

AUSTRALIA'S NATION-BUILDING: RENEGOTIATING THE RELATIONSHIP BETWEEN INDIGENOUS PEOPLES AND THE STATE

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I INTRODUCTION

By the time of Australia's Federation in 1901, the colonies had established a long tradition of discrimination against Indigenous peoples. As a colonial country, racism was a founding value of Australian society – it justified the wholesale denial of Indigenous peoples' rights to retain their social, economic and political structures, while denying their rights to participate in the polity that was under construction. This beginning helped to establish the fundamental disrespect for Indigenous peoples that underpins Australia's legal and political development. Disrespect occurs not just in the relationship between the state and Indigenous peoples, but has engendered a more personal disrespect that is experienced by Indigenous people on a daily basis. It is the ongoing tolerance of disrespect that maintains racism as a core value of Australian society.

Achieving justice for Indigenous peoples therefore requires fundamental change at every level. As Australia moves into its second century as an independent state, an examination of the vestiges of Australia's colonial origins should move us toward rectifying the fundamental injustices that continue to undermine the foundations of Australian nationhood. Nation-building is an ongoing process. It requires constant reinforcement of values and identity. It is not sufficient to relegate the failure to respect Indigenous peoples as equals to the vagaries of history, because that history constantly informs Australia's identity, values and governance.

This paper looks back at those foundations but also at recent public policy debates concerning Indigenous peoples' rights. We identify the shortcomings of recent policies as stemming from the failure to approach Indigenous issues within the context of the structural relationship between Indigenous peoples and the colonial state. We suggest that Indigenous policy can no longer suffer the absence of a process that has the capacity to tear at the institutionalised racism

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and discrimination of the Australian state and build respect for Indigenous peoples as the first peoples of this land.

II COLONIALISM AND THE FOUNDATIONS OF AUSTRALIAN GOVERNANCE

Australia's founding ideology, one that is unique even among the community of former British colonies, lies in the assumption of the inherent superiority of the colonising culture, and their systems of government and civil society. History paints Indigenous peoples in a savage light, often portrayed as having no concept of civilised customs, societies or governments. This ideology has become familiarly known, since *Mabo v Queensland [No 2]* ('Mabo'), as the myth of *terra nullius* – the idea that the land was empty of law, government, property rights and civilised society or culture.¹ This arrogance led Lt Cook to ignore his instructions to seek 'the consent of the natives' before taking possession of particular locations.² It was this same arrogance that led the British courts to declare, without representation from the Indigenous peoples of New South Wales and without the benefit of any evidence, that the Australian continent was 'practically unoccupied, without settled inhabitants or settled law'.³

The 'settlement' of Australia was an extreme application of the notions of European superiority that fuelled imperial expansion. The law of nations, the international law of the era, while positing the equality of nations as a central tenet, was also formulated to justify colonisation and limit recognition of Indigenous peoples.⁴ In 1539, Vitoria acknowledged that the Indigenous peoples of the new world should be allowed to govern themselves 'in both public and private matters'.⁵ However, like the domestic doctrine, recognition was dependent upon a Eurocentric evaluation of the social and political development

1 (1992) 175 CLR 1. See, eg, the discussion by Brennan J at 58 referring to the 'enlarged notion of *terra nullius*'.

2 Reproduced in Garth Nettheim, "'The consent of the natives": Mabo and Indigenous political rights' (1993) 15 *Sydney Law Review* 223.

3 *Cooper v Stuart* (1889) 14 App Cas 286, 291-2. This case gave rise to the notion that issues of sovereignty and the recognition of self-determination claims were matters of law regardless of the facts. The fundamental contradiction between law and fact created a dilemma for future courts in which evidence was actually adduced. In 1971, a single judge of the Supreme Court of the Northern Territory struggled with the incongruent facts and legal fiction: *Milirrpum v Nabalco* (1971) 17 FLR 141.

4 See, eg, Samuel von Pufendorf (C H Oldfather (trans)), *De Jure Naturae et Gentium Libri Octo* (first published 1688, 1964) vol II; Christian Wolff (J H Drake (trans)), *Jus Gentium Methodo Scientifica Pertractatum* (first published 1764, 1964) vol II, xxxii, xxxix; Emmerich Vattel (C H Fenwick (trans)), *The Law of Nations or the Principles of Natural Law Applied to the Conduct of the Affairs of Nations and Sovereigns* (first published 1758, 1964) vol III, xii, xiii. See generally James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995) 70-82. Cf Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (1983) 26, where Slattery argues that the law of nations is unreliable as a basis for claims because it was not settled and was determined largely by, or in the interests of, the powers.

5 Francisco de Vitoria, 'Des Indes [1539]' in Anthony Pagden and Jeremy Lawrence (eds), *Francisco de Vitoria: Political Writings* (1991) 251.

of Indigenous peoples and was dismissive of the governmental structures that were in place.⁶

Treaties negotiated with Native American Nations and Canadian Aboriginal peoples expressed the notion that these Indigenous groups constituted separate and sovereign peoples who had their own laws and were capable, as nations and tribes, of forming and breaking their own alliances with others, including colonial powers, and who had national or tribal territories under their control. The treaty process acknowledged that there is or was a distinct relationship between the two groups that were defined in those agreements. These treaties had the international character of agreement making – nation to nation.

Canada and the United States ‘de-internationalised’ these arrangements. The common law no longer regarded these treaties as having any of the characteristics of international legally binding instruments.⁷ In a recent report to the United Nations Working Group on Indigenous Populations, Special Rapporteur Miguel Alfonso Martinez describes this jurisprudence as ‘the process of domesticating relations with Indigenous peoples’.⁸ In short, respect for the equality of peoples was disregarded in the face of absolute power. While Indigenous peoples continued to exercise sovereignty over their remaining lands and peoples, the law no longer recognised their independence.

In Australia, the unique approach to settlement, which denied even the fact of occupation by Indigenous peoples, led to even greater human rights abuses. The colonisers did not merely reject the rights of Indigenous societies to govern themselves, but also denigrated their rights within the new colonial societies. The exploitation of labour, the denial of effective participation in social and political life, the denial of protection under the law and the legalised or condoned violence and genocide against Indigenous peoples were an integral part of Australia’s colonial identity. The ideology of racial superiority justified the denial of individual rights of Indigenous peoples to manage their own affairs as individuals and as groups. These are not innocent legal myths but are part of the practical operation of colonial government that has operated to deny Indigenous rights and self-government for over two centuries. Moreover, they are based on ideals that are central to the philosophies of governance upon which Australian institutions and systems of government are founded.⁹

6 See, eg, M F Lindley, *The Acquisition and Government of Backward Territory in International Law* (1928) 11.

7 In the United States, this was rationalised in the ‘*Marshall Cases*’ as the recognition of ‘domestic dependent nations’: *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831), 18. See, earlier, *Johnson v M’Intosh*, 21 US (8 Wheat) 543 (1823) 547, 573-4.

8 Miguel Alfonso Martinez, *Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations*, Final Report, UN Doc E/CN.4/Sub.2/1999/20 (1999).

9 On the central place of this kind of elitism in the liberal theories of government, particularly in the colonial administration of subject peoples, see Christine Helliwell and Barry Hindess, ‘The “Empire of Uniformity” and Government of Subject Peoples’ (2002) 1 *The Journal of Cultural Research* (forthcoming).

III INDIGENOUS PEOPLES AND THE AUSTRALIAN CONSTITUTION

When the colonies came together to federate under a commonwealth structure, Indigenous interests were neither directly nor indirectly represented in the debates on the new *Australian Constitution* ('Constitution'). Despite a hundred years of colonisation, even at the point of Federation, a great deal of the country remained effectively under Indigenous government. Yet, these communities were not included among the self-governing polities that came together to negotiate the federal arrangement. This exclusion was reflected in a pervasive disrespect that was explicit in the references to Indigenous peoples during the Conventions.¹⁰

It is not surprising that when the colonial governments negotiated the federal settlement, they wanted to retain their discretion to exploit Indigenous peoples, their wealth and resources, without interference from a federal government. The still burgeoning economies were dependent upon continued expansion into Indigenous territories. The treatment of Indigenous people as non-citizens, divorced from any identity as self-governing polities with wealth or resources, was reinforced in the text of the new Constitution. Indigenous peoples were considered to be a resource to be managed as each colonial government saw fit, their civilisation and welfare, too, were matters considered settled by the principles of governance in place in each of the colonies.

As a result, s 51(xxvi) of the Constitution, which provides that the Commonwealth can legislate for 'the people of any race', specifically reserved the power to legislate for Indigenous peoples to the States. Moreover, proposals for an equal protection clause that may have guaranteed the equal application of laws to all people regardless of gender, race, or ethnicity were rejected because they may have impinged on the ability of the States to discriminate on the basis of colour and race.¹¹ Similarly, the right to vote at federal elections was framed in a way that would accommodate the States that chose to deny the fundamental right of political participation to Indigenous peoples and other people of colour.¹²

Despite their deference to colonial governments in relation to managing their Indigenous populations, even at the federal level, the principles of government were made consistent. Certain classes of people, identified by their race or colour, were subordinated and excluded and it was considered appropriate government policy to 'regulate the affairs of people of coloured or inferior races'.¹³

10 See generally Australia, *Official Report of the National Australasian Convention Debates, 1898* (1986).

11 Instead, a provision that proscribed discrimination on the basis of residence in a particular State or Territory was included in s 177: see George Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 645, 645-6.

12 Section 41 of the *Australian Constitution* provided that no-one entitled to vote at State elections would be prevented from voting at federal elections, thereby protecting State legislation such as s 6 of the *Elections Act 1885* (Qld). This section is reinforced by s 25 of the Constitution, which specifically recognises that where laws are in place to disqualify persons of a particular race from voting, those people will not be counted for the purpose of determining the population.

13 Melbourne, *Australasian Federal Convention Debates*, 27 January 1898, 228-9 (Edmund Barton).

This principle has continued to play an important role in the interpretation of s 51(xxvi) in recent times. While overt references to Indigenous peoples in the Constitution were successfully removed as a result of the 1967 referendum, it appears from recent cases that the 1967 amendments did not overcome the history of the framing of the Constitution.¹⁴ The impetus for the amendments was to remove the obvious discrimination on the face of the text and place greater responsibility for Indigenous policy and rights protection with the federal government. It was one of the most successful referendums in Australia's constitutional history. The amendments, however, did not recognise Indigenous peoples within the Constitution so much as make the text completely silent on the place of Indigenous peoples in Australian legal and political structures. It has merely ensured that the power to discriminate against Indigenous peoples has been entrenched and centralised.

IV THE DEBATES OVER THE LAST 10 YEARS

In the 30 years since the referendum, and particularly in the last 10 years, the issue of Indigenous rights has become one of the central issues in Australian public policy and debate, particularly at the federal level. Australia's Indigenous policy has become less overtly racist and paternalistic, as Indigenous peoples have become more involved in the institutions of government, and there have been significant attempts to improve the recognition and protection of rights. The successful 1967 referendum, the national land rights campaign, the treaty debates of the 1960s and 70s, reconciliation, native title, the Stolen Generations, even the republic debate and debates over Australia's participation in United Nations, have captured national attention with regard to the claims of Indigenous peoples.

However, successive federal governments have been reticent to champion the promotion, recognition and protection of Indigenous rights where it would require a challenge to the racism at the core of Australia's societal values. Instead, a tolerance for racism has been nurtured. Allowing those values to direct policy development has resulted in the fragmentation of issues and the isolation of the impacts of the colonial relationship. This year, while reflecting on the centenary of Federation, Indigenous peoples have called for a renegotiation of the relationship between Indigenous peoples and the state that diverges from the policies of the past and reconverges to form a new approach. An examination of the key debates on reconciliation and native title illustrates the need to approach Indigenous policy at a more fundamental structural level.

14 See *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('*Hindmarsh Island Bridge Case*'). In that case, a majority of the High Court suggested that the power to legislate for the people of any race did not become a beneficial provision as a result of the 1967 amendment.

V THE RECONCILIATION MOVEMENT

In the late 1970s and early 1980s, the National Aboriginal Conference ('NAC') and the Aboriginal Treaty Committee became engaged in a campaign to persuade the Australian government to negotiate a treaty with Indigenous peoples. In 1979, the NAC put a concrete proposal for the negotiation of outstanding issues of language protection, restoration of land, regulation of development, compensation for loss of land and ways of life and control over decision-making. The campaign was largely unsuccessful. It was felt that Australian people were not ready for a formal document.¹⁵

As part of an ongoing campaign, the *Barunga Statement* was delivered to Prime Minister Hawke during the Bicentennial celebrations in 1988. It again stated Indigenous demands for the recognition and protection of Indigenous rights within the legal and political structures of the Australian state. Arguably, this precipitated the development of a process to address Indigenous disadvantage and produce reform in the lead up to the centenary of Federation. In 1991, the Commonwealth Parliament enacted the *Council for Aboriginal Reconciliation Act 1991* (Cth), which provided for the establishment of the Council for Aboriginal Reconciliation.

While one of the purposes of the Council was to consider a document or documents of reconciliation, such as a treaty, the main focus of the Council's work over its ten year life was to improve relations between Indigenous and non-Indigenous people at the community level.¹⁶ In particular, the Council sought to raise awareness about Indigenous peoples' history and distinctive place within Australian society. This emphasis was clearly aimed at addressing the individual racism and discrimination experienced by Indigenous people, as well as the lack of national acceptance of Indigenous culture and Indigenous peoples' view of Australian history. It was thought that fundamental change would come from a people's movement. The philosophy was based on an individual understanding of the principles of equal participation and appreciation of cultural difference, even embracing Indigenous culture and traditions as part of Australian identity. However, it did not extend to political autonomy. Indeed, when the Chairperson of the Aboriginal and Torres Strait Islander Commission, Mr Geoff Clark, at Corroboree 2000, spoke of a treaty as a component of 'true' reconciliation which goes beyond merely a show of public support, members of the Council were concerned that support for the less confronting values of tolerance and cultural diversity would not survive the introduction of this political element.¹⁷

Toward the end of its time, the Council became more focused on the need to publicly address the lack of recognition of Indigenous peoples' rights within the broader community and encouraged public education and awareness. While

15 At the same time, the Aboriginal Treaty Committee, led by H C Coombs, had garnered public support for a treaty from a number of prominent citizens. The word 'treaty' has been a source of irritation to successive Federal Governments.

16 *Council for Aboriginal Reconciliation Act 1991* (Cth) s 6(1).

17 Geoff Clark, (Address to Corroboree 2000, Sydney, 27 May 2000). Corroboree 2000 was the culmination event in the work of the Council.

maintaining its commitment to community-based initiatives in promoting respect for Indigenous rights, the Council, in its Final Report, acknowledged that there are some issues that must be dealt with between Indigenous peoples and the state:

Reconciliation also requires a formal resolution of issues that were never addressed when this land and its waters were settled as colonies without treaty or consent.¹⁸

The Council put forward a concrete proposal for legislation that would initiate negotiation directly between Indigenous peoples and the federal government. They called on government to recognise the flaw in Australia's nation-building and acknowledge the need for agreements or treaties and to negotiate a process by which they can be achieved.¹⁹

Former Prime Minister, Malcolm Fraser, in the 2000 Vincent Lingiari Lecture, argued that it is the government that has the resources, authority and power to achieve reconciliation:

[I]t is the government that must ... persuade all Australians that we must act with greater expedition and greater generosity. Government, if not this, another, will set the pace.²⁰

The Council acknowledged that the failure to achieve significant reform in housing, health, employment and other aspects of the lived experience of discrimination of Indigenous peoples is linked to the lack of a formal negotiation process. A formal negotiation process would allow Indigenous peoples to take responsibility for their decisions as groups and as individuals from a position of authority and respect. The work of the Council demonstrated that renegotiation of the relationship between Indigenous and non-Indigenous Australians is a governmental responsibility. These issues go to the heart of Australia's constitutional make-up and cannot be resolved by a people's movement alone.

VI PRACTICAL RECONCILIATION

It is yet to be seen whether the final vision of the Council for Aboriginal Reconciliation was able to take its followers with it. The population, indoctrinated with the liberal values of equality through uniformity based on the superiority of the institutions and culture of the colonial society, is resistant to any challenge to those values. The conclusions of the Council can be directly contrasted with the concept of 'practical reconciliation' that was propounded by the federal government in response to the direction being taken by the Council. 'Practical reconciliation' is a new term within Australian public policy that seeks to address Indigenous peoples' place in Australian society within a liberal democratic model of unitary government and individual responsibility. Practical reconciliation, at best, seeks to address Australia's failure to guarantee the rights

18 Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge*, Final Report (2000) 103.

19 *Ibid* app 3 and recommendations 5, 6.

20 Malcolm Fraser, 'The Past We Need to Understand' (Fifth Vincent Lingiari Memorial Lecture, Northern Territory University, Darwin, 24 August 2000).

of Indigenous peoples to equal enjoyment of the privileges of citizenship in a wealthy, industrial state. This includes taking action, including special remedial action, to address issues such as housing, health and employment as isolated problems – for example, by building houses and infrastructure, providing structured employment programs and the like.

These policy objectives seek to address Indigenous disadvantage as an issue of individual rights. This does not exclude issues of cultural appropriateness and involvement of Indigenous peoples in some levels of decision-making with regard to service delivery in order to achieve the full enjoyment of citizenship. However, it does not admit Indigenous peoples' autonomy to address these issues collectively, especially where that is expressed as a right to be self-governing in regions or over jurisdictions for which they have the capacity and desire to assert control. It certainly does not admit an underlying constitutional issue.

As with any liberal legal concept, there is a danger of individualising the concept of equality. Practical reconciliation does not envisage Indigenous peoples' claims as the collective rights of peoples, which transcend the ending of discrimination. The policy reflects a view of rights in which, for example, the prohibition of discrimination and support for 'special measures' are seen as embracing the idea of equality as a formal sameness of treatment.²¹ This remedial rights framework is an extension of the 'civilising' of the Indigenous population to enjoy the 'superior' way of life and enjoy equal participation in the uniform structures of colonial government, where individual rights can be accommodated.²² To confuse the concept of equality with sameness in this way is to use equality and freedom from discrimination as a 'guise for assimilation'.²³

This philosophy has underpinned the recent approach to Indigenous policy generally, replacing the concept of self-determination that had been the stated policy of Australian governments since the Whitlam Labor Government of the

21 *The International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('CERD'), signed and ratified by Australia, reinforces the prohibition on discrimination and the obligation on states to eliminate racial discrimination contained in all of the international human rights instruments: CERD preambular para 1, art 2 and expanded at art 5. In 1975, the Commonwealth Parliament passed the *Racial Discrimination Act 1975* (Cth), which partially implements the Convention. The Act prohibits discrimination, by any arm of government, on the basis of race, nationality or ethnic origin. The only exception to this general rule is in the context of special measures, which may be introduced to overcome disadvantage or institutional or structural discrimination.

22 Even the international legal system has rejected this interpretation of equality and non-discrimination. In 1997, the United Nations Human Rights Committee reaffirmed the application of the provisions of the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'), to Indigenous peoples and asked states to include reference to them in their periodic reports: Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.1 at 38 (1994). See generally Sarah Pritchard, 'Native Title in an International Perspective' in Research Institute for Humanities and Social Sciences, University of Sydney, *Sharing Country: Land Rights, Human Rights and Reconciliation after Wik, Proceedings of a Public Forum Held at University of Sydney, February 28, 1997* (1997) 35-6.

23 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report, Jan-Jun 1994* (1995) 63.

early 1970s. The self-determination policy in Australia sought to address discrimination by ensuring that Indigenous peoples were directly involved in decisions about legislative and policy changes and not merely consulted as another minority interest group. However, this occurred predominantly within existing or imposed structures, with the Aboriginal and Torres Strait Islander Commission most often held up as the pinnacle of Australia's policy of self-determination.

Self-determination is understood in international legal theory as the right of a people to participate in decisions that directly affect their rights and interests. Self-determination is often understood as a process right that respects a people's autonomy and authority in decision-making. Therefore, it also has the character of a right of self-government, whereby the institutions that govern Indigenous peoples, whatever they may be, are freely chosen by them. International bodies have recognised that this may require 'positive measures' to allow Indigenous peoples to exercise the responsibility for their own decisions.²⁴ However, this first requires an acknowledgment of Indigenous peoples' distinct constitutional identity. This had been a conceptual difficulty for previous governments, despite the rhetoric of self-determination, but is clearly rejected by the most recent policy of practical reconciliation.

VII NATIVE TITLE

The recognition of native title has been a site of contest for competing views of Indigenous rights and the recognition of Indigenous polities as self-governing and autonomous. In June 1992, in the *Mabo* case, the High Court of Australia ('High Court') agreed that Indigenous peoples' title to land continued after the colonisation of the continent and enjoyed the recognition and protection of the common law.²⁵ The Court dismissed the earlier doctrine of *Cooper v Stuart*,²⁶ which denied the rights of Indigenous peoples based on a supposed scale of social organisation, as unjust and discriminatory.²⁷ The *Mabo* case affirmed that distinctively Indigenous rights arise from 'prior sovereignty'.²⁸

The form of title recognised by the High Court in the *Mabo* case is not merely recognition of private or individual rights to land. Moreover, in *Western Australia v Commonwealth* ('*Native Title Act Case*'), the High Court rejected the view that a law protecting Indigenous peoples' unique rights over land was

24 Human Rights Committee, above n 22, [6.2]. See also Pritchard, above n 22, 45. See also Michael Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report, Jun 1994-Jul 1995* (1995) 13. See the recent Human Rights Committee's *Concluding Observations* on Canada regarding the implementation of art 1 of the ICCPR in relation to Aboriginal peoples: Human Rights Committee, *Concluding Observations of the Human Rights Committee: Canada 07/04/99*, UN Doc CCPR/C/79/Add.105 (1999).

25 (1992) 175 CLR 1.

26 (1889) 14 App Cas 286.

27 *Mabo* (1992) 175 CLR 1, 40 (Brennan J); 182, 197 (Toohey J).

28 *Ibid* 60 (Brennan J).

merely a 'special measure' to overcome disadvantage.²⁹ It was not discriminatory, they argued, because the distinct identity and status of Indigenous peoples were relevant in distinguishing the way in which Indigenous peoples' relationship with land was recognised and protected.³⁰

Native title affirmed a communal title that arose from, and carried with it, the power to determine the law and custom applicable to land. The native title doctrine is therefore an acknowledgment of the continuation of Aboriginal law and Indigenous society as a source of authority. The rights of Indigenous peoples are recognised by virtue of their existence as distinct peoples and a distinct constitutional entity, and not merely as a cultural minority within an otherwise homogenous Australian polity.³¹ For these reasons, the *Mabo* case is seen as a high watermark in the relationship between Indigenous peoples and the state.

However, at the same time that the courts recognised Indigenous peoples' distinct constitutional identity, they asserted that the state has the power to divest those rights unilaterally, without consent or recompense.³² The majority of the judges in *Mabo* held that such 'acts of state', though adverse to the rights of Indigenous peoples, could not be legally wrongful.³³ The court relied on the irresistibility of power as a source of sovereign authority.

Native title, they argued, can be extinguished by a valid exercise of governmental power that demonstrates a clear and plain intention.³⁴ The basis for this is the claim that the underlying title of the state may be perfected by the exercise of complete dominion. Thus, the native title doctrine establishes a hierarchical relationship between Indigenous interests and the interests of others and re-introduces an element of dependency of Indigenous rights on the goodwill of the state.³⁵ The Court determined that native title did not enjoy the same protection as other interests and was, therefore, a much more vulnerable title than any non-Indigenous title.

The High Court, as a matter of policy and expediency, chose to subordinate the rights of Indigenous peoples to other interests, even limiting the availability of compensation for the damage caused by past acts and policies. They have

29 (1995) 183 CLR 373.

30 Ibid 483-4. Cf the judgment of Brennan J in *Gerhardy v Brown* (1985) 59 ALJR 311, 339, where it was argued that 'special measures may be necessary to achieve equality between groups'. See generally Michael Dodson, 'Discrimination, Special Measures and the Right to Negotiate' (Paper presented at the Humanities Research Centre/Australian Institute of Aboriginal and Torres Strait Islander Studies Conference, *Is Racism Un-Australian?*, Australian National University, Canberra, 21-22 February 1997) 10.

31 Patrick Macklem, 'Distributing Sovereignty: Indian Nations and Equality of Peoples' (1993) 45 *Stanford Law Review* 1325. See also Menno Boldt and J Anthony Long, *Surviving as Indians* (1988) xv.

32 See *Mabo* (1992) 175 CLR 1, 68-74 (Brennan J); 94, 100 (Deane and Gaudron JJ) (but cf 92); 194-5 (Toohey J).

33 Ibid. Cf Deane and Gaudron JJ at 92 who initially commented on wrongful extinguishment, but reverted to the power of the state at 94, 100. Justice Toohey at 194-5 was the only judge to affirm the rights of Indigenous peoples against arbitrary exercise of power by the state. The brief judgement of Mason CJ and McHugh J confirmed the *ratio decidendi* of the case in this regard.

34 Ibid 64 (Brennan J).

35 Patrick Macklem, 'First Nations Self-Government and the Borders of the Canadian Legal Imagination' (1991) 36 *McGill Law Journal* 397.

placed native title so low in the hierarchy of rights and interests in land that Indigenous peoples do not have the power to determine development on their lands. Rather than aim to reflect, to the fullest extent, the rights of Indigenous peoples to own, develop and control their land, the courts have relied on the of the rights, as emerging from Indigenous society, as a source of vulnerability.³⁶

The doctrine of extinguishment replaced *terra nullius*, with a basis for dispossession no less reliant on a conception of Indigenous society as a relic of 'prior sovereignty'. While acknowledging Indigenous rights as unique, the doctrine does not see Indigenous society as an equal source of rights and obligations.

The Court constrained the arbitrary treatment of Indigenous rights by holding that the introduction of the *Racial Discrimination Act 1975* (Cth) ('RDA') ensured that, at minimum, the same protection – such as the constitutional guarantee of just terms for compulsory acquisition of property – that applies to non-Indigenous interests must also apply to Indigenous titles.³⁷ In the absence of constitutional entrenchment of the principle of non-discrimination, however, the paramountcy of the Australian legislature makes it possible for the Commonwealth Parliament to pass laws that are inconsistent with the RDA. The Commonwealth Parliament exercised this power in s 7 of the *Native Title Act 1993* (Cth) ('Native Title Act') in order to validate non-Indigenous interests that may have been affected by the recognition of native title.

The *Native Title Amendment Act 1998* (Cth) further circumscribed native title rights and interests and again validated non-Indigenous titles. The amendments were based on the same philosophy underpinning practical reconciliation, to treat all interests the same without differentiation. The federal government had embraced the idea of 'balancing' rights and interests so that native title would not unduly interfere with the interests of others.³⁸

The *Mabo* decision did not deliver a just settlement either through the decision itself or through the *Native Title Act* and its amending Act. It did not address the legitimate historical grievances of Aboriginal and Torres Strait Islander peoples. Despite these significant limitations, the recognition of native title has forced a fundamental change in attitude toward the right of Indigenous peoples to assert their distinct political identity. In recognising collective rights to traditional lands, the courts have provided a more secure base from which to argue for a greater role in decision-making over those lands and greater respect for Indigenous peoples' claims more generally.

36 See Lisa Strelein, 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95, 120-2. See also *Commonwealth v Yarmirr*; *Yarmirr v Northern Territory* [2001] HCA 56 (Unreported, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 11 October 2001) [271] (Kirby J).

37 *Mabo* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J). The judgement of Mason CJ and McHugh J was said to be made with the authority of the rest of the Court. Therefore the determination of the *Racial Discrimination Act 1975* (Cth) and wrongful extinguishment issue in that judgement is taken to be the position of the majority. See also *Mabo v Queensland [No 1]* (1998) 166 CLR 186.

38 Although whether the *Native Title Amendment Act 1998* (Cth) complies with this formal equality standard has also been questioned. See Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Undertakings Freely Given: Australia's International Obligations to Protect Indigenous Rights*, Report (2000) 145ff.

VIII THE RE-CONVERGENCE OF INDIGENOUS POLICY: THE TREATY DEBATE

Looking back over the last three decades of Indigenous rights in Australian law, and looking towards the future for the recognition of Indigenous rights, the divergence and reconvergence of debates relating to human rights, native title, reconciliation and treaties is significant. A recent native title conference reflecting on these themes demonstrated their reconvergence.³⁹

After a decade of separation between native title and reconciliation and the removal of treaty questions from the agenda, there is now an unavoidable overlapping of these processes. One can no longer be considered without touching or more likely embracing the others. The underlying fundamental relationship between Indigenous peoples and the state and the assertion of self-determination by Indigenous peoples lies at the heart of all of these engagements.

The concerns expressed by the NAC in 1979 have returned for reconsideration in a new debate. Despite their failings, the reconciliation and native title processes have set the groundwork for a reinvigorated treaty debate. The reconciliation process remains directed primarily at changing non-Indigenous views and relationships at an individual and community level. For Indigenous peoples to continue to engage in such a process, a response is required at a national government level that respects Indigenous peoples' status within the Australian society as constitutional entities, based on a policy of equality of peoples. A framework is needed, within which Indigenous and non-Indigenous peoples can renegotiate and restructure their relationship. Debates on native title and reconciliation have provided a context for this discussion by setting a benchmark against which recognition can be measured and by providing a new language of Indigenous authority and an ongoing process of engagement.

But the limitations of these processes have constrained their capacity to deal comprehensively with Indigenous peoples' claims. Ultimately, practical reconciliation, reconciliation as envisaged by the Council and native title are not, of themselves, the appropriate method for structuring the relationship between Indigenous and non-Indigenous peoples. Those debates have not moved beyond the cultural imperialism of the Australian colonial mindset. While they embrace Indigenous cultural identity, they maintain Indigenous political identity within a scale of social organisation that legitimises the management of Indigenous

39 Australian Institute of Aboriginal and Torres Strait Islander Studies, *The Past and Future of Land Rights, Native Title Legal Conference*, Townsville, 28-30 August 2001 (convened by Greg McIntyre and Lisa Strelein). The conference commemorated the earlier James Cook Students Union and Townsville Treaty Committee Conference, *Land Rights and the Future of Australian Race Relations*, James Cook University, Townsville, 1981 (see the publication from that conference: Eric Olbrei (ed), *Black Australians: The Prospects for Change* (1982)). It was at the 1981 conference that a group of Torres Strait Islanders led by Eddie Koiki Mabo gave instructions to take their claim for recognition of their rights to their traditional lands on Murray Island to the Australian courts.

affairs from outside and denies Indigenous peoples' autonomy in decision-making processes.

Colonialism and its racist ideology is not a relic of Australia's past, it is a part of the fabric of the Australian identity, how we are governed and how we respond to the claims of Indigenous peoples in contemporary debate. The claims that Indigenous peoples make today cannot be divorced from their historical context and the failure by the British in their invasion and occupation of Australia to negotiate an agreement with the First Peoples. The concept of 'unfinished business' seeks to capture this idea that practical measures of addressing Indigenous peoples' lived experience of discrimination cannot ignore the fundamental renegotiation of the Australian state demanded by Indigenous peoples. The failure to obtain the consent of Aboriginal and Torres Strait Islander peoples, subsequently compounded by the dispossession and ill-treatment of the Aboriginal and Torres Strait Islander peoples by the new arrivals and their descendants, provides a moral component to these claims.

These grievances are not defined by meeting the physical needs of Indigenous peoples. The moral legitimacy will never be met by better informed government policies of service delivery and the provision of reasonable health, housing and education – of so-called practical reconciliation. Intensive government programs directed at bringing about equality with other citizens will not, of themselves, provide justice for Indigenous peoples.

To address this question of legitimacy, there has to be a recognition and acceptance by the state of two factors. First, that the Aboriginal and Torres Strait Islander peoples have been injured throughout the colonisation process and just recompense is owed. Second, that the Aboriginal and Torres Strait Islander peoples as First Peoples have distinctive rights and a special status based on prior and continuing occupation of land, and authority and autonomy as distinct polities.

Indigenous peoples in Australia must have a process for renegotiating a place within the constitution of Australian society that accommodates their myriad histories and aspirations for the future. This process must be driven by national leadership and a national framework that sets benchmarks for the recognition of rights and interests. Indigenous peoples deserve respect as the First Peoples of this land and deserve to be reinvested with their heritage in ways that resonate within Australia's 'national' identity. Renegotiating the relationship between Indigenous peoples and the state will provide greater legitimacy to Australian nationhood and the sense of shared identity that has been palpably absent in Australia's first one hundred years.

The time is right to talk about a treaty during the centenary of Federation. Even the word 'federate' is derived from a Latin word meaning to make a treaty. The Constitution is essentially a treaty between the former colonies and the Imperial Parliament of Britain. Aboriginal and Torres Strait Islander peoples were excluded as relevant parties in the formation of the Australian federation. If treaties, or indeed the Constitution, had been negotiated on the basis of principles of respect for the equality of Indigenous societies, and provided a place for Indigenous peoples within the federal system, the structure of

Federation would, no doubt, have incorporated a different dynamic. A national treaty process that invites Indigenous peoples to participate as partners in this federation will reflect a nation that has matured, and a people who have matured as a nation and who have rejected racism as their founding value.