as would any other group of people in rightful possession of a place.

Historically, settler Australians have grappled with the problem of what to do about the Aborigines. There is a persistent unwillingness to acknowledge that, in Australia, the rights of Indigenous people are inferior to those in the United States, Canada and New Zealand.

In particular, the impression one gains from reading some of the contributions to the 1988 Institute of Public Affairs' publication on an Aboriginal Treaty is that Australian dealings with Aboriginal people should be quarantined from world history. It is as if none of the treaty-making and similar arrangements in the comparable settler states occurred, and if it did, no relevance could be drawn for Australian circumstances. John Howard wrote in that collection, 'I regard a treaty as a recipe for separatism'. He announced his suspicion that the treaty demands of Aborigines were nothing more than disguised attempts to obtain 'massive compensation'. Such widely held views, especially among committed monarchists, also fail the test of historical accuracy in ignoring the 1769 Instructions of King George III to Captain Cook and others under his command to:

*... with the consent of the Natives to take possession, in the name of the King of Great Britain, of convenient situation in such countries as you may discover, that have not already been discovered or visited by any other European Power
... But if you find the countries so discovered are uninhabited you are to take possession of them for His Majesty.*

This failure to obtain consent in a range of matters throughout Australian history is referred to be Aboriginal leaders as the ‘unfinished business’ in their relations with the state.

Around the globe, for the last two centuries with the rise and decline of the ‘blood and soil’ doctrine of nation state and sovereignty, the twinned ideas of nation state and sovereignty have been challenged. As legal history scholar, Joaquin Varela Suanzes, has noted, Britain itself has not been free of serious challenges to the idea of sovereignty:

On the other hand, there is no doubt that during the current century the principle of Parliamentary sovereignty has had to face new and very difficult challenges. Particularly three: firstly that faced by the 1937 Statute of Westminster which compelled the reconsideration of the relationship between the British parliament and the Commonwealth [285]; secondly that caused by Britain joining the European Economic Community in 1972, which put on the table the no less problematic relationship between the sovereignty of the British Parliament and the primacy of European Community Law [286]; thirdly that implied by the approval in 1997 of the Autonomy polls in Wales and Scotland, which have compelled a redefinition of the role of the Parliament of Westminster and its relationship with the two new legislative assemblies [287]. Such challenges have forced a reconsideration of the validity of Parliamentary sovereignty in Great Britain today [288] where the debate regarding sovereignty has acquired great political importance and substantial academic interest ...

Historian Henry Reynolds has brought a clarity of understanding to the issue of sovereignty in Australia. He observes:

What has been conspicuously lacking in the assessment of Aboriginal history is an appreciation that the Aboriginal tribes were, in effect, small nations which had long traditions of complex ‘international’ relations. They made war and peace, negotiated treaties, settled conflicts, arranged marriages and organized access to resources and right of way across territories.

In his study of Aboriginal sovereignty, he clarifies the confusion in the conflation of two separate notions: nation and state. He both distinguishes between them and examines the evidence for a conceptualisation of Aboriginal sovereignty. His conclusion is that sovereignty in Australia can be understood as residing within the distinct Indigenous and settler nations, and as such is compatible within the framework of the sovereign state. Such an arrangement need not be regarded as threatening the dismemberment of the existing state, or as separatism. As arrangements elsewhere in the world demonstrate, there is compatibility between a nation’s sovereignty and a state’s sovereignty. Therefore, when we examine the objections to the idea of a treaty with Aboriginal people, none of the grounds for refusal remain persuasive.

The current treaty processes in Canada and the Canadian constitutional entrenchment of treaties and agreements provide a model favoured by many Aboriginal people in these circumstances. There is no evidence that there has been any detriment caused either to Canadian sovereignty nor to the polity by these arrangements. That many recent agreements are affirmed by the Canadian Constitution is evidence that there are alternatives to the limited discursive framework of the legal canon in Australia.

Adopting such a process would open up the possibility for alternative arrangements in a post-frontier Australia that would accord a status of full equality to the traditional laws of Indigenous peoples by mutual agreement. Such a polity would thereby include Indigenous

people within the *civitas* on a voluntary basis, rather than by coercion as a result of historical events. In any case, it is clear that the anomaly of Aboriginal status remains one that confounds agreement-making, and contributes to the insecurity felt among parties to such agreements while governments refuse to acknowledge or affirm many of the agreements that have been negotiated in the last two decades.

Future governments may consider the possibilities for legislation supported by Constitutional entrenchment to overcome the monstrous injustice involved in the seizure and dominion of Aboriginal territory. The lack of consent and absence of agreements or treaties, remains a stain on Australian history and the chief obstacle to constructing an honourable place for Indigenous Australians in the modern state.

APPENDIX I

Reconciliation Bill 2001²⁵

A Bill for an Act to further advance reconciliation between Aboriginal and Torres Strait Islander peoples and all other Australians, by establishing processes to identify, monitor, negotiate and resolve unresolved issues for reconciliation, and for related purposes

Preamble

Because:

- (a) Australia has been occupied by Aboriginal and Torres Strait Islander peoples from time immemorial, before the assertion of British sovereignty; and
- (b) many Aboriginal and Torres Strait Islander peoples suffered dispossession and dispersal from their traditional lands and waters by the Crown without compensation and without lasting and equitable agreement on the use of those lands and waters; and
- (c) many Aboriginal and Torres Strait Islander peoples suffered separation from their families under government policies now discredited; and
- (d) as a consequence of these and subsequent deprivations, the Aboriginal and Torres Strait Islander peoples have become, as a group, the most disadvantaged in Australian society; and

²⁵ A Private Member's Bill introduced into the Senate by Senator Aden Ridgeway on 5 April 2001. It received its second reading on 27 November 2003 but was never voted on.

- (e) there has been no formal process of negotiation between Aboriginal and Torres Strait Islander peoples and the Government to achieve reconciliation; and
- (f) it is desirable and beneficial for all Australians that there be such reconciliation; and
- (g) the Council for Aboriginal Reconciliation, through consultation with the people of Australia, developed the *Australian Declaration Towards Reconciliation* and the National Strategies to advance reconciliation and recommended in its final report that there be legislation to continue the reconciliation process and realise the principles and goals set out in those documents; and
- (h) reconciliation between Aboriginal and Torres Strait Islander peoples and all other Australians is an ongoing process that requires all matters identified as unresolved issues for reconciliation to be addressed; and
- (i) reconciliation between Aboriginal and Torres Strait Islander peoples and all other Australians can be achieved with the development of partnerships between Aboriginal and Torres Strait Islander peoples and the wider community to ensure the full recognition and respect for the place of Aboriginal and Torres Strait Islander peoples in the life of the nation; and
- (j) reconciliation between Aboriginal and Torres Strait Islander peoples and all other Australians can be achieved with solutions that are developed cooperatively and implemented in conjunction with the Aboriginal and Torres Strait Islander communities, the wider Australian community, and all levels of government; and
- (k) it is the intention of the people of Australia to further the progress toward reconciliation and rectify the consequences of past injustices to ensure that Aboriginal and Torres Strait Islander peoples receive the full recognition and status within the Australian nation to which history, their prior occupation and their rich and diverse culture fully entitle them to aspire; and
- (l) it is the wish of the Australian people that reconciliation be achieved through a real and lasting settlement reached with Aboriginal and Torres Strait Islander peoples.

The Parliament of Australia therefore enacts:

Part 1—Preliminary

1 Short title

This Act may be cited as the *Reconciliation Act 2001*.

2 Commencement

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

3 Interpretation

In this Act, unless the contrary intention appears:

ATSIC means the Aboriginal and Torres Strait Islander Commission appointed under the *Aboriginal and Torres Strait Islander Commission Act 1989*.

Commissioner means the Aboriginal and Torres Strait Islander Social Justice Commissioner, appointed under the *Human Rights and Equal Opportunity Commission Act 1986*.

Council for Aboriginal Reconciliation is the Council established under the *Council for Aboriginal Reconciliation Act 1991*.

human rights means the rights and freedoms recognised by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child, and such other instruments relating to human rights as the Commissioner considers relevant.

HREOC means the Human Rights and Equal Opportunity Commission, established under the *Human Rights and Equal Opportunity Commission Act 1986*.

reconciliation refers to the achievement of a united Australia which respects this land of ours, values the Aboriginal and Torres Strait Islander heritage and provides justice and equity for all.

unresolved issues for reconciliation means any issue, whether already identified or identified through the processes of this Act, that is an impediment to achieving reconciliation until it is addressed, including but not limited to the following:

- (a) the recognition of the right to equality;
- (b) the protection of Aboriginal and Torres Strait Islander culture, heritage and intellectual property;
- (c) the recognition of Aboriginal and Torres Strait Islander customary law;
- (d) a comprehensive agreements process for the settlement of native title and other land claims;
- (e) regional autonomy; and
- (f) constitutional recognition.

4 Objects

The objects of this Act are to:

- (a) further advance reconciliation between Aboriginal and Torres Strait Islander peoples and all other Australians; and
- (b) acknowledge the progress towards reconciliation and recognise that there are unresolved issues that impede the achievement of reconciliation; and
- (c) recognise the unique status of Aboriginal and Torres Strait Islander peoples as Australia's first peoples; and
- (d) establish processes to identify and resolve the unresolved issues for reconciliation between Aboriginal and Torres Strait Islander peoples and the Australian community; and
- (e) initiate a negotiation process to resolve unresolved issues for reconciliation at the national level, that will result in an agreement or treaty which will unite all Australians; and
- (f) establish a process for reporting on the nation's future progress toward reconciliation.

Part 2—Recognition of the unique status of Aboriginal and Torres Strait Islander peoples

5 The Australian Declaration Towards Reconciliation

- (1) The Aboriginal and Torres Strait Islander peoples are recognised as the first peoples of Australia.
- (2) The *Australian Declaration Towards Reconciliation* in Schedule 1 is hereby recognised.²⁶

Part 3—A process to identify and resolve issues for reconciliation

6 A National Reconciliation Convention

- (1) ATSIC must use its best endeavours to ensure that a National Reconciliation Convention is held within one year after the commencement of this Act and every 3 years for 12 years after the first Convention is held.
- (2) Participation in a National Reconciliation Convention is to be determined by:
 - (a) the Minister; and
 - (b) a body chosen by the Minister as representative of the wider community in relation to reconciliation; and
 - (c) ATSIC.

²⁶ See Appendix II

(3) In determining who should attend a National Reconciliation Convention, the entities referred to in subsection (2) must have regard to these criteria:

- (a) at least 50% of delegates must be Aboriginal or Torres Strait Islander people; and
- (b) the entire composition of the delegates must show fair representation of the Australian population by gender and geographical location.

(4) The agenda at a National Reconciliation Convention must be negotiated between:

- (a) the Minister; and
- (b) a body chosen by the Minister as representative of the wider community in relation to reconciliation; and
- (c) ATSIC; having regard to the functions of the Convention under section 7.

7 The functions of a National Reconciliation Convention

(1) The functions of a National Reconciliation Convention are to:

- (a) discuss reports and consultations carried out in preparation for the Convention; and
- (b) report on and discuss implementation of recommendations from any previous Convention; and
- (c) identify and prioritise unresolved issues for reconciliation for discussion and action; and
- (d) debate and recommend appropriate action to resolve unresolved issues for reconciliation identified under paragraph (c).

(2) In carrying out the functions under subsection (1), delegates to a National Reconciliation Convention must have regard to events and issues at the local, regional, State and Territory level.

(3) In identifying issues for discussion and action, delegates must have regard to, but are not limited by:

- (a) issues identified in the work of the Council for Aboriginal Reconciliation; and
- (b) issues identified by the Minister, the body chosen by the Minister under paragraph 6(2)(b) as representative of the wider community in relation to reconciliation, and ATSIC; and
- (c) issues related to or arising from national negotiations or agreements between Aboriginal and Torres Strait Islander peoples and other Australians; and

- (d) issues related to or arising from State, Territory, regional or local negotiations or agreements between Aboriginal and Torres Strait Islander peoples and other Australians; and
- (e) matters arising from reports prepared under Division 1 of Part 5; and
- (f) any other issue considered relevant to the progress of reconciliation.

Part 4—A negotiation and agreement process to resolve issues for reconciliation between Aboriginal and Torres Strait Islander peoples and the Government

8 A negotiation process to facilitate resolution of reconciliation matters

- (1) The Prime Minister must immediately begin negotiations with ATSIC to develop a process which will unite all Australians by way of an agreement or treaty through which the unresolved issues for reconciliation can be resolved.
- (2) The negotiation process developed under subsection (1) must:
 - (a) identify the parties to be involved; and
 - (b) provide for negotiations to be undertaken having regard to the work of the National Conventions under Part 3; and
 - (c) be in place by 31 December 2001, or as soon as practicable thereafter using the best endeavours of the Prime Minister and ATSIC.

9 Protocols

The negotiation processes developed and carried out under section 8 must be guided by a set of principles to be decided by the parties to negotiation, including:

- (a) dealing in good faith, and with a view to reaching agreement; and
- (b) mutual recognition and respect, including:
 - i) recognition of the status of Aboriginal and Torres Strait Islander peoples and protection of their civil, political, economic, social and cultural rights; and
 - ii) recognition of government and Aboriginal and Torres Strait Islander protocols; and
- (c) equitable and sufficient provision of resources to ensure effective participation by all parties in negotiations; and
- (d) other matters that are agreed between the parties.

Part 5—A process for reporting on reconciliation

Division 1—Reports

10 Reports by the Aboriginal and Torres Strait Islander Social Justice Commissioner

- (1) The Commissioner must include in the report prepared under section 46C of the *Human Rights and Equal Opportunity Commission Act 1986* a specific reference to:
 - (a) the operation of this Act; and
 - (b) the national progress toward reconciliation in relation to the exercise and enjoyment of human rights of Aboriginal and Torres Strait Islander peoples.
- (2) In carrying out the functions under this section, the Commissioner may exercise all of the powers of HREOC and the Aboriginal and Torres Strait Islander Social Justice Commissioner under the *Human Rights and Equal Opportunity Commission Act 1986*.

11 Three-Yearly Report on the Progress Toward Reconciliation

- (1) As soon as practicable after each third anniversary of the commencement of this Act, the Minister must appoint an independent body or taskforce to prepare and submit to the Minister a National Report on the Progress Toward Reconciliation.
- (2) Matters to be addressed in the National Report on the Progress Toward Reconciliation may include:
 - (a) relevant indicators of community and individual wellbeing, including statistics, agreed benchmarks and other indicators in relation to mortality, health, housing, education, employment, poverty, representation in the criminal justice system, community development, political participation, and any other matter that may indicate progress in relation to Aboriginal and Torres Strait Islander peoples' enjoyment of human rights; and
 - (b) matters identified in any reports commissioned by the Council of Australian Governments; and
 - (c) the implementation of the recommendations contained in the following national strategies developed by the Council for Aboriginal Reconciliation:
 - (i) *National Strategy to Sustain the Reconciliation Process*;
 - (ii) *National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights*;
 - (iii) *National Strategy to Overcome Disadvantage*;
 - (iv) *National Strategy for Economic Independence*; and
 - (d) matters identified in the reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner under section 10; and

- (e) matters identified at the National Reconciliation Conventions held under Part 3; and
- (f) the progress of negotiations under Part 4; and
- (g) any other matter relevant to the progress of reconciliation.

12 Tabling of the National Report on the Progress Toward Reconciliation

The Minister must cause a copy of the National Report on the Progress Toward Reconciliation to be laid before each House of the Parliament within 15 sitting days of that House after its receipt by the Minister.

Division 2—Monitoring the progress toward reconciliation

13 Parliamentary Joint Committee on Reconciliation

- (1) As soon as practicable after the commencement of this Act and after the commencement of the first session of each Parliament, a joint committee of members of the Parliament, to be known as the Parliamentary Joint Committee on Reconciliation, must be appointed.
- (2) The Parliamentary Joint Committee must consist of at least 10 members, of whom:
 - (a) 5 must be senators appointed by the Senate; and
 - (b) 5 must be members of the House of Representatives appointed by that House.
- (3) The appointment of members by a House must be in accordance with that House's practice relating to the appointment of members of that House to serve on joint select committees of both Houses.
- (4) A member ceases to hold office if he or she ceases to be a member of the House by which he or she was appointed.
- (5) A member appointed by the Senate may resign his or her office by writing signed and delivered to the President of the Senate.
- (6) A member appointed by the House of Representatives may resign his or her office by writing signed and delivered to the Speaker of that House.
- (7) A House may appoint one of its members to fill a vacancy among the members of the Parliamentary Joint Committee appointed by that House.

14 Powers and proceedings of Committee

All matters relating to the Parliamentary Joint Committee's powers and proceedings must be determined by resolution of both Houses.

15 Duties of Committee

The Parliamentary Joint Committee's duties are:

- (a) to consult extensively about the implementation and operation of this Act with:
 - (i) Aboriginal and Torres Strait Islander peoples; and
 - (ii) ATSIC and other Aboriginal and Torres Strait Islander representative organisations as appropriate; and
 - (iii) Commonwealth, State, Territory and local governments; and
 - (iv) Other appropriate persons and bodies; and
- (b) to report from time to time to both Houses on the implementation and operation of this Act; and
- (c) to examine each yearly report that is prepared by the Commissioner referred to in section 10 and of which a copy has been laid before a House, and to report to both Houses on matters:
 - (i) that appear in, or arise out of, those reports; and
 - (ii) to which, in the Committee's opinion, the Parliament's attention should be directed; and
- (d) to examine each Three-Yearly National Report on the Progress Toward Reconciliation that is prepared under section 11 and to report to both Houses on matters:
 - (i) that appear in, or arise out of, that Three-Yearly Report; and
 - (ii) to which, in the Parliamentary Joint Committee's opinion, the Parliament's attention should be directed; and
- (e) to examine the recommendations of each National Reconciliation Convention held under Part 3 and to report to both Houses on matters:
 - (i) that appear in, or arise out of, those recommendations; and
 - (ii) to which, in the Parliamentary Joint Committee's opinion, the Parliament's attention should be directed; and
- (f) from time to time, to inquire into and report to both Houses on:
 - (i) the progress toward reconciliation; and
 - (ii) the implementation of the recommendations contained in the final report produced by the Council for Aboriginal Reconciliation; and
 - (iii) matters referred by either House.

APPENDIX II

Australian Declaration Towards Reconciliation²⁷

We, the peoples of Australia, of many origins as we are, make a commitment to go on together in a spirit of reconciliation.

We value the unique status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of lands and waters.

We recognise this land and its waters were settled as colonies without treaty or consent.

Reaffirming the human rights of all Australians, we respect and recognise continuing customary laws, beliefs and traditions.

Through understanding the spiritual relationship between the land and its first peoples, we share our future and live in harmony.

Our nation must have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves.

Reconciliation must live in the hearts and minds of all Australians. Many steps have been taken, many steps remain as we learn our shared histories.

As we walk the journey of healing, one part of the nation apologises and expresses its sorrow and sincere regret for the injustices of the past, so the other part accepts the apologies and forgives.

We desire a future where all Australians enjoy their rights, accept their responsibilities, and have the opportunity to achieve their full potential.

And so, we pledge ourselves to stop injustice, overcome disadvantage, and respect that Aboriginal and Torres Strait Islander peoples have the right to self-determination within the life of the nation.

Our hope is for a united Australia that respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all.

²⁷ Presented by the Council for Aboriginal Reconciliation at Corroboree 2000.

APPENDIX III

Roadmap for Reconciliation²⁸

The National Strategy to Sustain the Reconciliation Process

The National Strategy to Sustain the Reconciliation Process sets out ways to build on progress towards reconciliation between Aboriginal and Torres Strait Islander peoples and the wider community after the Council for Aboriginal Reconciliation completes its term.

These measures address practical, cultural and spiritual dimensions of reconciliation.

Essential actions include:

LEADERSHIP FOR THE RECONCILIATION PROCESS

- All levels of government, the private sector, community and voluntary organisations publicly support the ongoing reconciliation process, provide resources and increasingly involve Aboriginal people and Torres Strait Islanders in their work.
- A foundation, Reconciliation Australia, is established to maintain a national leadership focus for reconciliation, report on progress, provide information and raise funds to promote and support reconciliation activities.
- State, Territory and local reconciliation groups, involving Aboriginal and Torres Strait Islander people and people from the wider community, lead and support action that promotes reconciliation.
- Australian parliaments and political parties address the low level of Indigenous representation in the political system.

EDUCATION FOR RECONCILIATION

- Schools, tertiary education institutions and employers require and support the culturally appropriate teaching of the truth of Australia's history that includes Indigenous perspectives and addresses racism.
- The media feature stories that promote reconciliation and challenge racist stereotyping.

PEOPLE'S MOVEMENT FOR RECONCILIATION

- Communities celebrate significant dates and events and take joint action to achieve agreed reconciliation goals.

²⁸ Presented by the Council for Aboriginal Reconciliation at Corroboree 2000.

PROTOCOL AND CEREMONY

- All parliaments, governments and organisations observe protocols and negotiate with local Aboriginal and Torres Strait Islander elders or representative bodies to include appropriate Indigenous ceremony into official events.

SYMBOLS OF RECONCILIATION

- Governments, organisations and communities negotiate to establish and promote symbols of reconciliation. This would include changing the date of Australia Day to a date that includes all Australians.

FORMAL RECOGNITION OF THE DOCUMENTS OF RECONCILIATION

- All parliaments and local governments pass formal motions of support for the documents of reconciliation.

The National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights

This strategy proposes a number of actions, including some constitutional and legislative processes, to assist the progressive resolution of outstanding issues for the recognition and enjoyment of Aboriginal and Torres Strait Islander rights. It aims to ensure:

- that all Australians enjoy, in daily life, a fundamental equality of rights, opportunities and acceptance of responsibilities; and
- the status and unique identities of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia, and achieve recognition, respect and understanding in the wider community.

Essential actions include:

EDUCATION

- Governments and their agencies, legal, cultural and educational institutions, Indigenous organisations, and the media work together to improve community awareness and appreciation of Aboriginal and Torres Strait Islander peoples as the first peoples with distinct cultures, rights and status.

LEGISLATION

- All governments take steps to ensure the recognition and protection of Indigenous intellectual property as already occurs in some Commonwealth legislation.
- All governments ensure their policies and practices observe Australia's international Indigenous and human rights obligations.

- State and Territory governments consider giving magistrates and judges the discretion to take account of traditional laws in sentencing, as already occurs in some circumstances in the Northern Territory.
- Governments establish legislative processes to deal with the 'unfinished business' of reconciliation, allowing for negotiated outcomes on matters such as Indigenous rights, self-determination within the life of the nation, and constitutional reform.

AUSTRALIAN CONSTITUTION

- Government agencies, legal institutions and educational organisations develop and promote community awareness about the Constitution and its application in protecting the rights of all Australians.
- Within the broader context of future constitutional reform, the Commonwealth Parliament enacts legislation for a referendum which seeks to:
 - prepare a new preamble to the Constitution which recognises the status of the first Australians; and
 - remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.

The National Strategy to Overcome Disadvantage

The National Strategy to Overcome Disadvantage aims for a society where Aboriginal people and Torres Strait Islanders enjoy a similar standard of living to that of other Australians, without losing their cultural identity.

This strategy focuses on education, employment, health, housing, law and justice. Priority must be given to achieving comparable outcomes in health and education. Improvement in these areas is critical to advancing reconciliation. It is important that no person is disadvantaged by the inability of governments and service providers to communicate and cooperate in the delivery of services.

Essential actions include:

PERFORMANCE MEASUREMENT AND REPORTING

- The Council of Australian Governments (COAG) evaluates and updates its National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders, agreeing on a framework for all governments and the Aboriginal and Torres Strait Islander Commission (ATSIC) to:
 - set program performance benchmarks that are measurable, include timelines and are agreed in partnership with Indigenous peoples and communities;

- ensure they have the information systems necessary to monitor performance; and
 - annually report their performance to parliaments, councils and their constituents against these benchmarks.
- Every five years, the Human Rights and Equal Opportunity Commission works with ATSIC to prepare an independent report on the nation's progress in addressing disadvantage.

PARTNERSHIPS AND WORKING ARRANGEMENTS

- Peak business and community groups make commitments to overcome disadvantage, and encourage their members to make similar commitments.
- Services are designed and delivered in a way that is driven by local Indigenous people, strengthens local communities, and forges social coalitions and equal partnerships, drawing on and building the skills and resources of the community.
- Service providers, ATSIC and governments identify and eliminate systemic discrimination and racism, beginning with a review of their own practices.
- Governments adopt funding arrangements that are flexible and sufficient to meet local needs, and enable the pooling of funds across agencies and between the different levels of government.
- Employers link performance-based salaries in all sectors to improvements in Indigenous outcomes, where appropriate.

COMMUNITY AND PERSONAL RESPONSIBILITY

- Indigenous communities, families and individuals take more responsibility for addressing the causes and consequences of disadvantage within their control.
- All Australians accept the responsibility to learn more about the causes and extent of disadvantage and reject racism and related behaviour.

The National Strategy for Economic Independence

The National Strategy for Economic Independence aims for a society where Aboriginal and Torres Strait Islander peoples and communities can share the same levels of economic independence as the wider community.

For most Australians, pathways to economic independence include getting a job and/or running a business.

In both of these cases, an education substantially improves the likelihood of success.

This strategy is not for everyone. For some, economic independence will be defined in terms of their traditional economy and lifestyle.

Essential actions include:

ACCESS TO JOBS AND RESOURCES

- All employers establish strategies for employing and training more Aboriginal people and Torres Strait Islanders.
- Banks and other financial institutions actively adopt culturally-responsive banking and financing regimes and facilitate better access to capital.
- Governments increase the value of Indigenous assets by legislating for Indigenous intellectual property and cultural rights and by working in partnership with Indigenous communities to protect biodiversity and rehabilitate and sustain lands and waters under the control of those communities.

EFFECTIVE BUSINESS PRACTICES

- Indigenous people and communities develop their existing competitive advantages in respect of their cultural assets and special knowledge of the land and the environment.
- Governments, ATSIC, and the private sector all research and develop successful business models that can be applied in regional and remote communities. Priority should be given to developing commercial activities on Indigenous-owned land.
- Private-sector organisations seek opportunities for joint ventures with Indigenous businesses. Governments promote such joint ventures.
- Governments and industry work in partnership with Indigenous communities to ensure their projects strengthen Indigenous communities by supporting the local economy and enhancing regional employment opportunities.

SKILLS DEVELOPMENT

- Schools, TAFEs, universities and other education providers, working with families, develop and implement flexible programs to improve student attendance, retention rates, academic results and career pathways.
- TAFEs and other vocational education providers target their programs to the employment opportunities in the local labour market, aiming for available jobs or business opportunities on the completion of training programs and schemes.
- With local community involvement, education providers, banks and other financial institutions develop money-management programs that increase the capacity of people to plan, save and invest in their future.
- Indigenous leaders actively encourage their people to equip themselves with the skills, knowledge and experiences that are valued in the local employment market.

ABOUT THE CONTRIBUTORS

Linda Burney is a member of the Wiradjuri nation. On 22nd March 2003 she made history by becoming the first Aboriginal person to be elected into the NSW Parliament, for the Sydney seat of Canterbury. Linda has a high profile at state and national levels, in education and training as well as in Aboriginal affairs and has had a varied and interesting career. She was one of the state's senior bureaucrats as Director General for the NSW Department of Aboriginal Affairs from 2000-2003, wrote policy for the Aboriginal Education Unit of the NSW Department of Education and Training, and was a teacher at Lethbridge Park Public School. Linda has been a member of the National Social Justice Task Force of the Aboriginal and Torres Strait Islander Commission, member of the Executive of the Council for Aboriginal Reconciliation, has represented Aboriginal Education at the United Nations and is a member of the Board of Trustees at the University of Western Sydney. Linda attended Leeton High School and was the first Aboriginal graduate from Mitchell College of Advanced Education. She holds an Honorary Doctorate from Charles Sturt University. In 2001 Linda was named as one of 10 "True Leaders" of Australia by The Australian Financial Review's inaugural "Boss" magazine. She has received the NSW Department of School Education Director General's Award for Outstanding Service to Public Schools. Linda was the keynote speaker at the 25th International Montessori Conference in Paris in 2000.

Aden Ridgeway was born in Macksville in northern NSW and is from the Gumbayngirr people of that area. He has served on the Sydney ATSIC Regional Council and for five years was Executive Director of the NSW Aboriginal Land Council. He was a member of both Indigenous Native Title negotiating teams following the Mabo and Wik decisions and was a member of the Council for Aboriginal Reconciliation. Aden was elected as a Democrat Senator for NSW in October 1998 and entered the Senate as Australia's only Indigenous Federal politician in July 1999. He is currently chairing the NSW Aboriginal Trust Fund for Stolen Wages and is Adjunct Professor at the University of Technology, Sydney. He was also recently appointed as Executive Chairman of Indigenous Tourism Australia.

Sarah Pritchard is an experienced international human rights lawyer. She is currently practicing as a Sydney Barrister, following a distinguished academic career and a decade of training in the Diplomacy Training Program (DTP) at the University of NSW. Dr Pritchard is a Board Member of the DTP and her human rights work, both in Australia and internationally, has primarily been in relation to Indigenous affairs and East Timor. She addressed the special session on East Timor at the UN Commission on Human Rights in Geneva as the representative of the Australian Section of the International Commission of Jurists, and has played an important supportive role in the development of Indigenous issues at the UN. Sarah is editor of *Indigenous Peoples, the United Nations and Human Rights* published in 1998.

Shelley Reys, an Aboriginal woman of the Djiribul people, is Managing Director of Arrilla – Aboriginal Training and Development, which promotes respect between Aboriginal and Torres Strait Islander peoples and the wider community through practical services to the private, public and community sectors. Shelley was Co-Chair of Reconciliaiton Australia at the time of the ESORA Forum and has been NSW Coordinator of Australians for Reconciliation and a NSW Reconciliation Committee member. She is

currently a Board member of the Hollows Foundation and is Vice President of the YWCA of Sydney.

Jason Field is a Yuin man from the NSW South Coast. He is Director of Research at Jumbunna Indigenous House of Learning, University of Technology, Sydney, and is currently working with the NSW Aboriginal Land Council at Parramatta. Since 1992 Jason has worked with community, public sector, and higher education organisations in the areas of policy, research, administration and project management on a range of Indigenous issues, including human rights education and training, culture and heritage protection, and the Stolen Generation and the law. At the time of the ESORA Forum he was the Co-ordinator of the Indigenous Law Centre at the University of New South Wales.

John Howard is an Australian stage and screen actor. After a different John Howard was elected Prime Minister of Australia in 1996, jokes about the coincidence entered Australian comedy – notably in an episode of the satirical television series *The Games* in which the organisers of the Sydney Olympics hired the actor to stand in for the Prime Minister. John Howard the actor, identifying himself only as ‘John Howard’, said ‘Sorry’ to Indigenous Australians for their treatment at the hands of the English settlers and their descendants through to the present day. This was a direct comment on the repeated refusal by the Prime Minister to make such an apology on behalf of the Government of Australia. Since this joke, his public profile has risen dramatically and he has appeared at many rallies opposing Australia’s involvement in the Iraq War.

Jack Beetson is from the Ngembaa people of north-west New South Wales. He is an educator and teacher and each year hosts the Aboriginal Philosophy Farm at Linga Longa near Port Macquarie, a place where people get together to discuss all aspects of Indigenous spirituality, culture and the Indigenous world view. People like to call him ‘the Farmer of Minds’. For many years, beginning in the mid 1980s, Jack was associated with Tranby Aboriginal College through his roles as student, teacher and Director of Studies. During this time he played a prominent part in achieving self-determination in education for Aboriginal people. In 2001, in the Year of Dialogue Among Civilizations, he was recognised with a certificate of acknowledgement for the Unsung Hero Award by the United Nations, one of only 12 people throughout the world to receive such an award.

Tony McAvoy was born and bred in Brisbane. His traditional country is the Clermont area of Central Queensland and his people are the Wiri people. In 1983, Tony commenced work as an articled clerk with a Brisbane law firm. In 1988, he graduated in law from Queensland University of Technology and was admitted as a solicitor. He practised as a solicitor in general practice until 1992 when he went overseas. Returning to Brisbane in early 1994 he worked as a solicitor at the Brisbane Aboriginal Legal Service. In late 1994 he came to Sydney and worked for the Department of Aboriginal Affairs. In 2000 he was admitted as a Barrister in NSW. He currently works in the areas of native title and land rights specialising in resource law, criminal law, industrial law, human rights and planning law.

Marcia Langton is the Inaugural Chair of Australian Indigenous Studies at the University of Melbourne, Australia. She is also a Chief Investigator with the research project on Agreements, Treaties and Negotiated Settlements. Marcia is a descendent of the Bidjara and Yiman nation of central Queensland. She was previously the founding Director of the Centre of Indigenous, Natural and Cultural Resource Management and Ranger Professor of Aboriginal Studies at the Northern Territory University. She has worked for three of the

major Aboriginal Land Councils and is a specialist in Aboriginal land tenure and resource issues.

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GLOSSARY

Aboriginal Deaths in Custody: The Royal Commission into Aboriginal Deaths in Custody was established in 1987 to investigate why so many Aboriginal people were dying in prison. There were 99 deaths between January 1980 and May 1989 alone. Despite the recommendation of the Royal Commission, handed down in 1991, deaths in custody have continued to rise, along with rates of imprisonment.

ATSIC: The Aboriginal and Torres Strait Islander Commission was established by the *Aboriginal and Torres Strait Islander Commission ACT 1989* and began operations on 5 March 1990 as a means of involving Indigenous people in the processes of government affecting their lives. ATSIC's structure combined an elected arm of Indigenous representatives, consisting of 35 Regional Councils around Australia with a national Board of Commissioners led by an elected Chairperson; and an administration headed by a Chief Executive Officer (CEO). On 16 March 2005 Parliament passed the *ATSIC Amendment Bill* repealing provisions of the ATSIC Act and so abolishing ATSIC.

CERD: The Committee on the Elimination of Racial Discrimination (CERD) is a body of independent experts that monitors implementation of the United Nations Convention on the Elimination of All Forms of Racial Discrimination. The Committee is administered by the Office of the United Nations High Commissioner for Human Rights in Geneva.

Council for Aboriginal Reconciliation: Established in 1991 by the Federal Government to promote a formal reconciliation process in the decade leading up to the centenary of Federation in 2001. Following the expiry of the Council at the end of 2000, Reconciliation Australia has continued the work of providing a national focus on reconciliation and improving the relationship between Indigenous and non-Indigenous Australians.

Land Council: A local council controlled by an Indigenous community to manage their own affairs.

Mandatory sentencing: The handing down of minimum sentences of detention and imprisonment for people convicted of certain offences. This is without consideration of mitigating circumstances, thus removing all judicial discretion, such as taking into account a person's age. These laws were enacted in Western Australia and the Northern Territory in 1996 and 1997 and impact disproportionately on Aboriginal people.

NAIDOC: The National Aboriginal Islander Day Observance Committee (NAIDOC), founded in 1957, organises celebrations of Aboriginal and Torres Strait Islander culture around Australia at the beginning of July each year. In NAIDOC Week Indigenous Australians celebrate their survival and the richness and uniqueness of their traditions and cultures, while recognising their ongoing fight for justice and equality.

Nunavut Agreement: A treaty between the Inuit people of the Nunavut Settlement Area and the Canadian Government signed in 1993, in which the Inuit gained title over 350,000 km² of land; mineral and hunting rights; a share of mining royalties on Crown Land; shared land management rights; increased government employment; and financial support. As a result of the Agreement, the Nunavut Territory was founded in 1999 with its own government and premier.

Sorry: Each year Australia commemorates National Sorry Day in memory of the Stolen Generations. The first Sorry Day was held on 26th May 1998, a year after the tabling in Federal Parliament of the *Bringing Them Home Report*. Many Australians signed sorry books, and some state and local governments and some members of Parliament issued sorry statements as a mark of recognition of those who were removed from their families and their suffering. There were continued calls for a national apology, with the then Prime Minister refusing to say sorry. Finally, on 13th February 2008, Prime Minister Kevin Rudd made a formal apology to Australia's Indigenous peoples, particularly those whose lives had been affected.

Stolen Generations: For 150 years thousands of young Aboriginal and Torres Strait Islander children were taken forcibly from their families by police and welfare officers. They are known as the 'Stolen Generations'. Between ten and thirty percent of all Aboriginal children were removed, and in some places these policies continued into the early 1970s. The purpose was to assimilate Indigenous children into mainstream society over one or two generations by denying and destroying their Aboriginality.

Terra nullius: A Latin expression deriving from Roman law meaning 'land of no-one'. The Swiss philosopher and international law theoretician Emerich de Vattel, building on the philosophy of John Locke and others, proposed that *terra nullius* applied where the land was not cultivated by the Indigenous inhabitants and hence was deemed not to have been put to good use. From 1788 the doctrine gave 'legal' force to the appropriation of land owned by Aboriginal and Torres Strait Islander people in Australia. It was overturned on 3rd June 1992 as a result of the historic Mabo Case, brought by Eddie Mabo and four other Meriam people before the High Court of Australia. The High Court judgment found that native title rights survived settlement, though subject to the sovereignty of the Crown.

Unfinished Business: Refers to the inadequate response by the Australian Government and the Australian people to the history of dispossession and the denial of human rights of Indigenous Australians that has occurred since 1788.