

Chapter 4

Importing the Discourses of Domination: Aboriginal Status in Australia 1788-1972

- I. 1788: (Not) gaining consent
- II. Two streams of jurisprudence
- III. Status 'settled'
- IV. The great Australian silence
- V. *Milirrpum v Nabalco*
- VI. Conclusion

The anthropologist W.E.H. Stanner suggested that the 'basic structure of relations' between Aboriginal and non-Aboriginal peoples in Australia was determined in the initial period of cultural encounter, and remained 'more or less unchanged' for 150 years.¹ The difficulty later in altering this structure lay in getting non-Aboriginal people to 'escape from a style of thinking that unconsciously ratified that order of life as natural and unalterable.'² Similarly,

¹ W.E.H. Stanner, *After the Dreaming: Black and white Australians - an anthropologist's view*, Australian Broadcasting Commission, Sydney, 1969, p.18.

² *ibid*, p.17.

continued dominance of colonial discourses led historian Henry Reynolds to suggest that with the possibility of reordering Indigenous issues, 'Australia's difficulties are as much conceptual as practical'.³ Of course, imported doctrines have never been wholly determinative of the domestic situation. This denies both Aboriginal agency, as well as the continuous process of local adaptation. Australia was never just 'the implanted fragment of a Europe far flung'.⁴ If, as Kercher, suggests, the law exported to Australia was 'a store room of archaic values, sometimes only thinly disguised by later rationalisations',⁵ Australians would increasingly determine which values, rationalisations and justifications would be pulled out of the store room.

Having said that, a striking feature of the Aboriginal-European encounter is not only the degree to which discourses of domination were used, but the extent to which they have been normalised. There is a noted reluctance to recognise that Australia has played the role of an imperial power over what have been called 'internal colonies' or 'nations within'.⁶ This lack of recognition suggests the importance of examining the extent to which the discourses of domination were imported into Australia in order to counter the situation suggested by Reynolds, where

Australians are dangerously unaware of the degree to which racism underpins popular attitudes, customary expressions, and what passes for common sense. That is just the way things are done in Australia.⁷

³ Henry Reynolds, *Aboriginal Sovereignty: reflections on race, state and nation*, Allen & Unwin, St Leonards NSW, 1996, p.175.

⁴ Peter Beilharz, 'Australian civilisation and its discontents', *Thesis Eleven*, no. 64, February 2001, p.69.

⁵ Bruce Kercher, *Debt, Seduction and Other Disasters: the birth of civil law in convict New South Wales*. The Federation Press, Leichardt NSW, 1996, p.xix.

⁶ Reynolds, *ibid*, p.175.

⁷ Henry Reynolds, 'The Wik Debate, Human rights and Australia's International Obligations' in Richard Nile and Michael Peterson (eds.), *Becoming Australia*, University of Queensland Press, Brisbane, 1998, p.28.

Fundamental ambiguities have always characterised non-Indigenous approaches to the question of Aboriginal status. In this, Australia is typical. As with encounters in previous centuries, Indigenous people were a part of the new society, a presence that always had to be dealt with. Yet at the same time they were held apart from society, as a new species of legal creature. Were they, for example, British subjects, or 'domestic dependant nations'?⁸ The paradoxes of assigning status would reveal themselves over the ensuing two centuries. Initially, a 'self-evident' (racial) difference was used to exclude Aboriginal peoples and maintain the unity of the emerging white society. This exclusion occurred in the critical period where an independent 'Australian' identity was being formed, and as such, contributed to that formation. Yet, in recent decades, the denial of (political) difference has been used for the same ends – preserving the unity of the national polity, thus maintaining a dominant national identity some regard as being 'in crisis'.⁹ While Aboriginal peoples are now assumed to be part of that political community, their entry owes more to the discourses of domination than any act of consent. Here I explore the importation of some of these discourses into Australia in the period up to 1972, a year which marks the first judicial pronouncement on Aboriginal status in the modern period.

I. 1788: (Not) gaining consent

Despite contemporary efforts to erase any difference via the suggestion that we are 'one nation', true to accepted colonial practice, the distinction between 'first peoples' and 'settlers'

⁸ *R v Bonjon* (SCNSW), Willis J, Port Phillip Gazette, 18 September 1841.

⁹ Carol Johnson, 'The Treaty and Dilemmas of Anglo-Celtic Identity: from Backlash to Signatory' paper delivered to AIATSIS Seminar Series, Limits and Possibilities of a Treaty Process in Australia.
<http://www.aiatsis.gov.au/rsrch/smnrs/papers/johnson.htm>

was acknowledged even before contact. This is evident in the instructions to Captain Cook. He was,

to observe the genius, temper, disposition, and number of the natives, if there be any, and endeavour by all proper means to cultivate a friendship and alliance with them... You are *with the consent of the natives* to take possession of convenient situations in the country in the name of the King of Great Britain, or, if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.¹⁰

Similarly, instructions provided to the first Governor of the colony, Phillip, implicitly at least recognised a distinction between 'our subjects' and 'them': he was 'to endeavour, by every possible means, to open an intercourse with the natives, and to conciliate their affections, enjoining all of our subjects to live in amity and kindness with them'.¹¹

The facts of colonisation that followed are not in doubt, though the interpretation of such facts continues to be the source of controversy. Aboriginal people were not deemed worthy of a status that necessitated negotiations take place. Contrary to Cook and Philip's instructions, possession was not gained via the consent of its inhabitants, but acquired by 'discovery', as if the country had no previous inhabitants at all. Rather than detail the reasons for this departure from colonial practice, this thesis seeks primarily to investigate the consequences of this categorisation with respect to Indigenous status. Yet in broad terms, it seems correct to suggest, as Reynolds does, that Aboriginal peoples were dispossessed not so much by law, but because of their separation from it. Aboriginal possession and occupation were overlooked, Reynold's argues, for two reasons – European ignorance, and European philosophical and political ideas.¹² While the former soon came under pressure from increased knowledge about

¹⁰ Cited in Garth Nettheim, 'The Consent of the Natives': Mabo and Indigenous Political Rights', *Sydney Law Review*, vol. 15 no. 2, June 1993, p.223. [emphasis added]

¹¹ Cited in John Hookey, 'Settlement and Sovereignty', in Peter Hanks and Brian Keon-Cohen (eds.), *Aborigines and the Law*, Allen and Unwin, Sydney, 1984, p.1.

¹² Reynolds, *Law of the Land*, p.22.

Aboriginal numbers and political society, particularly with relation to occupation of land, Aboriginal status would increasingly be determined by the latter. The theory of an uncultivated continent 'up for grabs' was just too convenient to surrender lightly.¹³ It gradually became an unarguable truth that, as Justice Gibbs would state, 'it is fundamental to our legal system that Australian colonies became British possessions by settlement and not conquest'.¹⁴

This was the case contrary to the fact that international law – and Cook's instructions – recognised that only if land was unoccupied could Europeans acquire the territory as first discoverers. Despite the known presence of Aboriginal peoples, it is now clearly acknowledged that 'settlement' in Australia proceeded on the positivist assumption that there was no need to deal with the indigenous inhabitants, or even to acknowledge their laws, their rights, or their interests.¹⁵ The key assumptions were that the territory of New South Wales, was in 1788, *terra nullius*, or practically unoccupied; and secondly, that full legal and beneficial ownership of lands vested in the Crown, unaffected by Aboriginal claims.¹⁶ From the period of first encounters, this 'imported ideology' would constantly come into conflict with the 'Australian reality'¹⁷ of a continent already occupied by a society with its own long-standing systems of governance and land tenure.

Devising methods of bridging this gap between the legal fiction of *terra nullius* and the reality of continued Aboriginal occupation has exercised Australian courts and legislatures ever since 1788. Kercher suggests the legal status of Aborigines was the subject of passionate debate

¹³ Reynolds, *Law of the Land*, p.32.

¹⁴ *Coe v Commonwealth* (1979) 53 ALJR 408.

¹⁵ Nettheim, *ibid*, p.224.

¹⁶ *ibid*.

¹⁷ Reynolds, *Law of the Land*, p.69.

among the colonists and imperial officials for a hundred years.¹⁸ This status was determined 'slowly and hesitantly' through conflicts, with the position of Aboriginal peoples ostensibly to be determined by royal decree rather than statute.¹⁹ In practice, however, ambiguity prevailed. This was largely due to the conduct of officials and settlers on the ground, whose immediate actions were often more profound than distant declarations in determining the reality of Aboriginal status.

Recent historical commentary by the High Court has pointed out the intimate relationship between the political imperatives of the time as they referred to the Indigenous inhabitants, and the development of an Australia common law. Brennan J suggested that the blame for dispossession lay with the exercise of executive power.²⁰ Dawson J went as far as to suggest that as 'the policy which lay behind the legal regime was determined politically', and as such the legal and moral responsibility to recognise title lies with the legislature, not the courts.²¹ The links between colonialism and the development of law established above suggest the Justices' attempts to absolve the law (if that is what they are) may be unfounded. Yet, the influence of domestic politics on the law of the colony was such that even outright massacres of Aboriginal people often went unpunished.²² The colonial imperatives revealed above to

¹⁸ Kercher, *op cit*, p.5.

¹⁹ For discussion of these colonial recognitions of inherent Aboriginal rights which were to be respected, see Kevin Gilbert, 'Recognition of our inherent sovereign and Indigenous rights within Australia' in *Aboriginal Sovereignty: justice, the law and land*, Canberra, 1988. Perhaps the most significant of these should have been the British House of Commons Select Committee on Aboriginal Tribes which reported in 1837. While generally noting that 'the native inhabitants of any land have an incontrovertible right to their own soil', the report spoke specifically of Australia in the context of the birth of a new colony at South Australia. It stated it was '... a melancholy fact, which admits of no dispute, and which cannot be too deeply deplored, that the native tribes of Australia have hitherto been exposed to injustice and cruelty in their intercourse with Europeans... This then appears to be the moment for the nation to declare that ... it will tolerate no scheme which implies violence or fraud in taking possession of such territory, that it will no longer subject itself to the guilt of conniving at oppression'. (p.109) Cited from

http://www.aiatsis.gov.au/lbry/dig_prgm/treaty/t88/m0066865_a/m0066865_p44_a.rtf

²⁰ Brennan in *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

²¹ Dawson, *ibid*, at 136.

²² Kercher, *op cit*, p.12. For a different interpretation, disputing the massacre of Aboriginal people, see Keith Windschuttle, who debated historian Henry Reynolds at the National Press Club, 19 April 2001.

have been present in previous centuries were no less evident in the colony of Australia. In the application of the law to Indigenous peoples, it is possible to discern certain similarities in the way the question of status arose, was determined, then receded into the realm of unquestioned assumption. Yet the possibility that a distinct Aboriginal political and legal status would be recognised by Australian law remained, at least for a time. Denial of status was never absolute, not least because colonial authorities, as with Australian society itself, have always had to deal with the reality of a continuous assertion of a distinct Aboriginal identity. Reflecting this, we can discern what Bartlett described as 'the two streams of Australian jurisprudence'²³ which, to a certain extent, mirror the debate over Aboriginal status that has been taking place for centuries.

II. Two streams of jurisprudence

One of the earliest major cases to comment on the issue of Aboriginal status in the colony was *R v Murrell* in 1836.²⁴ Here, the jurisdiction of the New South Wales Supreme Court to try a case between two Aboriginal people was challenged. Murrell's barrister, Sydney Stephen, argued that the natives had their own laws to which, strictly speaking, the white people should be subject. Kercher suggests the unstated effect of Stephen's arguments was that Australia was

<http://www.sydneyle.com/National%20Press%20Club%20debate.htm> See also *Lateline*, ABC TV, 16 April 2001. 'Debate rages over 'peaceful' white settlement', transcript at <http://www.abc.net.au/lateline/s277827.htm>

²³ Richard H. Bartlett, 'Current Aboriginal Sovereignty in Canada and Australia', *Australian-Canadian Studies*, vol. 11, no. 1-2, 1993, p.4.

²⁴ Prior to this case, in 1829, *R v Ballard* also looked at the question of whether the New South Wales Supreme Court had jurisdiction to try one Indigenous person for the murder of another. For a transcript of this case, as well as *Murrell* and *Bonjon*, see Kercher, 'R v Ballard, R v Murrell and R v Bonjon', *Australian Indigenous Law Reporter* no. 3, 1998, p.410. Kercher notes it was *R v Lowe*, 1827, that decided Aboriginal people would be subject to the court's jurisdiction when they came into conflict with whites.

subject to a plurality of laws: that of the whites and those of the Aboriginal peoples.²⁵ The acceptance of such an argument could have paved the way for a very different accommodation of Aboriginal status within the emerging society, relying upon recognised norms of continuity and co-existence. Yet, instead, the case preferred the imposition of uniformity suggested by the attorney general's argument that all people are subject to a British law which does not recognise any independent authority.

Kercher suggests the plaintiff's argument based on the continuity of Aboriginal law was 'an assertion of original sovereignty'.²⁶ It is plain to see that in coming to effectively deny that sovereignty, Justice Burton, who heard the case, was guided not only by the facts before him. Full recognition could not be allowed, as Burton suggested, because 'the greatest inconvenience and scandal to this community would be consequent if it were beholden by this court that it had no jurisdiction in such a case as at present...'.²⁷

The denial of Aboriginal jurisdiction effectively forms part of the process whereby a uniform 'Australian' jurisprudence is established. In achieving this, Burton did not simply rely on the doctrine of settlement, because he initially recognised Aboriginal 'peoplehood'. However, after this recognition he resorted to a Lockean consideration of Aboriginal development, thus avoiding 'inconvenience' and 'scandal' to the new colony. Burton found:

Although it be granted that the Aboriginal natives of New Holland are entitled to be regarded as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them, yet the various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers of civilisation and to such a form of government and laws, as to be entitled to be recognised as so many sovereign States governed by laws of their own.²⁸

²⁵ Kercher, *Debt, Seduction and Other Disasters*, p.9.

²⁶ *ibid*, p.9.

²⁷ Cited in Nettheim, *op cit*, p. 95.

²⁸ *R v Jack Congo Murrell* (1836) 1 Legge Rep 72.

Initially, Aboriginal people are recognised as ‘a free and independent people’, a status suggesting inherent political rights – rights whose source predates and survives ‘first settlement’. Burton does indeed foresee the continuity of ‘those rights which as such, are valuable to them’. Yet, in the subsequent step, the court’s response amounts to what we would call today a policy decision.²⁹ In order to effectively deny an alternative source of law, Aboriginal people are positioned as inherently inferior. They are uncivilised, lacking in government, and sovereignty. Thus, while some rights should be recognised, such as their right to life, their laws are not of a ‘form’ or ‘position’ to justify the right of self-government. By relying on a number of European standards – that of civilisation, form of government, and the equation of government with states – inherent Aboriginal rights were effectively denied, lest they impair the uniform development of the colony. Aboriginal people were thus, from a legal and an anthropological point of view, ‘stateless’. The assumption that British law was superior and universal justified its imposition over Indigenous peoples.³⁰

A second stream of jurisprudence also existed which, while not developing beyond a trickle, did come to a very different conclusion regarding the status of Aboriginal peoples in Australia. This was evident in the 1841 case of *R v Bonjon*.³¹ In similarly addressing the issue of jurisdiction, Justice Willis followed the reasoning of Marshall CJ in *Worcester v Georgia*.³² This meant that as a member of a ‘domestic dependant nation’, the court had no right to try an Aborigine for a crime against another Aborigine using what was effectively, ‘foreign law’.

²⁹ Hookey, *op cit*, p.3.

³⁰ Lisa Strelein, ‘Indigenous Self-Determination Claims and the Common Law in Australia’, PhD thesis, Australian National University, April 1998, p.158.

³¹ SCNSW, Willis J, Port Phillip Gazette, 18 September 1841.

³² 31 US (6 Pet.) 515 (1832).

Again, debates of previous centuries were prominent, with Willis quoting Vattel with approval:

whoever agrees that robbery is a crime, and that we are not allowed to take forcible possession of our neighbour's property, will acknowledge, without any other proof, that no nation has a right to expel another people from the country which they inhabit in order to settle in it herself.³³

Willis took the position expounded by both Locke and Vattel that while Christians did have a duty to populate and cultivate land, this right extended only to as much as was needed. In a conception of Aboriginal status that seems to imply a more 'modern' concept of substantive equality, Willis recognised Aboriginal peoples as the possessors of rights which were inherent rather than delegated. He thus doubted the reach of British law to cases between Aboriginal peoples who maintained their own independent systems of law. In coming to describe Aboriginal peoples as not automatically subject to British law, the failure to gain consent at first settlement was critical to Willis' reasoning. In terms of mediating the position of Aboriginal peoples in the colony, he reviewed the comments of a number of colonists who had come into contact with the Aborigines. He found:

Thus, according to these Statements respecting the aborigines, it appears they are by no means devoid of capacity – *that they have laws and usages of their own* – that treaties should be made with them...³⁴

Unlike many before him, once Willis took the first step of recognising Aboriginal humanity, he did not take the second step of judging Aboriginal society according to European standards in order to deny substantive independent rights. Rather, in a conception which resonates with many Aboriginal people today, he conceived of Aborigines as '*a distinct people with their*

³³ Cited in Hookey, *op cit*, 6.

³⁴ Cited in Kercher, *Debt, Seduction and Other Disasters*, p.14. [emphasis in original] Willis paints the picture here of a 'stateful' society.

own continuing rights'; they were 'dependant allies, rather than British subjects'.³⁵ Willis recognised the existence of Aboriginal rights whose source was within their society, rather than being granted by a 'superior civilisation'. They would prevail – they were *their own continuing* rights.

While they came to diametrically opposed conclusions, both *Murrell* and *Bonjon* conceived of an Aboriginal status that in some way relied upon Indigenous rather than European tradition. There was no attempt to deny them rights because they were different; rather, it was recognised that their rights had not been extinguished by the establishment of British sovereignty, or subsequent events.³⁶ Evidence suggests that even before *R v Bonjon*, other prominent individuals also maintained the possibility of co-existence rather than uniformity. In 1807, in order to limit conflict in the Hawkesbury River region north of Sydney, Governor King negotiated with Aboriginal peoples as if they were the owners of land, stating he 'had ever considered them the real proprietors of the soil'.³⁷ Up to this period, several individuals in the colony spoke of the need for a treaty. One such man was Saxe Bannister, the former Attorney General of NSW, who wanted Aboriginal law recorded, as well as a treaty based on the consent of the natives drawn up to govern relations between the two peoples. He felt ultimate dominion of the Crown was not inconsistent with the sovereignty of the original occupiers, who could cede their land to the Crown but not others.³⁸ Former commandant of forces in Swan River, F.C. Irwin, published a book in 1835 in which he argued that all future dealings with Aboriginal peoples should be governed by a treaty negotiated between the two

³⁵ Cited in *ibid*, p.11. [emphasis added]

³⁶ Hookey, *op cit*, p.8.

³⁷ King cited in Reynolds, *Law of the Land*, p.60.

³⁸ *ibid*, p.58.

parties.³⁹ In Tasmania, Governor Arthur said in 1837 that he regarded it as ‘a great oversight’ no treaty was negotiated with Indigenous peoples there.⁴⁰

While they may not have been held by the majority of colonists, these opinions tell us much as to the status of Aboriginal peoples. First, there is a good deal of recognition that they were the original owners of the land. Intellectually, if not legally, the concept of *terra nullius* had effectively been rejected by the 1830s.⁴¹ Second, in the first decades of encounter, knowledge of Aboriginal society had progressed beyond its mere existence toward the recognition – by some at least – that Indigenous societies were sufficiently stable and organised to enable relations to be mediated via consensual political negotiations. This line of thinking was often seen in pronouncements from Britain, with the 1837 Select Committee finding that relations with Aboriginal peoples should be guided by recognition of their ‘incontrovertible’ right to land.⁴² In the first third of the nineteenth century then, there remained some possibility of relations between peoples being directed by recognition of some form of Aboriginal nation status.

IV. Status ‘settled’

Under the pressures of colonial expansion, the possibility of some sort of accommodation quickly evaporated. Rather than the (limited) recognition of *Bonjon*, it was the more convenient decision in *Murrell*, based as it was on the popular demarcation of ‘savage’ and

³⁹ F.C Irwin, *The State and Position of Western Australia; commonly called the Swan-River Settlement*. Simpkin, Marshall and Co., London, 1835, p. 28.

⁴⁰ Cited in Reynolds, *Law of the Land*, p.96.

⁴¹ Reynolds, *Law of the Land*, p.93.

⁴² See note 19 above.

‘civilised’, which formed the precedent. Following this period, the status of Aboriginal peoples would increasingly be determined not by legal principle, or British pronouncements, but by domestic politics – a politics which required the removal rather than construction of barriers to effective colonisation. This politics would, in turn, rely on imported discourses of domination such as Locke’s, to the extent that even many of those pastoralists who recognised Aboriginal peoples as ‘the original possessors of the soil’ felt dispossession was justified on the basis of more effective economic use.⁴³ With the passing of this period, a great opportunity for justice had been lost.⁴⁴ In fact, Charles Rowley identifies this phase as ‘a turning point in Aboriginal affairs’, not so much in practice, but in the attitude of colonial governments, which increasingly reflected the growing power of settler communities rather than British principles of equality or protection.⁴⁵ Reynolds comments that even by the 1830s it was difficult to change the course of colonial practice, as settler attitudes, habits of mind and action were already entrenched.⁴⁶

With the shift toward self-government in the 1850s, the legal status of Aboriginal peoples in Australia was largely settled.⁴⁷ Although the issue would still be debated sporadically, fundamental questions receded from view. While some felt there was nothing more ‘anomalous’ or ‘perplexing’,⁴⁸ for all effective purposes, Aboriginal peoples had no status other than as British subjects. They were never, of course, *exactly* the same as other subjects, but included enough to legitimate control, while differentiated enough for subordination.

⁴³ Bain Attwood, *The Making of the Aborigines*, Allen and Unwin, Sydney, 1989, p.106.

⁴⁴ Kercher, *Debt, Seduction and Other Disasters*, p.11.

⁴⁵ C.D Rowley, *The Destruction of Aboriginal Society*, ANU Press, Canberra, 1970, p.132.

⁴⁶ Reynolds, *Law of the Land*, p.150.

⁴⁷ Kercher, *ibid*, p.9.

⁴⁸ WA lawyer E.W. Landor suggested in 1847: ‘Nothing could be more anomalous and perplexing than the position of the aborigines as British subjects...What right have we to impose laws upon people whom we profess not to have conquered, and who have never annexed themselves of their country to the British Empire by any written or even verbal treaty.’ Cited in Reynolds, *Aboriginal Sovereignty*, p.101.

Paradoxically then, settling this issue that Aborigines were 'the same' as settlers enabled consolidation of a distinct, though imposed, Aboriginal status. This was not as nation(s) or people(s), but as objects of policy, as a subordinated minority, and recipients of welfare. So while many rejected outright the meddling of those in Britain, Reynolds points to 'a more interesting and subtle reaction' which accepted what the Colonial Office was doing very selectively, namely, supporting purely humanitarian aspects while rejecting the central emphasis on legal equality and land rights.⁴⁹ The increased establishment of reserves in the second half of the nineteenth century entrenched rather than challenged this Aboriginal status by clearly attributing their development to the benevolence of settlers rather than to any inherent Aboriginal rights.⁵⁰ Similarly, distinct legislative regimes of control could be built up, which reflected not the unique political status of Aborigines, but the paternal duty of Europeans to assist a lower race. By the time one of the earliest 'Protection Acts' was passed in Victoria in 1869,⁵¹ this 'duty' had become 'a habit of mind',⁵² indicating the development of Australia's own discourses of domination.

An alternative Aboriginal status with a strong hold on contemporary popular consciousness emerged to negate the fact that an independent (political) status for Aboriginal peoples had even been considered. This was the Aboriginal not just as 'savage', but 'savagest' – a human remnant destined for extinction, initially due to Divine Providence, and later explained by the natural laws of evolutionary biology. In 1880, American Lewis Henry Morgan wrote in the

⁴⁹ Reynolds, *Law of the Land*, p.157.

⁵⁰ Reynolds suggests this distinction 'had a major impact on the legal and political status of Aboriginal communities', *ibid*, p.138.

⁵¹ Colin Tatz, *Obstacle Race: Aborigines in Sport*, New South Wales University Press, Kensington, N.S.W, 1995, p.36.

⁵² Attwood, *op cit*, p.93.

preface to the 'first Australian classic of evolutionary anthropology', Fison and Howitt's, *Kamilaroi and Kurnai*, that Australian Aborigines

now represent the condition of mankind in savagery better than it is elsewhere represented on this earth...it is a condition which...is one of the stages of progress through which the more advanced tribes and nations of mankind have passed in their early history.⁵³

The question of Aboriginal status then became not *how* the 'indigene' would fit into Australian society, but *whether* s/he would. Until at least the 1930s, the 'Doomed Race' theory provided the answer in the negative. 'Extinction of the unfittest' was the inevitable conclusion of those who misused Charles Darwin's theory of natural selection. And there were no more 'unfit' than the Australian Aborigine. While declining numbers were seen as partly due to contact with 'vices of civilisation', such as alcohol and opium, many observers sought absolution via explanations which emphasised the inherent flaws of Aboriginality. As popular author Daisy Bates suggested at the turn of the century, it was 'their very primitiveness' that meant the Aborigines were 'passing out of existence'.⁵⁴

It is no coincidence that the strongest judicial affirmation of the *terra nullius* doctrine emerged in this period. The position of Aboriginal peoples as effectively devoid of inherent rights was confirmed on the eve of the twentieth century by the Privy Council in *Cooper v Stuart*. New South Wales was found, at the time of settlement, to be

a tract of territory, practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions...There was no land law or tenure existing at the time of its annexation to the Crown.⁵⁵

⁵³ Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880-1939*. Melbourne University Press, Melbourne, 1998, p.34.

⁵⁴ Cited in *ibid*, p.55.

⁵⁵ *Cooper v Stuart* (1889) 14 App Cas 286.

By this decision, any argument for Aboriginal sovereignty was effectively quashed. Despite a century of relations with the original inhabitants, the suggestion that Australia was 'practically unoccupied' maintained the position that Australia's Aboriginal people were too uncivilised to possess rights. In the words of the ICJ case of *In Re: Southern Rhodesia*, two decades later, they were one of the 'aboriginal tribes...so low on the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society.'⁵⁶

For anthropologists (and administrators) like Baldwin Spencer, there were none so low as the Australian Aborigines – they were 'the most backward race extant'.⁵⁷ Yet there remained an important link between Aboriginal status and European identity. As with Innocent, Vitoria, Locke and others, evolutionary anthropologists did include Aboriginal peoples within the realms of humanity, despite their savagery. This was essential in order to legitimate the 'stages view' of the evolutionary paradigm which positioned the Aboriginal present as a window on the European past. Anthropology sought to study the Australian Aborigines not to determine whether they were primaeval forms of humanity. This was taken for granted to the extent that by the late nineteenth century, data from the antipodes was an essential ingredient of virtually every European theory of the course of human evolution.⁵⁸ The point of increasing studies was to find from the Aborigines what the primaeval forms of society were, in order to shed more light on the European's own path to the similarly self-evident status as exemplar of the highest civilisation.⁵⁹

⁵⁶ *In Re Southern Rhodesia* [1919] AC 211 (Privy Council), per Lord Sumner, at p.233.

⁵⁷ Cited in McGregor, *op cit*, p.41.

⁵⁸ *ibid*, p.39.

⁵⁹ *ibid*, p.48.

A similar argument can also be made regarding the creation of an Australian identity. Attwood reminds us that Aboriginal administration in this period was influenced by the fact it took place at a time when a much wider project – ‘the making of a nation’ – was at work. As European Australians came to define themselves, they increasingly believed Aboriginal peoples and ‘Others’ ‘had no part in Australia society, or in an ‘Australian’ identity.’⁶⁰ This exclusion is seen in the fact that the Australian Constitution Act of 1901 included only two references to Aboriginal people, both negative. Section 51(26) excluded people of the Aboriginal race from the scope of the special race power given to the Commonwealth, and Section 127 excluded Aboriginal people being counted in the census, thus continuing their exclusion from the franchise.⁶¹ Yet, while Aboriginal people may have been officially excluded from the emerging Australian identity, they remained a vital ‘negative referent’ in its construction. Positioning them as a doomed people did not obliterate the relation between Aboriginal and European Australians, but rather cemented it. For in carrying out the role of the dying remnant, Aboriginal people were to affirm the emergence of a fine European nation. Thus, when searching for proof of the ultimately progressive purpose of the evolutionary process in 1901, prominent British biometrician and eugenicist, Karl Pearson happily cited the case of Australia, where the passing of a ‘lower race’ signalled the birth of ‘a great civilisation’.⁶²

⁶⁰ Attwood, *op cit*, p.100.

⁶¹ See George Williams, ‘Race and the Australian Constitution: From Federation to Reconciliation’, *Osgoode Hall Law Journal*, no. 38, 2000; Michael Dodson and Lisa Strelein, ‘Australia’s Nation-Building; Renegotiating the Relationship between Indigenous Peoples and the State’, *University of New South Wales Law Journal*, vol. 24, no. 3, 2001; John Chesterman and Brian Galligan, *Citizens without rights: Aborigines and Australian citizenship*, Cambridge University Press, Cambridge, 1997 [especially chapter 3: ‘Is the Constitution to blame?’]; and Geoffrey Sawer, ‘the Australian Constitution and the Australian Aborigine’, *Federal Law Review*, vol. 2, 1996-97.

⁶² Cited in McGregor, *op cit*, p.58.

With the beginning of a new century and a new state, an independent Aboriginal political status had been denied to the point where it could effectively be forgotten. Discourses of domination formed in other contexts were refined in Australia so as to allow the formation of a distinctly uniform political community. Demands that a self-generated Aboriginal status be recognised would return, but for most of the twentieth century the only attention the issue received was a deafening silence.

IV. The great Australian silence

This term, referring to the lack of attention to questions of Aboriginality, was coined in 1968 by W.E.H. Stanner.⁶³ He suggested for much of Australia's history, 'the Aboriginal question' had received

inattention on such a scale [that it] cannot possibly be explained by absent-mindedness. It is a structural matter, a view from a window which has been carefully placed to exclude a whole quadrant of the landscape. What may have begun as a simple forgetting of other possible views turned under habit and over time into something like a cult of forgetfulness practiced on a national scale.⁶⁴

This process of 'active forgetfulness' is evident in the 1901 Constitution Act. Aboriginal peoples were excluded from the discussions surrounding federation of the previous Australian colonies, as reflected in the fact that they are only mentioned in the two negative senses discussed above. Section 51(26) has been widely interpreted as Australia's Constitution actively preventing Aboriginal peoples from gaining the status of citizens. Yet John Chesterman and Brian Galligan have shown that the Constitution merely allowed the states to

⁶³ Stanner, *op cit*, p.18.

⁶⁴ *ibid*, pp.24-5.

perpetuate regimes of discrimination that were already in place. Constitutional exclusions did not require or entail exclusion from citizenship – that was done through normal legislative and administrative practices by successive governments, parliaments and bureaucrats.⁶⁵ We have already seen where the perceptions that support these exclusions originated, and Chesterman and Galligan reflect that these instruments of government presumably had the tacit or active support of the people they represented.⁶⁶

It is important to note that processes that relegated Aboriginal peoples to an inferior status were not aberrant or exceptional – or even distinctive – but rather ‘normal practice’. After 1901, new national institutions were assembled without reference to Indigenous polities. This renders questionable suggestions that what is now required is increased Aboriginal inclusion in contemporary Australian institutions, rather than reform of the institutions themselves. Scrutinising these institutions from an Aboriginal perspective counters the fact that the discourses of domination had become so entrenched at the time Australia’s state was founded as to become simply part of the way we do things.

Aboriginal people in the new state of Australia did not die out and thus oblige those who wished to create an homogeneous white nation-state. Yet this did not mean that a radical new appraisal of the position of Aboriginal Australians took place. After the first quarter of the twentieth century, debate, such as it was, was led by those who maintained the inevitability of Aboriginal extinction, and others who thought it possible to ‘uplift’ the Aboriginal toward

⁶⁵ John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship*, Cambridge University Press, Cambridge, 1997, p.7.

⁶⁶ John Chesterman and Brian Galligan, *op cit*, p.83. See also George Williams, ‘Race and the Australian Constitution: From Federation to Reconciliation’, *Osgoode Hall Law Journal*, no. 38, 2000, p.645.

civilisation, such as through the gradual move to settled agriculture.⁶⁷ In the shift from evolutionary to social or functional anthropology, racial theories began to be less salient, but the core belief in the primitiveness of the Australian Aboriginal remained.⁶⁸ Aboriginal peoples continued their existence into the twentieth century, with the increasing number of 'half-castes' a particular worry for those keen to maintain the critical historic distinction between black and white, savage and civilised. The maintenance of such distinctions, as well as solving 'the Aboriginal problem', would be left in the hands of a few white 'experts' – 'the faithful preaching to the converted'⁶⁹ – while the majority of the new state became part of the 'cult of forgetfulness'.

Stanner's quotation alludes to the active nature of the process of forgetting, or of wilful amnesia. The increasing number of 'half-castes' made this process more difficult, while also directly challenging the central organising distinction between 'them' and 'us'. Policing this boundary became a central concern of legislators. In an exhaustive study, John McCorquodale identified 700 separate pieces of legislation with 67 classifications, descriptions or definitions of 'Aboriginal'.⁷⁰ He found that the same expressions to define or describe Aborigines as special subjects of special laws, or as special subjects by uneven and unequal operation of the same law, recur over time and space in Australia.⁷¹ The result has been 'Aboriginal policy, and its legislative expression, remained static and immured, entrenched by perceptions inapplicable to modern times and conditions'. As a consequence of these perceptions,

⁶⁷ For example, Archibald Meston. See his *Geographic History of Queensland*, E. Gregory, Government Printer, Brisbane, 1895.

⁶⁸ McGregor, *op cit*, p.104.

⁶⁹ Stanner, *op cit*, p.21.

⁷⁰ John McCorquodale, 'Aboriginal Identity: Legislative, Judicial and Administrative Definitions', *Australian Aboriginal Studies*, no. 2, 1997, p.26. See also his *Aborigines and the Law: a digest*, Aboriginal Studies Press, Canberra, 1987.

⁷¹ *ibid*, p.24.

Aboriginal peoples were treated as fundamentally different to the rest of the Australian community – ‘a new species of legal creature was created and sustained as a separate class, subject to separate laws and separately administered’.⁷² Aboriginal peoples had certainly gained a distinct status – but it was neither one of equal peoples, nor one that reflected their self-expression. Rather, it was an artificial status that could be created, removed and reimposed at the behest of officialdom, through what McCorquodale describes as ‘legislative sleights of hand’.⁷³

In answering the question of why Aboriginal peoples were singled out so consistently for special legislative treatment, McCorquodale speculates that ‘the answer has its roots in the question of land dispossession and ownership/usage’. It was an attempt by authorities to remove Aboriginal people ‘from the conscience of a society united, not by class or common origin, but by greed for land’.⁷⁴ Of course they were also united in their identity as non-Aboriginal, an identity whose maintenance required strict legislative policing of the key categories which distinguished ‘us’ from ‘them’.

This was particularly true of the problem of the increasing ‘half-caste’ population. Addressing this issue was the catalyst for the first national ‘Aboriginal affairs’ conference, in Canberra, in 1937.⁷⁵ Its key resolution was to predict the ‘ultimate absorption’ of Australia’s Indigenous people. Under the title ‘Destiny of the Race’, it resolved: ‘That this conference believes that the destiny of the natives of aboriginal origin, but not of the full blood, lies in their ultimate

⁷² *ibid.*, p.29.

⁷³ John McCorquodale, ‘Aboriginal Identity: Legislative, Judicial and Administrative Definitions’, p.26.

⁷⁴ *ibid.*, p.34.

⁷⁵ Commonwealth of Australia, *Aboriginal Welfare*, AGPS, Canberra, 1937.

absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to that end.’⁷⁶

While ‘full bloods’ were destined to die out, ‘half-castes’ would be assimilated into the general population. Elsewhere I have described this as a policy of genocide.⁷⁷ It was not just that the notion of a separate Aboriginal status could not be entertained, but Aboriginality itself was deemed unconscionable. At the conference, A.O Neville described Australia’s future thus: ‘Are we going to have a population of 1 million blacks in the Commonwealth, or are we going to merge them into our white community and eventually forget there ever were any aborigines in Australia?’⁷⁸

Shortly after the conference, the minister for the Interior, John McEwen, released the paper Charles Rowley described as ‘the foundation of the assimilation policy’.⁷⁹ Issued in 1939, it continued differential policies for ‘part-Aborigines’, but it was also the first policy to suggest any sort of common citizenship for surviving Indigenous individuals. It suggests the start of a shift to a more cultural, less biological understanding of ‘race’.⁸⁰ McEwen’s objective was ‘the raising of their status so as to entitle them by right, and by qualifications to the ordinary rights of citizenship and enable and help them to share with us the opportunities that are available in their native land’.⁸¹

⁷⁶ Commonwealth of Australia, *op cit*, p.1.

⁷⁷ Stuart Bradfield, ‘With the best of intentions: The removal of Aboriginal children and the question of genocide’, BA Honours thesis, Macquarie University, 1997.

⁷⁸ A. O. Neville, *Aboriginal Welfare*, p.11.

⁷⁹ C. D. Rowley, *Outcasts in White Australia*, Penguin Books, Hammondsworth, 1973, p.31.

⁸⁰ Atwood, *op cit*, p.101. Stanner points out that as late as 1930, the renowned historian Ian Hancock was still writing of a ‘predestined passing’. Cited in Stanner, *op cit*, p.38.

⁸¹ Cited in Rowley, *ibid*.

Rowley suggests at this time the word 'assimilation' was in the air.⁸² Yet the policy of 'replacing' Aboriginal culture had been around, particularly in New South Wales and Victoria, since Governor Macquarie's Native Institution was established in Parramatta, in 1814.⁸³ The goal of absorption/assimilation became more explicit, but it was put on hold during World War Two. This, ironically, was a period when some Aboriginal people enjoyed equal status with their white counterparts.⁸⁴ By 1948 that status was forgotten, and the pre-war policy began to be implemented. In the Commonwealth controlled Northern Territory, a department of Native Affairs was created. Under this regime, numbers of 'patrol officers' were responsible for implementing a poorly understood policy of 'assimilation', including removing Aboriginal children from their families.⁸⁵

In 1951 Minister for Territories, Paul Hasluck, put forward his vision of assimilation.⁸⁶ Under the policy adopted by all states and territories, it was 'expected that all persons of aboriginal blood or mixed blood will live like white Australians do.'⁸⁷ In 1953, Hasluck suggested 'assimilation does not mean the suppression of the aboriginal culture, but rather that, for generation after generation, cultural adjustment would take place'.⁸⁸ Implementation of the

⁸² Cited in Rowley, *op cit*, p.32.

⁸³ See Jack Brook and J.L. Kohen, *The Parramatta Native Institution and the Black Town: a history*, New South Wales University Press, Kensington, 1991.

⁸⁴ See Robert Hall, *Fighters from the Fringe : Aborigines and Torres Strait Islanders recall the Second World War*, Aboriginal Studies Press, Canberra, 1995.

⁸⁵ For the recollections of one such officer, see Colin Macleod, *Patrol in the Dreamtime*, Mandarin, Kew, 1997. The stories of some of the 'Stolen Generations' are published in Human Rights and Equal Opportunity Commission, *Bringing them Home: The Report of the Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families*, HREOC, Sydney, 1997.

⁸⁶ See Paul Hasluck, *Native welfare in Australia: speeches and addresses*, P. Brokensha, Perth, 1953; Hasluck, *The Policy of Assimilation: Decisions of State and Commonwealth and State Ministers at the Native Welfare Conference, Canberra, January 26 and 27, 1961*. Commonwealth Government Printer, Canberra, 1961. For a more recent critique of assimilation from an Indigenous perspective see Mick Dodson, *Assimilation versus Self-Determination: no contest*, NARU Discussion Paper no.1 NARU, ANU, Darwin, 1996.

⁸⁷ Cited in Colin Tatz, *Aboriginal Administration in the Northern Territory*, PhD thesis, Australian National University, 1964, p.12.

⁸⁸ Hasluck, *Native Welfare in Australia*, p.17.

policy was notoriously haphazard,⁸⁹ with a common definition only being adopted 1961. Under this policy it was determined, 'all aborigines and part aborigines will attain the same manner of living as other Australians and live as members of a single Australian community'.⁹⁰ This was modified after the 1965 Native Welfare conference, which introduced the element of choice. The new policy sought 'that all persons of Aboriginal descent will choose to attain a similar manner of living to that of other Australians'.⁹¹

Changes in the Commonwealth's jurisdiction of the Northern Territory were meant to indicate a shift away from differential treatment. The *Aboriginal Ordinance* that had governed all aspects of Aboriginal life from 1911 was replaced in 1959 by the *Welfare Ordinance*. In theory this was what Tatz described as a 'radically new policy', whereby Aborigines were to be treated individually, not as a mass. Authorities were to provide welfare for individuals, not protection for a race.⁹² In practice, domination continued as before, with 'full-blood' Aboriginal people simply reclassified as 'wards', while 'half-castes' were 'emancipated' overnight. Officially, control over individuals was due to their 'wardship', rather than their Aboriginality. Yet out of an official population of 17,000, there were only around 89 Aboriginal people not declared to be wards.⁹³ Hasluck appears to have wished to change the perception of Aboriginal people, yet continued differential treatment reinforced exclusionary attitudes. For Hasluck, assimilation may have meant 'cultural adjustment', but those who implemented the policy saw it as requiring the 'dis-integration of traditional life'.⁹⁴

⁸⁹ See particularly, Tatz, *Aboriginal Administration*.

⁹⁰ Cited in *ibid*.

⁹¹ Cited in Lorna Lippmann, *Generations of Resistance*, Longman cheshire, Melbourne, 1994, p.29.

⁹² Colin Tatz, 'Commonwealth Aboriginal Policy', *Australian Quarterly*, vol. 30, no. 4, December 1964, p.51.

⁹³ John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship*, p.175.

⁹⁴ In 1959 an official of the Northern Territory Welfare Branch suggested: 'The successful development of Australia's aboriginal-assimilation programme is inevitably linked with the dis-integration of the social pattern of traditional life.' Welfare Branch Northern Territory Administration, *Maningrida Settlement*, Darwin, 1959, p.3.

This period did see a little amelioration in the strict regimes that controlled Aboriginal life. This was reflected in legislative changes in Victoria in 1958 then 1965; South Australia and Queensland in 1965; and New South Wales in 1969.⁹⁵ There was still no suggestion of recognising distinct Aboriginal rights which originated in their status as First Peoples. In fact, 'Aboriginality' continued to be defined by an archaic quality. This was evident in the founding of the Australian Institute for Aboriginal Studies (now Australian Institute for Aboriginal Studies and Torres Strait Islander Studies (AIATSIS)). It was to concentrate only on the 'disappearing' aspects of culture, rather than investigate issues concerning contemporary Aboriginality.⁹⁶ While there was a new interest in aspects of Aboriginal culture, it was still viewed as archaic, rather than vibrant, dynamic, and evolving.

The shift toward assimilation ultimately relied upon, rather than challenged assumptions of European superiority. In a similar way, the referendum of 1967 which altered the exclusionary sections of the Constitution discussed above, aimed at facilitating Aboriginal entry into the dominant society. This was at the cost, rather than recognition, of a distinct Indigenous status.⁹⁷ Attwood and Markus conclude in their book on the subject that while the referendum marks Aboriginal attainment of 'the status and rights of Australians', it does not represent a

⁹⁵ See McCorquodale, *Aborigines and the Law*, *op cit*.

⁹⁶ The phrase 'disappearing aspects of culture' was used by Colin Tatz in 1966 to differentiate the (more contemporary) work of the Centre for Research into Aboriginal Affairs he began at Monash University. Tatz, 'Centre for Research into Aboriginal Affairs', *Monash University Gazette*, vol. 3, no. 1, September 1966, p.7. In the second reading of the 'Australian Institute of Aboriginal Studies Bill 1964', Senator Gorton stated explicitly, 'The permanent institute will not be concerned with the current problems of the Australian aborigine.' *Hansard*, 7 May 1964, p.1027.

⁹⁷ Dodson and Strelein suggested the amendments of 1967 "did not recognise Aboriginal peoples within the Constitution so much as make the text completely silent on the place of Indigenous peoples in the Australian legal and political structures. It has merely ensured the power to discriminate against indigenous peoples has been entrenched and centralised." *op cit*, p.830.

turning point or watershed as is commonly claimed.⁹⁸ Stanner points out that what he calls the 'great reforms' of the period which culminated in the referendum 'did not damage real interests and pockets to an alarming extent'.⁹⁹ Yet for our purposes, the even more fundamental point is that these reforms, primarily integrative in their trajectory, did not follow or promote changes in real attitudes. Rather than representing any shift towards recognition based on co-existence and equality, Stanner suggested the increase in interest in Aboriginality smacked of 'a romantic cult of the past, a cult that could end as rapidly and as strangely as it began'.¹⁰⁰ Writing at the end of the 1960s he suggested it was not the result of

any deep-seated change of heart or mind towards the living aborigines. I see it rather as the sign of an affluent society enjoying the afterglow of an imagined past and as a reaching out for symbols and values that are not authentically its own but will do because it has none of its own that are equivalent.¹⁰¹

This period of Aboriginal-state relations ends then, as it began – characterised by ambiguity. Non-Aboriginal society apparently maintained a firm belief in the guiding principle of its superiority over Aboriginal society, yet began to look to that society for representations of its own (non-Aboriginal) identity. Policy focus shifted radically from segregation to assimilation, yet these apparently contrasting positions reflected rather than challenged popular perceptions of Aboriginal status. Many of the paradoxes of 'denial by recognition' that have been part of the colonial encounter for centuries were present in the first modern Australian case to assess the possibility of a distinct political status for Australian Aboriginal peoples.

⁹⁸ Bain Attwood and Andrew Markus, *The 1967 Referendum, or When Aborigines didn't get the Vote*, AIATSIS, Canberra, 1997, p.71.

⁹⁹ Stanner, *op cit*, p.38.

¹⁰⁰ Stanner, *op cit*, p.39.

¹⁰¹ *ibid.*

V. Milirrpum v Nabalco¹⁰²

Marcia Langton suggested Australia's case law 'accords our nation the status of an anomaly among the settler colonial States', particularly in terms of the lack of recognition accorded to Aboriginal status.¹⁰³ Once again, as with *Bonjon*, *Murrell* and *Cooper*, in *Milirrpum* the judiciary of the state was required to rule on the ambiguous status of the indigenes. In this case, the plaintiffs were Yolgnu peoples from Yirrkala in Arnhem Land, who contended they held a communal native title which had been usurped without their consent by the mining company Nabalco.¹⁰⁴ While Stanner spoke at the time of the possibility of 'judicial creativity',¹⁰⁵ the court instead relied on the imposition of what Tim Rowse described as 'brute colonial doctrine'.¹⁰⁶ Blackburn felt obliged to reassert the 'settlement thesis' which denied the existence of Aboriginal land rights. Yet in doing so, he sympathetically recognised the existence of Aboriginal law. Blackburn suggested

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', it is that shown in the evidence before me.¹⁰⁷

That he arrived at a decision which affirmed the position of the state, as previously, is not surprising. Yet, Blackburn apparently *wanted* to find for the Aboriginal plaintiffs. Barbara Hocking described Blackburn's ultimate finding as 'grievously wrong', but in so far as it

¹⁰² *Milirrpum v Nabalco* (1971) 17 FLR 141.

¹⁰³ Marcia Langton, 'A treaty between our nations?', Inaugural Professorial Lecture, University Of Melbourne, Melbourne, Australia. <http://www.indigenous.unimelb.edu.au/treatylecture1.html>

¹⁰⁴ *Milirrpum*, at pp.149-50.

¹⁰⁵ Stanner cited in Tim Rowse, *Obligated to be Difficult: Nugget Coomb's legacy in indigenous affairs*, Cambridge University Press, Cambridge, 2000, p.51.

¹⁰⁶ *ibid*, p.57.

¹⁰⁷ *Milirrpum*, at p.267.

corrected factual errors found in *Cooper*, 'it constituted an intermediate point in the legal chain that has, with *Mabo*, culminated in the correct application of long-established principles and doctrines of the common law.'¹⁰⁸ Yet at this point in the chain, the 'reality' of Aboriginal society was deemed to be irrelevant by the justice in making his decision. The question to be determined was 'one of law, not of fact'.¹⁰⁹ Native title could not be recognised because Blackburn felt bound by precedents such as *Cooper*. The 'chain of authority' cited by the judge went all the way back to *Calvin's Case*,¹¹⁰ and its differentiation of the rights of the civilised from the uncivilised. Thus, despite his recognition of a sophisticated society preceding the coming of Europeans, the law was 'well settled', with Blackburn citing Blackstone that the doctrine of *terra nullius* was meant 'to include territory in which live uncivilised inhabitants in a primitive State of society'.¹¹¹

David Ritter suggested that in widening the gap between law and reality, the decision in *Milirrpum* created a 'crisis of legitimacy' for the rule of law in Australia.¹¹² In a sense, it represents the zenith of state management (or denial) of Aboriginal status. The decision is indicative of a state confident enough of its own power and position to allow official recognitions of Aboriginal society that may be self-evident, yet represent a fundamentally different narrative. As we have seen, Aboriginal law is said to exist in this organised society, and Blackburn even alluded to the existence of forms of Aboriginal sovereignty and

¹⁰⁸ Barbara Hocking, 'Aboriginal law does now run in Australia: reflections on the *Mabo* case: from *Cooper v Stuart* through *Milirrpum* to *Mabo*', *Sydney Law Review*, vol. 15, no. 2, June 1993, p.288.

¹⁰⁹ *Milirrpum* at p.244.

¹¹⁰ *ibid.*, at p.201.

¹¹¹ *Milirrpum* at p.201.

¹¹² David Ritter, 'The "rejection of terra nullius" in *Mabo*: A critical analysis', *Sydney Law Review*, vol. 18, no. 5, 1996, p.6.

authority.¹¹³ He also rejected the arguments for a strictly Lockean conception of property.¹¹⁴ Despite all these recognitions, he concluded by denying the existence of Aboriginal rights to land – not despite the law as he saw it, but *because* of that law, whose beginnings have been investigated in this and the previous chapter. Thus, as a ‘matter of law not fact’, Blackburn regarded the decision in *Bonjon* recognising a plurality of laws in Australia not as a conception of Aboriginal status commensurate with modern knowledge of Aboriginal society, but merely as a ‘curiosity of Australian legal history’.¹¹⁵ He felt compelled to follow the ‘clear and binding’ authority of *Cooper*¹¹⁶, despite its conflicting understanding of Aboriginal society. Again, in contrast with his understanding of Aboriginal organization, backed by the law, he simply asserted that on the ‘foundation’ of New South Wales, ‘every square inch of territory in the colony became the property of the Crown’.¹¹⁷ From that point he was quick to interpret previous land grants as evidence of European ‘benevolence’, rather than Aboriginal right.¹¹⁸

Such findings flow directly from an approach which relies on the convenience of ‘law’ rather than ‘fact’. This case sought to determine the existence of Aboriginal rights to land they had occupied for millennia, and effectively rule on the relationship between Aboriginal and non-Aboriginal peoples. Yet the Indigenous beliefs which gave rise to the expression of those

¹¹³ *Milirrpum* at p.268: ‘The absence of an identifiable sovereign authority is a characteristic of the community of nations; it does not convince me that there is no such thing as international law...Great as they are, the difference between that [Aboriginal] system and our system are, for the purposes in hand, differences of degree.’

¹¹⁴ *ibid*, at p.271. ‘I would not withhold from a clan’s relationship to a piece of land the description ‘proprietary’ because the boundary of the land is less precisely definable than those to which we are accustomed.’

¹¹⁵ *Ibid*, at p.262.

¹¹⁶ *ibid*, at p.242.

¹¹⁷ *Milirrpum*, at p.245.

¹¹⁸ *ibid*, at p.281.

rights meant nothing. The arbiter of Western law could state simply: 'With great respect to the plaintiffs beliefs, I do not think that they help me to decide the matter before me.'¹¹⁹

VI. Conclusion

Milirrpum illustrates Australia at the point where Aboriginal status has been denied to such a degree that Aboriginal law could be recognised, and yet have no effective impact on the empire of uniformity that had been built up. By 1972 we saw in Australia, a triumph of the self-serving logic of positivism. Aboriginal rights and status are not recognised because they have never been recognised. The question of recognition is entirely a matter of Western law – a law which as we have seen, contains within its fundamental structure, beliefs which preclude the recognition of an independent Aboriginal political status. The end of this period, the early 1970s, may then be seen as the 'high point' of the *terra nullius* doctrine, and the thinking behind it.

David Ritter points out it is relatively straightforward to refute the legality of *terra nullius* (as the High Court did in 1992), particularly when the assertion of Australia as 'land of no-one' is juxtaposed against the facts of Aboriginal society.¹²⁰ Yet the resilience of what Paul Patton referred to as '*terra nullius* thinking'¹²¹ suggests the significance of the doctrine may lie beyond mere legality. Ritter has argued that such was the power of imported conceptions of inherent Aboriginal inferiority that no doctrine was formally required to preclude recognition

¹¹⁹ *Milirrpum*, at p.270.

¹²⁰ The idea of a land inhabited by Indigenous people being *terra nullius* was overturned by the International Court of Justice in 1975. *Advisory Opinion on Western Sahara* [1975] ICJR 12.

of Aboriginal right to land. In founding Australia, there was no need to refer explicitly to the doctrine of *terra nullius* as 'the Indigenous inhabitants of the colony were seen and defined by the colonists as intrinsically barbarous and without any interest in land'. It was 'axiomatic'.¹²² Ritter argued that it was not the doctrine of *terra nullius*, but 'the discourses of power that accompanied the colonisation of Australia' that actually caused Aboriginal interests to be formally ignored.¹²³ These 'discourses of power' were evident in the organic growth of the colony's law and politics, and particularly in the close relationship between the two. These discourses were not just marshalled in the cause of establishing the legitimacy of the emerging society, but in a process by now familiar, they actually developed according to the requirements of this task.

Reynolds and others have noted the reluctance of Australians to see their country as a colonial power. Perhaps we also tend to see ourselves as agents of a kinder, gentler form of colonialism. Yet this necessarily brief examination of the early period of Australian history shows a reliance upon 'orthodox' discourses of domination, rather than any rejection of them. Initially, we saw a complete denial of Aboriginal status, despite Imperial instructions in line with international law of the time to gain the 'consent of the natives'. This was followed by a period of some ambivalence where the possibility of co-existence remained, with even the suggestion that it should be Europeans who were subject to the local law, rather than the other way around. Despite the claims of some colonists that relations should proceed according to *negotiation and treaty*, by the 1850s the question (and denial) of Aboriginal status had been effectively 'settled'. Ambiguity would, however, continue to be attached to the position of

¹²¹ Paul Patton discusses this idea in 'Constitutional Paradoxes: native title, treaties and the nation' paper delivered to AIATSIS seminar series, The Limits and Possibilities of a treaty process, May 28 2001.

http://www.aiatsis.gov.au/rsrch/smnrs/smnr_treaty1.htm

¹²² Ritter, *op cit*, p.6.

¹²³ *ibid*, p.7.

Aboriginal people *vis a vis* the emerging society, and later, the state. After a long period when the question effectively disappeared from view, this ambiguity resurfaced in Justice Blackburn's *Milirrpum* decision. Read one way, *Milirrpum* represents the triumph of an imposed legal order which could incorporate Aboriginal people into the state entirely on its own terms. Yet Blackburn J's decision also contained the seed of recognition – a recognition that was inevitable, given the continuous existence of Aboriginal societies which maintained their own culture, traditions and identities.

The maintenance of a distinct Aboriginal identity would always prevent complete realisation of the colonial project. In a similar way, the refusal of Aboriginal people to follow the colonial script and abandon their law and culture in the face of a 'superior' European system has contributed to what Fitzpatrick described as the 'ambivalence of occidental self-constitution'.¹²⁴ Just as the development of (European) law and sovereignty in settler societies such as Canada and Australia was given substance by denying their existence in Aboriginal societies, so has settler identity been given shape through its expression in opposition to that of the Indigenous inhabitants.

In the period examined in the following chapter, the decades following *Milirrpum*, this process would only intensify as white society was forced to react to increasingly strident Aboriginal claims for recognition. To this point, historic conceptions of an inferior Aboriginal status proved remarkably enduring. There was little sign of a paradigm shift in non-Indigenous perceptions which underpinned the dominant society's institutions and processes. If the discourses of domination continue to endure, this raises real doubt as to the substance of the new era of 'self-determination'. The persistence of ambiguity is evident in the fact that

despite being seen as a period of significant change with regards the Aboriginal-state relationship, the period from 1972 to 2001 both begins and ends with Aboriginal demands for, and state denials of, a treaty.

¹²⁴ Fitzpatrick, *op cit*, p.19. Cf. Chapter 6 discussion of Prime Minister Howard.

Chapter 5

From Treaty to Treaty: continuity and change in Aboriginal status from 1972 to 2001

- I. Treaty talk begins
- II. Aboriginal Treaty Committee
- III. 'Back in 1988, all those talking politicians...'
- IV. *Mabo*
- V. Conclusion

The current phase in Aboriginal-state relations shows that the ambiguity examined in the previous chapter continues. While Aboriginal peoples appeared to make gains in the last three decades, real doubt continues as to the fundamental, lasting nature of that change. Similarly, even as non-Aboriginal people free themselves from some of the discourses of domination, other prejudices retain and consolidate their power. A distinctly Indigenous agenda has developed in the last thirty years, but it continues to be contained within parameters that remain largely determined by the state. There has been increased movement within these boundaries, but the boundaries imposed remain the same. This sense of both movement and

stasis, of both progression and maintenance of the *status quo*, is illustrated by the fact that the period under examination both begins and ends with Indigenous demands for the negotiation of a treaty. It has been suggested that we are caught between the old and the new Australia: the new is emerging, but the old will not die.¹

Marcia Langton felt that throughout its history, Australia's public culture has been characterised by disputes as to the nature of Aboriginal status. This failure to accord Indigenous peoples a 'clear and just status' continues to be 'a loose hanging thread in the web of our civil society'.² I continue tracing this thread in contemporary Australia – a thread whose sources the previous chapter suggested are older than Australia itself. The analysis of contemporary developments takes place against the backdrop of four critical phases in 'treaty talk'. This framework brings out the consistency of both Aboriginal demands for recognition, and state denials. These denials are investigated via some key judicial pronouncements, as well a number of legislative and policy interventions.

I. Treaty talk begins

Despite arguments to the contrary, demands for a treaty are not new. They form part of a tradition going back to the 1830s.³ There is a strong continuity both in Indigenous demands and non-Indigenous responses. The latter have consistently failed to recognise the political implications of an Aboriginal status as distinct peoples.

¹ Peter Beilharz, 'Australian civilisation and its discontents', *Thesis Eleven*, no. 64, February 2001, p.75.

² Marcia Langton, 'A Treaty Between Our Nations?' Inaugural Professorial Lecture, University of Melbourne, Melbourne, Australia. <http://www.indigenous.unimelb.edu.au/lecture1.html>

³ See Chapter 4, note 30, and accompanying text.

Perhaps the first formal Aboriginal demand for a treaty process came in 1972. The Larrakia people, whose traditional territory lies around present-day Darwin, called for the federal government to undertake treaty negotiations with all Aboriginal peoples. Notable among their demands were the creation of a treaty commission, the negotiation of treaties tribe by tribe, and the suggestion that the treaties would be binding, or 'good for all time'. They said '...we shall not stop until treaties are signed'.⁴

This initial demand was met with the assertion of national unity that retains favour with conservative governments then, as now. Prime Minister William McMahon argued that it was inappropriate to negotiate with British subjects as though they were foreign powers. Furthermore, the idea of a treaty was not only wrong, but practically difficult. McMahon asserted the reason no treaties had historically been negotiated in Australia was partly the difficulty of identifying the people and groups with whom to negotiate.⁵

McMahon may have been correct in pointing out the difficulty English authorities had in locating Aboriginal leadership, given the vast differences in systems of governance among the two peoples. Yet there is also evidence of a type of 'binary logic' in McMahon's thinking which acts to limit recognition of Aboriginal status. Aboriginal peoples are assigned only two possible roles, those of 'British subjects' or 'foreign powers'. The two categories are considered as mutually exclusive. Labelling Aboriginal people unproblematically as 'British subjects' ignored the history of differentiation outlined in the previous chapter, as well as the fact that discriminatory legislation continued to exist in many jurisdictions. The assertion of

⁴ Full text is cited in Judith Wright, *We Call For A Treaty*, Collins/Fontana, 1985, pp.14-15.

⁵ *ibid*, p.15.

this status, despite the reality of Aboriginal life, could be viewed as a deliberate strategic response designed to maintain the uniformity of the state. Rather, unity of the state was defined in such a way that made it impossible to conceive of a third, alternative identity increasingly stressed by Aboriginal peoples, one which simultaneously included elements aligned both with 'British subjects' and 'foreign powers'.

This initial Aboriginal demand for a treaty echoes those of the present. Then, as now, Indigenous leaders pointed to their failure to consent to contemporary political arrangements, the international precedent for treaty-making, while they also asserted a distinct 'First Nation' status within the state. In a petition to be presented to Princess Margaret on her visit in October 1972, ultimately sent to the Queen, the Larrakia argued:

The British settlers took our land. No treaties were signed with the tribes. The British Crown signed treaties with the Maoris in New Zealand and the Indians in North America. We appeal to the Queen to help us, the original people of Australia.⁶

The election of the Whitlam Labor government in late 1972 saw the emergence of what has been regarded as 'an entirely new concept of Australian national identity,'⁷ one which sought to move away from the monocultural concept of White Australia. In his 1972 policy speech, Whitlam had promised 'a new deal' for Aboriginal people, including transfer of traditional lands, spending five million dollars a year for ten years in the newly created Department of Aboriginal Affairs, as well as passing legislation to prohibit racial discrimination.⁸ Veteran political commentator Alan Reid described it as an 'ambitious idealistic programme, a very large milestone in Australian history'.⁹ Yet, even while Tatz agrees that 'for a very short

⁶ Wright, *op cit*, p.16.

⁷ Ann-Mari Jordens, 'Australian Citizenship: 50 years of change', *Reform*, no. 74, Autumn 1999, p.26.

⁸ Alan Reid, *The Whitlam Venture*, Hill of Content, Melbourne, 1976, pp.165-166.

⁹ *ibid*, p.166.

while', their issues held centre stage, he suggests Aboriginal people 'soon reverted to their perennial status: that of a social welfare problem'.¹⁰ The failure to recognise Aboriginal peoples as retaining any rights which inhered in them as peoples rather than those that originated from the state, was perpetuated by the *Milirrpum* case.¹¹

Despite the adverse finding for the Aboriginal plaintiffs, in a legal-political continuum not often recognised,¹² *Milirrpum* did contribute directly to initiating land rights legislation in the Northern Territory. While Prime Minister McMahon had previously announced the Yirrkala people would receive 'trivial' royalties, he made it clear, as did Blackburn and others before him, this was not based on traditional ownership.¹³ Aboriginal peoples continued to be viewed largely as passive receivers of welfare, and instruments of white benevolence. It was through the *Aboriginal Land Rights Act 1976* (Cth), that Aboriginal people first had their distinct status recognised by the federal government.

The Inquiry that facilitated the beginnings of land rights legislation in Australia was the Aboriginal Land Rights Commission, headed by A. E. Woodward, chief counsel for the plaintiffs in the *Milirrpum* case.¹⁴ Following that case, the Whitlam government set Woodward the task of determining not *if* Aboriginal rights to land existed, but rather 'the appropriate means to recognise and establish the traditional rights of the Aborigines in and in relation to land'.¹⁵

¹⁰ Colin Tatz, *Race Politics in Australia: Aborigines, Politics and the Law*, University of New England Publishing Unit, Armidale, 1979, p.6.

¹¹ *Milirrpum v Nabalco* (1971) 17 FLR 141. For discussion of this case see chapter 4.

¹² Colin Tatz, 'Aborigines and Civil Law', in *Aborigines and the Law*, Peter Hanks and Brian Keon-Cohen (eds.), George Allen and Unwin, Sydney, 1984, p.115.

¹³ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fifth Report*, AGPS, Canberra, 1997, p.22.

¹⁴ Aboriginal Land Rights Commission, *First Report*, AGPS, Canberra, 1973; Aboriginal Land Rights Commission, *Second Report*, AGPS, Canberra, 1974.

¹⁵ *First Report*, *ibid*, p.1.

This would be an early test as to the seriousness of the state in recognising distinct Aboriginal rights, rights which could conflict with the interests of the broader political community. In a forerunner of later attempts, it would prove difficult to translate Indigenous interests into a Western paradigm. For instance, Woodward recognised that ‘to deny Aborigines the right to prevent mining on their land is to deny the reality of their land rights’.¹⁶ Yet this apparent challenge to traditional power relations was critically compromised by the next section in his report, which agreed that this right of veto could be overridden by government ‘in the national interest’.¹⁷ Traditional power relations were entrenched then, because, as former High Court Justice and land commissioner John Toohey suggested, following *Milirrpum*, the recognition of land rights in Australia was paradoxically postulated on the basis that Aboriginal title had *not* been established at common law.¹⁸ Ambiguity would continue to be attached to Aboriginal status. Ambiguity would be increased to the extent that distinct Aboriginal interests would be recognised, but they had to be expressed not only *within* the state, but *by* the state. This approach was not just ambiguous, but illogical. Recognition of a distinct Aboriginal interest in land meant the source of this right existed prior to the existence of the state. The state could not create a right which had existed prior to its creation.

However, given what the Royal Commission on Australian Government Administration described in 1976 as ‘the realities of power’, decisions about Aboriginal interests would be

¹⁶ *First Report, op cit*, s568.

¹⁷ *ibid*, s569.

¹⁸ Paul Toohey, ‘Observations on Evidentiary Matters and Native Title’, in Richard H. Bartlett and Jill Milroy (eds.), *Native Title Claims in Canada and Australia*, Centre for Commercial and Resources Law, University of WA, Perth, 1999, p.103.

made by 'white decision makers'.¹⁹ Of course, the difficulties faced by these decision makers can't be overstated. As Ken Maddock wrote when discussing the then newly established *Northern Territory Land Rights Act (1976)*,

the relation between modern legal structures and traditional rights or interests has yet to be definitively settled. The relation will vary with the interpretation put upon the provisions and definitions of the Act. But it is doubtful whether there can be a final interpretation, and so the relation between our two variables will remain an open question.²⁰

In pointing to an ever present 'open question', Maddock raised an interesting point about the management of 'Aboriginal difference', an issue investigated later.²¹ Of major interest for this chapter is the emerging recognition of this element of difference at official levels, and the embryonic attempts at intercultural negotiation it facilitated. In virtually all attempts post-Woodward to translate a newly recognised, distinct Aboriginal interest (in land) into forms that could be recognized (and managed) by the state, there would be two consistent themes: a lack of underlying principle or philosophy,²² and a major role for lawyers and the law.²³ From mid-1970s, when this distinct interest was recognised in Australia, unlike Canada, questions

¹⁹ The *Royal Commission on Australian Government Administration*, AGPS, Canberra, 1976, stated: 'The realities of power mean that ultimate decisions about them [Aboriginal peoples] and the allocation of resources to them will finally be made...by white decision makers.' p.337.

²⁰ Kenneth Maddock, *Anthropology, Law and the Definition of Australian Aboriginal rights to land*, Nijmegen, Netherlands, 1980, p.102.

²¹ See chapter 8 for discussion of treaty as an ongoing, open relationship.

²² Compare Maddock, commenting in the late 1970s, alleging there has been 'no serious discussion of the principles' by which land will be returned, 'or more generally, to govern relations between a settler and a native population.' (*ibid*, p.181). Writing in 2000, Christos Mantziaris and David Martin suggested 'There is little evidence of the development of a guiding set of principles for native title management. On the contrary, policy appears to have been made 'on the run' (*Native Title Corporations: a legal and anthropological analysis*, Federation Press, Leichardt, 2000, p.109) Further, 'The absence of a coherent policy for native title management has manifested itself in a confused legislative schema.' (p.134). In fact 'confusion...lies in the very foundations of the system.' (p.109)

²³ Again, compare Maddock (*ibid*): Post *Milirrpum* it is lawyers who are 'reopening and rethinking the question of the relation which should exist between a settler and a native people concerning the land they both inhabit. Originally answered by the British, it has now been differently determined by Australians....lawyers are largely responsible for the form taken by the new relationship...' (p.14) Similarly, McRae (et al) wrote in 1991, 'It is almost impossible to identify any consistent rationale underlying current Australian land rights legislation.' (Heather McRae, Garth Nettheim and L. Beacroft, *Aboriginal legal Issues: commentary and materials*, Law Book Co, Sydney, 1991, p.144.) Mantziaris and Martin (*ibid*) describe the outcome for Native title in 2000: 'Three different legal stools have been used to structure the relationship [between native title holders and their

about Aboriginal relationships to land are posed more in terms of the law of property than constitutional or international law.²⁴

In Australia, this has meant management of the new interest by the state through the construction of 'recognition structures' such as the now ubiquitous Aboriginal corporation.²⁵

There has been no interests in recognition of a First Nation status, as in Canada, where a distinct relationship with the state is the focus of constitutional discussion. However, given the strong hold the 'empire of uniformity' had on the public imagination, conversation about a distinct political status of this type rarely took place among public officials, let alone the general public. Containment of a separate Aboriginal political identity was effectively achieved through the ultimately impotent representative bodies created for Aboriginal peoples in this period.²⁶ The dilemma of the National Aboriginal Consultative Conference (NACC), set up by the Whitlam government in 1973, was then the same as that of similar bodies before and since. The NACC, writes Rowse, 'was established by the Minister, and it drew its resources from the Treasury at the Minister's pleasure, yet it was supposed to be the national vehicle by which the Minister was made responsive, if not held accountable, to indigenous Australians'.²⁷

title holding body] – the statutory trust or agency, the consent and consultation procedures, and the legal incidents of the corporate form.' (p.125) It is, they suggest, characterised by 'complexity'. (p.125)

²⁴ Maddock, *ibid*, p.4. It was of course, a 'different kind of property'. Woodward embraced the anthropological equation that the Aboriginal relationship to land was purely spiritual, ignoring the fact that some lands were also used for camping, hunting, and (non-sacred) ceremonies. Such a 'noble (savage)' relationship could not be sullied by crass commercial considerations like selling land.

²⁵ These incorporated Aboriginal bodies emerged in the late 1960s. There are now approximately 5000 Australia wide. (Cited in Tim Rowse, *Obligated to be Difficult: Nugget Coomb's legacy in indigenous affairs*, Cambridge University Press, Cambridge, 2000, p.221.)

²⁶ Tatz describes these bodies such as the National Aboriginal Conference, and National Aboriginal Consultative Congress as 'toy telephones, instruments into which they can speak, but at the other of which there is no one to listen!' *Race Politics in Australia: Aborigines, politics and law*, University of New England Publishing Unit, Armidale, 1979, p.48.

²⁷ Rowse, *ibid*, p.114.

Comments from Minister Gordon Bryant raised doubts about the reality of the Whitlam government's policy of 'self-determination' when he berated the NACC for 'indulging in criticism and abuse which is not consistent with their status as an Aboriginal council'.²⁸ It is little wonder that despite the 'advances' of the 1970s, Aboriginal people continued to demand recognition of a distinct Aboriginal status, including voting to change the name of the NACC to the (South African style) National Aboriginal *Congress*.²⁹ The government initially rejected this move, with subsequent Minister Senator Cavanagh stating, 'whatever they call themselves they are a consultative committee. Their power is only to advise.'³⁰ Cavanagh announced in July 1974 that once a constitution acceptable to government was agreed, the Congress would be born. However, following 'the Hiatt Report' on the NACC,³¹ the government consented to the formation of a National Aboriginal *Conference* in 1977. There was still no real attempt at power sharing. Tatz said of the continued rhetoric of 'consultation', 'the whole political vocabulary portends powerlessness'.³² While Aboriginal demands continued, non-Indigenous Australians, too, argued for the recognition of status, as well as the negotiation of a treaty.

II. The Aboriginal Treaty Committee

The next treaty proposal emerged in part as a response to the 1979 decision of the High Court in dismissing claims of continuing Aboriginal sovereignty contained in *Coe v*

²⁸ Cited in *ibid*, p.121. Along the same lines, Bryant's successor Senator Jim Cavanagh suggested to the NACC 'if your proposals are wise and logical, the government would reject them at your peril.' Cited in Lorna Lippman, *Generations of Resistance: Mabo and justice*, (3rd ed.), Longman Cheshire, Melbourne, 1994, p.59.

²⁹ This connection was tentatively made by Tatz, *Race Politics*, p.42.

³⁰ Cited in *ibid*, p.43.

³¹ Parliament of the Commonwealth of Australia, *National Aboriginal Consultative Committee, Report of Inquiry*, Parliamentary Paper no. 343, 1976.

³² Tatz, *ibid*, p.48.

Commonwealth.³³ This was put forward by the government-created National Aboriginal Conference (NAC). However, with little support evident among Aboriginal peoples for the body itself, the NAC's treaty proposal ultimately foundered.³⁴

This period also saw the formation of a non-Indigenous group committed solely to this issue, the Aboriginal Treaty Committee (ATC). The group's leading figure was perhaps H.C. 'Nuggett' Coombs, and also included prominent writers and academics such as Dr Diane Barwick, Stewart Harris, Charles Rowley, W.E.H. Stanner and the poet Judith Wright. Two of the key researchers, Harris and Barwick, were non-Australians, with Barwick drawing upon her Canadian experience in arguing for treaty. The ATC launched their case for a treaty between black and white in Australia with a full page advertisement in the *National Times*, 25 August, 1979, asserting:

'We call for a treaty – within Australia, between Australians.'

This group felt the time was right to discuss the issue of a treaty, because in the words of 'Nugget' Coombs,

The present political and economic climate seems unfavourable to attempts to press for specific programmes, reforms and benefits for Aborigines. There may therefore be value in turning our own and public attention to more general issues and principles.³⁵

As we have seen, there was indeed much need to discuss the underlying principles that would govern relations between Aboriginal and non-Aboriginal peoples. In this context, Coombs was

³³ *Coe v Commonwealth* (1979) 53 ALJR 403. For discussion see footnote 57 and following text.

³⁴ Ian McIntosh, 'Australia at the Crossroads', *Cultural Survival Quarterly*, vol. 23, no. 4, 2000, p.45.

³⁵ Coombs, cited in Wright, *op cit*, p.1.

one of the earliest to link the legitimacy of the non-Aboriginal position with the question of Aboriginal consent. A treaty would not only follow on the footsteps of the Woodward Royal Commission in securing Aboriginal land, but also bestow 'legitimacy and some colour of justice to our [European] sovereignty over this continent'.³⁶ Coombs viewed a treaty as a mechanism for non-Indigenous Australians to review their position, which he regarded as 'tainted and suspect'.³⁷

We've become accustomed to think of our occupancy of the land as legal, justified and secure. I think, again, each of those assumptions can be brought into doubt. And therefore I think we have to consider that the kind of security we feel in the occupation of the land at the present time may well be called into question...if we wish to feel secure, and for our children and grandchildren to feel secure, then I think we have to establish the justification, the legitimacy of our occupation. And that means the legitimacy of our relationship with the original inhabitants, the Aborigines.³⁸

Yet the ATC would push discussion beyond broad questions of principle, with Coombs concluding a 12-page 'Draft agreement in principle between the Aboriginal people of Australia and the Commonwealth to conclude a treaty of peace and friendship'.³⁹ According to the ATC, the negotiated 'Treaty, Covenant or Convention' should include elements relating to maintaining Aboriginal languages and culture, land, and mechanisms for compensation. As with others before and after them, they, too, described a treaty as 'unfinished business'.⁴⁰ In a statement that implied some separation of Aboriginal and non-Aboriginal jurisdiction, the group described a treaty as an instrument which aimed at putting Aboriginal 'land and their rights beyond the reach of sovereign parliaments'.⁴¹

³⁶ Coombs cited in Rowse, *op cit*, p.177.

³⁷ Coombs in *ibid*.

³⁸ Coombs cited in Peter Read, *Belonging: Australians, place and Aboriginal ownership*, Cambridge University Press, Oakleigh Vic., 2000, p.13.

³⁹ Rowse, *ibid*, p.175.

⁴⁰ Stewart Harris cited in Wright, *op cit*, vii.

⁴¹ Wright, *ibid*, p.xv.

The ATC succeeded in giving the treaty issue a profile it had not previously enjoyed, and once again, it highlighted the gap between Aboriginal and state positions on the issue of status. The NAC suggested, in 1981, that the need for a treaty arose from the fact that 'Aborigines maintain that our nationhood is a matter of fact and of law'.⁴² Yet, were they one nation, or many? The final section in Coombs' original draft treaty was 'authority to negotiate for the Aboriginal people of Australia', and Rowse notes it was the issues under this heading that would preoccupy Coombs as much as all the others put together.⁴³ The treaty debate brought out competition for moral and political legitimacy amongst Aboriginal leaders and organizations.⁴⁴ This revealed the Aboriginal constituency to be far more diverse and complex than the simple dichotomies often assumed by non-Aboriginal people of traditional/urban, north/south – 'Redfern man versus Kakadu man'.⁴⁵ The reality of this diversity continues to be used as a counter to those who suggest it is possible to conclude a treaty with *the* Aboriginal people of Australia.⁴⁶

Yet the issue of Aboriginal nation status did not occupy much official energy at this time, with the state again relying on conceptions of a uniform political community to deny any need for negotiations. The Minister of Aboriginal affairs thus rejected the concept of 'a treaty which implies an internationally recognised agreement between two nations'.⁴⁷ In something of a backdown, instead of 'treaty' the NAC subsequently suggested the word 'Makarrata', which in Yolgnu means a 'coming together' after a disagreement. In doing so, Charles Rowley suggests the NAC exhibited a deal of 'confusion' in matters of policy, for

⁴² Wright, *op cit*, p.153.

⁴³ Rowse, *ibid*, p.175.

⁴⁴ *ibid*, p.184.

⁴⁵ Colin Tatz discusses this perception in 'Aboriginality as Civilisation', in Tatz, *Aborigines and Uranium and other essays*, Heinmann Educational, Richmond Vic, 1982.

⁴⁶ See chapter 7.

⁴⁷ Wright, *op cit*, p.157.

it accepted the departmental rejection of the central idea on which its case depended: that there is a colonised people, deprived of their property and other rights, which has to be seen as a full negotiating legal person *vis-à-vis* the Commonwealth of Australia.⁴⁸

In August 1981, the National Aboriginal Conference issued a draft *Makarrata* document, subsequently referred to as 'The 24 Demands'.⁴⁹ The tone of the document saw it likened to an 'invoice to the nation'⁵⁰ and framed in this way it had little chance of receiving a positive response from authorities. Langton goes as far as to suggest that Aboriginal people were 'naïve' in putting forward non-negotiable demands such as receiving a percentage of GDP as compensation, and restricting the state's air space.⁵¹ The speed with which it issued the document also raised doubts about it accurately reflecting anything approaching a majority Aboriginal position.⁵² Yet, again, raising the treaty issue succeeded in placing the question of Aboriginal status at the forefront of the national political agenda.

Largely as a response to the work of the ATC, in October 1981, a Senate Standing Committee inquiry into the issue of a treaty was instituted. This was the first time in Australia's history that the issue of a treaty between Aboriginal and non-Aboriginal peoples had been investigated at this level. When it was ultimately released in 1983, the Senate Committee Report *Two Hundred Years Later*, would reject the idea of a treaty – again due to its connotations of an agreement between sovereign states.⁵³ It did, though, foreshadow the creation of a 'compact' to be inserted eventually into the Constitution, pointing once again to the unique nature of the relationship between Aboriginal peoples and the state.

⁴⁸ C.D. Rowley, *Recovery: the politics of Aboriginal reform*, Penguin, Ringwood Vic., 1986, p.43.

⁴⁹ The draft Makarrata can be found at http://www.aiatsis.gov.au/lbry/dig_prgm/treaty/nac/m0023749_a.rtf

⁵⁰ Tatz, 'Aborigines in the Age of Atonement', *Australian Quarterly*, vol. 55, no. 3, 1983, p.299.

⁵¹ Langton, *op.cit.*

⁵² Rowse, *op cit*, p.182.

⁵³ Senate Standing Committee on Constitutional and Legal Affairs, *Two hundred years later : report by the Senate Standing Committee on Constitutional and Legal Affairs on the feasibility of a compact or 'Makarrata' between the Commonwealth and Aboriginal people*, AGPS, Canberra, 1983.

Coe v Commonwealth

The ATC's pursuit of a treaty was partly motivated by a further failure of the High Court to recognise the continued existence of a distinct Aboriginal political status. In the Coe case, Aboriginal activist Paul Coe argued that 'there is an Aboriginal nation which, before European settlement, enjoyed exclusive sovereignty over the whole of Australia, and which still has sovereignty'.⁵⁴

In what has been described as 'a naked exercise of its power',⁵⁵ the court refused to recognise Aboriginal sovereignty, but as with *Milirrpum*, the possibility of Aboriginal progress was not denied outright. Gibbs and Aicken JJ particularly attacked the statement of claim as 'confused' and 'obscure', containing allegations which were 'quite absurd' and 'clearly vexatious'.⁵⁶ But more deeply, beyond procedural difficulties, Gibbs rejected Coe's claim to represent what in his Honour's opinion was a non-existing entity.⁵⁷ Justice Jacobs resorted to the familiar position that the matter of sovereignty was not one of domestic law, but the 'law of nations', and therefore not cognisable in a domestic court.⁵⁸ A similar argument was used by Justice Mason in 1993 when the Coe family later attempted to argue for a residual sovereignty.⁵⁹ Yet in a case the following year, despite its apparent non justiciability, the High Court felt it could

⁵⁴ *Coe v Commonwealth* (1979) 53 ALJR 403 at 407.

⁵⁵ David Ritter, 'The "rejection of terra nullius" in *Mabo*: A critical analysis', *Sydney Law Review*, vol. 18, no. 5, 1996, p.19.

⁵⁶ Cited in John McCorquodale, *Aborigines and the Law: A Digest*, Aboriginal Studies Press, Canberra, 1987, p.255.

⁵⁷ *Ibid*, p.256.

⁵⁸ *Coe, ibid*, at p. 403.

⁵⁹ *Coe v Commonwealth*, 118, ALR 1993 at p.195.

in fact rule on the question, explicitly rejecting the proposition that 'sovereignty resided in the Aboriginal people'.⁶⁰ In merely asserting, rather than explaining the European acquisition of sovereignty by maintaining the myth of 'settlement', the courts did not end, but rather illustrated more strikingly 'the growing chasm between truth and power'.⁶¹

As with *Milirrpum*, Coe left the door slightly ajar for those wishing to argue for a distinct Aboriginal political status in the future. Murphy suggested the Privy Council's decision in *Cooper*⁶² – that before European occupation Australia was 'waste and unoccupied' – could now be regarded either as displaying a degree of 'ignorance', or as 'a convenient falsehood to justify the taking of Aborigines' land.' Coe had the right to argue for certain continuing 'ownership rights'.⁶³ Jacobs J alluded to the ambiguity at the centre of the question of Aboriginal status by suggesting that 'while the view has generally been taken that Australia was settled...no decision has actually been made to that effect'.⁶⁴ Thus Murphy J and Jacobs J had not explicitly denied the possibility of some form of continuing Aboriginal sovereignty. Moreover, Gibbs appeared to invite a reformulation of the questions put to the court when he said: 'If there are serious legal questions to be decided as to the existence or nature of such [Aboriginal] rights, no doubt the sooner they are decided the better, but the resolutions of such questions by the courts will not be assisted by impulsive, emotional and intemperate claims.'⁶⁵ The importance of this judgement, Strelein argues, lies in the fact that for the first time the

⁶⁰ *Walker v NSW* 126 ALR 1994 at p.321.

⁶¹ Ritter, *ibid*, p.19.

⁶² *Cooper v Stuart* (1889) 14 App Cas 286.

⁶³ Murphy cited in McRae (et al.), *op cit*, pp.89-90.

⁶⁴ Coe (1979) at p.411.

⁶⁵ Gibbs cited in Tatz, *Aborigines and Uranium*, p.87.

court is recognising a need to reexamine the very foundations of 'Australia'.⁶⁶ It also seems to be inviting a properly researched and presented case – not seen until *Mabo*.

Of major significance for this thesis is the reasoning in the prevailing opinion of Justice Gibbs. His dismissal of the claim to sovereignty had much in common with denials of Aboriginal status seen in previous centuries. He asserted:

The Aboriginal people of Australia were subject to the laws of the Commonwealth and of the States and Territories in which they respectively resided. They had no legislative, executive or judicial organs by which sovereignty may have been exercised.⁶⁷

The process by which Aboriginal people became subject to European laws is not explained, but linked to the creation of non-Aboriginal jurisdiction. The possibility of Aboriginal sovereignty is then rejected due to the absence of European style institutions, at least alluding to the reasoning of *Southern Rhodesia*,⁶⁸ and its 'stages view' of human society which positioned some Aboriginal peoples as 'so low on the scale of human civilisation' as to deny them certain rights. The logic continues the tendency of political anthropology and law to define societies and nations as either 'state-ful' or 'state-less', that is, according to whether or not they have king, prince, paramount chief, legislature, executive or judiciary.⁶⁹ The logic of Gibbs' argument (and most of his predecessors in British administration) suggests powers of self-government could only be recognised in the case of an Aboriginal nation that had institutional arrangements similar to modern European states. As in previous times, Aboriginal

⁶⁶ Lisa Strelein, 'Indigenous Self-Determination Claims and the Common Law in Australia', PhD thesis, Australian National University, April 1998, p.168.

⁶⁷ Gibbs cited in McCorquodale, *op cit*, p.256.

⁶⁸ *In Re Southern Rhodesia* [1919] AC 211 (Privy Council).

⁶⁹ Tatz, *Aborigines and Uranium*, p.87.

society was judged according to the European standards, and found wanting. Even in 1979 there remained only 'one right way'.⁷⁰

Aside from continued state intransigence, part of the difficulty in obtaining a successful outcome for the Aboriginal plaintiff lay in the way the case was framed. Coe chose both to assert Indigenous sovereignty over the entire nation, and at the same time, deny that of the Australian state. The Court's denial of Indigenous sovereignty may here have been almost as much a factor of the need to affirm non-Aboriginal sovereignty as addressing Indigenous sovereignty on its own merits. Similarities here exist both with the treaty proposal of the ATC, and paradoxically, judicial and legislative denials of both sovereignty and the need for a treaty. All parties seem to have adopted a confrontational position where the recognition of rights on one side is seen to automatically diminish the position of the other. This is perhaps unsurprising, given the tenor of indigenous-state political relations in the 1970s. Yet, there are alternatives to this zero-sum gain. The relationship between sovereignties is more complex than this simple dichotomy would suggest, and may be better expressed in terms of 'competing' and 'co-existing' sovereignties, rather than maintaining the paradigm of mutually exclusive sovereignties used by both Coe and the High Court.⁷¹ This idea of co-existing systems of laws was investigated in the 1986 Australian Law Reform Commission Report, whose recommendations on recognizing Aboriginal customary law went some way toward resolving the issue of Aboriginal status for the first time.⁷² However, as with previous and

⁷⁰ This phrase was used in the Middle Ages by Pope Innocent IV who suggested 'There is only one right way of life for mankind...'. See chapter 3, footnote 27 and surrounding text.

⁷¹ This idea will be greatly expanded in chapter 7.

⁷² Australian Law Reform Commission, *The Recognition of Customary Aboriginal Laws*, 1986. For a review of this lengthy report see Richard Chisolm, 'Aboriginal Law in Australia: The Law Reform commission's Proposals for Recognition', *University of Hawaii Law Review* vol. 10, no. 1, Summer 1998, pp.47-80.

subsequent reports, it relied on political will for its implementation, an ingredient ultimately lacking, even in the run up to Australia's bicentennial celebrations in 1988.

III. 'Back in 1988, all those talking politicians...'⁷³

The moment of national introspection offered by the 1988 Bicentennial again saw the issue of a treaty and the corresponding question of Aboriginal status at the forefront of national politics. In 1987, Prime Minister Hawke accepted 'The Barunga Statement' from Aboriginal leaders which, amongst other things, called for national land rights legislation, and a treaty which recognised prior Indigenous 'ownership, continued occupation and sovereignty' over land.⁷⁴ In the period leading up to the Bicentennial, Hawke was under pressure to make a gesture towards Aboriginal peoples. It was this pressure more than any desire to reformulate Indigenous-state relations that saw him agree 'that there shall be a treaty negotiated between the Aboriginal people and the government on behalf of the people of Australia' within the life of the current parliament.⁷⁵ Despite this commitment to a treaty, talk quickly switched to the conclusion of a 'compact' or *Makarrata*. With some truth, and apparently recognising Aboriginal 'peoplehood', Hawke suggested '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...'.⁷⁶

⁷³ The phrase is from the Yothu Yindi song 'Treaty'. See <http://www.yothuyindi.com/archive.htm>

⁷⁴ The Barunga festival is a sports and cultural festival which every year attracts around 10 000 Aboriginal people to Barunga, 70 kilometres east of Katherine in the Northern Territory. Full text of the Barunga Statement can be found at <http://www.austlii.edu.au/au/orgs/car/docrec/policy/brief/attach.htm#A>

⁷⁵ Cited in Reynolds, *Aboriginal Sovereignty*, p.153.

⁷⁶ Cited in Langton, *op cit*, Lecture 3.

Hawke had pointed to the important link between a treaty process and the attitudes of Australians. Yet, in line with a governing style which favoured 'consensus' over decisive leadership, the idea of a treaty was held prisoner to these attitudes, rather than being seen as an agent capable of transforming them, and thus the relationship between peoples. By 1990, Hawke had ceased to discuss the issue of a treaty, suggesting peoples' attitudes did not indicate a national appetite for this sense of reconciliation – a claim which came under some attack at the time.⁷⁷ Yet the issue of who the government would treat with remained unresolved. There was not yet a consensus among Aboriginal peoples as to the appropriate mechanism for negotiating a treaty, with Nettheim and Simpson correctly foreshadowing doubts amongst Indigenous Australians as to the legitimacy of the new peak body, the Aboriginal and Torres Strait Islander Commission (ATSIC), as the appropriate representative.⁷⁸

For the federal opposition, then led by John Howard, the question of a legitimate Aboriginal authority with which to negotiate simply never arose – there would be no negotiations. For the conservatives, the whole suggestion that Aboriginal peoples had a status that was in any way different from 'other Australians' was 'absurd'. Howard stated in 1988:

The liberal and National parties remain committed to achieving policies which bring Aboriginal people into the mainstream of Australian society and give them equal opportunity to share fully in a common future with other Australians. Consequently we are utterly opposed to the idea of an Aboriginal treaty...It is an absurd proposition that a nation should make a treaty with some of its own citizens. It also denies the fact that Aboriginal people have full citizenship rights now.⁷⁹

⁷⁷ Murray Goot and Tim Rowse, 'The 'backlash' hypothesis and the land rights option', *Australian Aboriginal Studies*, no. 1, 1991, pp.5-6.

⁷⁸ Cited in McRae (et al), *op cit*, p.319.

⁷⁹ Cited in Djekurra, p.12. <http://www.treatynow.org/docs/gatijl.pdf>

While Howard sought to reassert the image of a coherent, uniform Australian nation, the ubiquitous element of ambiguity remains in his description of Aboriginal status. Aboriginal people are viewed as somehow outside 'the mainstream of Australian society', yet are not distinct enough to prevent them sharing 'a common future with other Australians'. Howard's notion of citizenship is used to maintain the uniformity of the state, while also confusing the formal equality accorded Aboriginal peoples in recent times, with a substantive political status that, as the previous chapter has shown, always maintained Aboriginal peoples as a separate and distinct class of person. This anomalous political position has been maintained rather than resolved by the imposition of institutions such as ATSIC and the Council for Aboriginal Reconciliation (CAR).

ATSIC and the CAR

ATSIC was established in 1989 by an act of the Commonwealth parliament.⁸⁰ After extensive consultation, the initial proposal of 26 regional councils to represent Aboriginal Australians was expanded to 56, from which fifteen commissioners were to be elected. The commission has various functions, including the development of policy proposals (s7), taking over some responsibilities of the Department of Aboriginal affairs (s8), and making grants to Aboriginal organisations.

⁸⁰ *Aboriginal and Torres Strait Island Commission Act*, 1989 (Cth). The Act has since been extensively amended. Section 3 provides that the objects of the Act are:

To ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies which affect them;

To further the economic and cultural development of Aboriginal persons and Torres Strait Islanders;

To ensure co-ordination in the formulation and implementation affecting Aboriginal persons and Torres Strait Islanders by the Commonwealth, State and local Governments, without detracting from the responsibilities of State, Territory and Local Governments to provide services to their Aboriginal and Torres Strait Islander residents.

A preamble to the Act – which was subsequently excised – dealt with some of the broader issues relating to the relationship between Aboriginal and non-Aboriginal peoples. This included recognition of past injustices, and that it was necessary to ensure that ‘the Aboriginal and Torres Strait Islander peoples receive full recognition and status within the Australian nation to which history, their prior ownership and occupation of the land and their rich and diverse culture fully entitle them to aspire’.⁸¹

ATSIC has been bedevilled by the fact that, like Aboriginal peoples themselves, its status in relation to wider society reflects strong ambiguity. While many people abroad regard it as evidence of a process of self-government,⁸² and domestic proponents describe it as a ‘radical shift towards self-determination’,⁸³ it remains subject to the control of the federal government.⁸⁴ As such, Michael Dodson suggested the creation of ATSIC represented a ‘momentous, albeit imperfect, shift’ in Aboriginal affairs. The ‘marriage between government bureaucracy and Indigenous decision making’ has not proven easy, with Dodson suggesting the key problem lies in the fact that, increased autonomy notwithstanding, Aboriginal people are still seen as little more than another interest group to be consulted.⁸⁵ This was seen in criticism by Kevin Tory on behalf of the National Coalition of Aboriginal Organisations, the umbrella group who organised the massive rally on Australia day 1988. While he agreed that the Commission was a step forward, he regretted the terms of debate had been set before real

⁸¹ Cited in R.D. Lumb, ‘Constitutional Issues Relating to the ‘Process of Reconciliation’ with Aboriginal and Torres Strait Islanders’, *University of Queensland Law Journal*, vol. 17, no. 1, 1992, p.112.

⁸² UN assistant rapporteur, Isabelle Schulte-Tenckhoff, personal communication, May 18, 2001.

⁸³ Robert Tickner, *Taking a Stand: Land Rights to Self-Determination*, Allen and Unwin, Sydney, 2001, p.48.

⁸⁴ The ambiguity is seen in that ATSIC is essentially an arm of government, (evidenced most dramatically by cuts to its budget in 1996 of \$400million,) yet it has Non Government Organisation status at the UN.

⁸⁵ Aboriginal Social Justice Commissioner, *ibid*, pp.34-5.

consultation took place.⁸⁶ Again, Aboriginal interests were slotted into the non-Indigenous agenda, rather than setting the terms themselves. The resulting lack of 'grass roots' identification with what was basically an imposed structure was seen in the fact that only 30 per cent of eligible Indigenous people voted at the first ATSIC elections.⁸⁷

The formation of ATSIC continued the trend of an Aboriginal policy devoid of a guiding philosophy. In creating the new organization, the government and Minister Gerry Hand saw no need to set out a case for an Aboriginal citizenship which differed in any way from other Australians. Rowse suggests that the originators of ATSIC failed to provide a philosophical defence against the argument, presented with vigour since then, that indigenous Australians have *no* distinct, historically based rights to govern themselves.⁸⁸

This enabled opponents to criticise ATSIC as destabilising national unity by promoting Aboriginal separatism, even while a Senate Select Committee found in 1989 that a majority of Aboriginal people did not identify with 'the whole ATSIC concept'.⁸⁹ The organisation has continued to hover in the uncertain space between autonomy and state bureaucracy,⁹⁰ with Aboriginal office-holders within the organization experiencing conflict between the different demands of their constituents versus the government. In a conclusion supported by Aboriginal leaders⁹¹, Peter Read suggested ATSIC 'is not and cannot, be representative of Aboriginal

⁸⁶ Cited in Lippmann, *op cit*, p.83.

⁸⁷ Mudrooroo, *Us Mob: History, Culture, Struggle: An Introduction to Indigenous Australia*, HarperCollins, Sydney, 1995, p76.

⁸⁸ Rowse, *Obliged*, p.199.

⁸⁹ Cited in Max Griffiths, *Aboriginal affairs : a short history*, Kangaroo Press, Kenthurst NSW, 1995, p.223.

⁹⁰ The 'split personality' of ATSIC was seen in native title negotiations that took place at Eva Valley. There ATSIC was ostensibly a member of government task force seeking agreement with states *and* party to a statement repudiating this approach. Rowse, *ibid*, p.206.

⁹¹ Jacqui Katona suggested 'ATSIC is always going to be accountable to government; it's not accountable to the Aboriginal community, and our society requires structures that are accountable to our communities'. Katona, 'If Native Title is Us, its Inside Us': Jabiluka and the politics of Intercultural Negotiation, Jacqui Katona interviewed by Suvendrini Perera and Joseph Pugliese, *Australian Feminist Law Journal*, vol. 10, March 1998, p.7.

cultural institutions at variance with standard notions of individual/community values or top down/bottom up decision making.⁹²

Whatever its practical role in facilitating a transfer of power, the CAR did at least succeed in broadening general understanding as to continued existence of the cultural institutions Read spoke of. The CAR was instituted in 1990 by the Hawke Labor government as part of a 'fall back' after retreating from its commitment to a treaty.⁹³ The Council, whose legislated term expired on 31 December 2000, was established to, in part, determine the merits of 'a document or documents of reconciliation'. Yet, as will be seen, the Reconciliation process itself is now put forward as one of the reasons why no discussion about a treaty can be entertained. The CAR thus served to constrain treaty talk to the Council, and perhaps replace it with an ill-defined notion of 'reconciliation' which has in recent years been interpreted by the federal government to mean little more than providing improved outcomes for Aboriginal people in the areas of health, education, housing and employment.⁹⁴ While not denying the need for improvement in these socio-economic figures, many Aboriginal leaders point out this focus entirely ignores the central question of Aboriginal political status which can be addressed by treaty.⁹⁵

In one of his last interviews, Kevin Gilbert expressed the views of many Aboriginal people opposed to the latest policy idea to be imposed upon Aboriginal people. He suggested:

The reconciliation process can achieve nothing because it does not at the end of the day promise justice. It does not promise a Treaty and it does not promise reparation...

⁹² Peter Read, Review of H.C. Coombs, *Aboriginal Autonomy: Issues and Strategies*, Cambridge University Press, Melbourne, 1994, in *Sydney Law Review*, no. 3, September 1995, p.489.

⁹³ Michelle Grattan, 'Introduction', in Grattan (ed), *Reconciliation: Essays on Australian Reconciliation*, Black Inc; Melbourne. 2000. 3-9. p7. See also *Melbourne Journal of Politics: The Reconciliation Issue*, vol. 25, 1998.

⁹⁴ See discussion of Prime Minister Howard's notion of 'practical reconciliation', and criticisms of it, in chapter 6, footnote 1 and following text.

⁹⁵ For example, Michael Dodson and Larissa Behrendt, chapter 6, footnote 2 and following text.

Unless it can return to us these very vital things, unless it can return to us a political and a viable land base, what have we?⁹⁶

IV. *Mabo*

The possibility of that viable land base being returned to Aboriginal people seemed to come closer in 1992. In something of an understatement, the case note in *The Sydney Law Review* suggests that in the *Mabo* case, the High court handed down a judgement of 'wide-ranging significance'.⁹⁷ The extent of that significance continues to be felt a decade later, and the case has been the subject of numerous articles as well as entire volumes.⁹⁸ In a six to one majority, the Court held that the people of Murray Island, part of the Torres Strait Islands, retained native title to their lands. In doing so, the Court overturned the doctrine of *terra nullius* which formed the basis of previous policy and jurisprudence. Debate has subsequently raged as to

⁹⁶ Gilbert cited in Mudrooroo, *op cit*, p.228.

⁹⁷ Susan Burton Phillips, 'A Note: Eddie Mabo v the State of Queensland', *The Sydney Law Review*, vol. 15, no. 2, June 1993, pp.121-142.

⁹⁸ Volumes include, Nonie Sharp, *No Ordinary Judgment*, Aboriginal Studies Press, Canberra, 1996; M. A. Stephenson and Suri Ratnapala, (eds.), *Mabo: A Judicial Revolution*, University of Queensland Press, St Lucia, 1993; Murray Goot and Tim Rowse (eds.), *Make a Better Offer: the politics of Mabo*, Pluto Press, Sydney, 1994; *Race & Class*, vol.35, no.4, April-June 1994 (Special issue on Aboriginal Australia: Land, law and culture); Will Sanders (ed.), *Mabo and Native Title: Origins and Institutional Implications*, Centre for Aboriginal Economic Policy Research, ANU, Canberra, Research Monograph no.7, 1994; *The Australian Journal of Anthropology*, vol.6, no.1&2, 1995; Bain Attwood (ed.), *In the Age of Mabo: History, Aborigines and Australia*, Allen & Unwin, Sydney, 1996. Selected articles include, Richard Bartlett, 'Mabo: Another Triumph for the Common Law', *The Sydney Law Review*, vol.15, no.2, 1993(a), pp.178-86; Bartlett, 'The Mabo Decision - Commentary', *The Mabo Decision*, Butterworths, Sydney, 1993(b); Jeremy Beckett, 'The Murray Island Land Case', *The Australian Journal of Anthropology*, vol. 6, no. 1&2, 1995; Council for Aboriginal Reconciliation, *Making Things Right: Reconciliation After the High Court's Decision on Native Title*, A.J. Law, Commonwealth Government Printer, Canberra, 1993; S.E.K. Hulme, 'Aspects of the High Court's Handling of Mabo', *Victorian Bar News*, no. 87, Summer 1993, pp.29-64; Duncan Ivison, 'Decolonizing the Rule of Law: Mabo's Case and Postcolonial Constitutionalism', *Oxford Journal of Legal Studies*, vol. 17, no. 2, 1997, pp.253-79; Kirby, M. 1994 'In defence of Mabo', in Goot and Rowse (eds.), *Make a Better Offer*, pp.67-81; Michael Mansell, 'The Court gives an inch but takes another mile', *Aboriginal Law Bulletin*, vol. 2, no. 57, 1993, pp.4-6; Gary D. Meyers and John Mugambwa, 'The Mabo Decision: Australian Aboriginal Land Rights in Transition', *Environmental Law*, vol. 23, 1993, pp.1203-1247; Garth Nettheim, 'Judicial Revolution or Cautious Correction? Mabo v Queensland' *University of New South Wales Law Journal*, 16, 1993, pp.1-26; Paul Patton, 'Poststructuralism and the Mabo Debate: Difference, Society and Justice', in Margaret Wilson and Anna Yeatman (eds.), *Justice & Identity: Antipodean Practices*, Wellington: Bridget Williams Books/ Sydney: Allen &

whether the decision represents a 'judicial revolution', or merely a 'cautious correction'.⁹⁹ True to the tenor of Aboriginal status in Australia, this brief appraisal suggests that in its treatment of sovereignty and extinguishment, which I will focus on, the profound yet limited possibilities suggested by the decision reveal both 'cautious' and 'revolutionary' elements, thus perpetuating rather than mediating the characteristic element of ambiguity.

Sovereignty

Mabo failed to acknowledge a continuing Aboriginal sovereignty. In a well worn phrase, Brennan J suggested in the leading decision that '[a]cquisition of sovereignty by the crown is not municipally justiciable'.¹⁰⁰ Yet proponents of Aboriginal sovereignty have largely ignored this routine recourse to the act of state doctrine, and focused instead on the recognition of a continuing Aboriginal legal order contained within the judgement, and its subsequent implications for the question of sovereignty. Marcia Langton suggested the 'dilemma of *Mabo*' was how it could 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?'¹⁰¹ She answered her own question by suggesting that 'just as British sovereignty did not wipe away aboriginal

Unwin, 1995, pp.153-71; Noel Pearson, '*Mabo*: Towards respecting Equality and Difference', *Voices from the Land*, 1993 Boyer Lectures, Sydney, ABC Books, 1994, pp.89-101.

⁹⁹ Garth Nettheim's article 'Judicial Revolution or Cautious Correction?...' (*op cit*) was written as a direct challenge to Stephenson and Ratnapala's, *Mabo: A Judicial Revolution*, (*op cit*).

¹⁰⁰ *Mabo*, at p.434 per Brennan J.

¹⁰¹ Langton, *op.cit*. The difficulties of Aboriginal people gaining this recognition were seen in the High Court's recent decision in *Yorta Yorta* which upheld the trial judges decision that native title had been 'washed away by the tide of history'. See Debra Jopson, 'Yorta 'a dismal day for Aboriginal justice', *Sydney Morning Herald*, 13/12/02.

title, neither did it wipe away Aboriginal jurisdiction'.¹⁰² Similarly, Noel Pearson observed in his 1993 Evatt Foundation Lecture:

As a matter of law the decision of the High Court in *Mabo* has established 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.¹⁰³

Indeed, the Court did recognise the existence of a right to land whose source is Aboriginal society itself, rather than any external authority, such as a state or federal government.¹⁰⁴ Exhibiting a degree of caution, Strelein concluded that *Mabo* moves Australian jurisprudence toward a theory of inherent indigenous rights.¹⁰⁵ This has a number of implications. For example, the failure of non-Aboriginal authorities to recognise Aboriginal self-determination, if it is also inherent, is merely temporal, existing only in the colonial law.¹⁰⁶ Secondly, the recognition of Aboriginal society as the source of different, though equally valid rights, evokes the norm of equality of peoples.¹⁰⁷ It is suggested that post-*Mabo*, 'racial equality before the law is now part of the common law of Australia'.¹⁰⁸ Australian Aboriginal peoples could argue they were also accorded a status that was on par with other peoples around the world. Once what Jeremy Webber described as 'the claim to justified disregard' was eroded, the similarities with other international jurisdictions assumed more prominence than the differences.¹⁰⁹

¹⁰² Langton, *op cit.*

¹⁰³ Cited in *ibid.*

¹⁰⁴ 'Native title has its origin in and is given its content by the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.' *Mabo v Queensland No 2* (1992) 175 CLR 1 at 58-9 per Brennan J.

¹⁰⁵ Strelein, *Indigenous Self-Determination*..., p.172. [emphasis added].

¹⁰⁶ *ibid.*, p.173.

¹⁰⁷ Strelein (*ibid.*, p.175) suggests *Mabo* represents recognition of 'the equality of Indigenous peoples as a basis for assessing the legal consequences of the acts of the colonial state.'

¹⁰⁸ Barbara Hocking, 'Aboriginal law does now run in Australia: reflections on the *Mabo* case: from *Cooper v Stuart* through *Milirrpum* to *Mabo*', *Sydney Law Review*, vol. 15, no. 2, June 1993, p.187.

¹⁰⁹ Jeremy Webber, 'The Jurisprudence of Regret: The Search for Standard of Justice in *Mabo*', *The Sydney Law Review*, vol. 17, 1995, p22.

The significance of this norm of equality has been recognised for its possible implications in other areas, such as self-government. Strelein identified the *Mabo* decision as recognising a form of title that is not merely individual, but communal – a title which carried with it the power to determine the law and custom applicable to land. It is arguable, she concludes, that native title is a collective right which carries with it the power to make laws.¹¹⁰ Nettheim suggests that the approach in *Mabo* ‘is at least capable of being applied to acknowledge some forms of sovereignty or inherent powers of self-government in Aboriginal or Torres Strait Islander peoples that retain a sufficient degree of social cohesion’.¹¹¹

The sting may be in the tail. For, as Nettheim suggests, the decision also carries within it a number of limitations which restrict its general application for Aboriginal people, most of whom have not retained links with traditional lands, at least in terms of continued occupation. Michael Dodson identified the bittersweet nature of the decision: ‘While the decision on *Mabo* (No 2), by recognising the existence of indigenous peoples’ property rights, was a gigantic step forward for indigenous people, the conceptualisation of those rights and the limitations placed upon them potentially undermine the ability of the decision to deliver indigenous people more than token recognition.’¹¹²

Despite the apparent commitment to an inherent rights approach to self-determination claims in *Mabo*, ‘the test for determining whether a society was sufficiently civilised to have its legal systems respected remains the foundation of the Australian state’.¹¹³ There were a number of

¹¹⁰ Strelein, *Indigenous Self-Determination...*, p.172.

¹¹¹ Garth Nettheim, ‘The Consent of the Natives’: *Mabo* and Indigenous Political Rights’, *Sydney Law Review*, vol. 15, no. 2, June 1993, p.231

¹¹² Michael Dodson, ‘Human Rights and the extinguishment of native title’, in Eliot Johnson, Martin Hinton and Daryle Higney (eds.), *Indigenous Australians and the law*, Cavendish Publishing, Sydney, 1997, p.163.

¹¹³ Strelein *op cit*, p.171. This harks back to the English *Southern Rhodesia* case of 1919, which suggested ‘some tribes are so low on the scale of human evolution’ as to forego current rights. See chapter 4 footnote 56.

gains in *Mabo*, but Ritter suggests that these ‘legal gains’ are achieved within, and acknowledge the supremacy of, the liberal, Anglo-Australian rule of law framework.¹¹⁴ Along with the continued failure to explain the acquisition of non-Aboriginal sovereignty (which is simply assumed to have taken place), this is most evident in the question of extinguishment.

Extinguishment

Brennan J found that while native title was ‘unaffected’ by the Crown’s acquisition of sovereignty, it is ‘exposed to the risk of extinguishment by a valid exercise of sovereign power intended to extinguish the title’.¹¹⁵ There are two bases to extinguishment, either by inconsistent Crown grant, or by loss of connection with the land, whether it is physical, or through abandonment of traditional laws and customs.¹¹⁶ In December 2002, this was seen in the *Yorta Yorta* case, where this people were found to have had their native title ‘washed away by the tide of history’.¹¹⁷

Aboriginal and other critics of *Mabo* have two major difficulties with the concept of extinguishment. These refer both to the philosophy behind it, and its practical consequences. Firstly, as Dodson point out, while all Justices agreed on the right to extinguish title, the precise source of this right remains unclear.¹¹⁸ It is not explained, but, like the acquisition of Crown sovereignty, is simply assumed. It appears to be part of Australian law’s ‘skeleton of principle’ that Brennan found could not be fractured – a basic ‘given’ of contemporary society

¹¹⁴ Ritter, *op cit*, p.32.

¹¹⁵ *Mabo*, *ibid*, at p.434 per Brennan.

¹¹⁶ Philips, *ibid*, 128.

¹¹⁷ *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002).

¹¹⁸ Dodson, ‘Human Rights...’, p.150.

that rests on the assumed priority of current non-Aboriginal interests in land over prior Aboriginal interests, no matter how such interests were obtained. Thus imagined, the concept of extinguishment raises grave doubts as to the substantive nature of equality in *Mabo*. In this sense, the 'hierarchy of cultures' established at colonisation remains.¹¹⁹ In a return of the two step 'inclusion-exclusion dynamic' explored in the previous chapter, Detmold suggests that while the court initially recognised 'aboriginal difference' in the matter of a different conception of title, secondly, they secondly imposed a European valuation of it in the matter of extinguishment.¹²⁰ It is for this reason that Dodson could categorise extinguishment as 'an act of colonialism'. For him, while *Mabo* tells a different story, Aboriginal peoples are ultimately left with the same ending.¹²¹

The second difficulty is the practical effect of perpetuating the gulf between law and the lived experience of people in Australia. Dodson has identified a 'deep disjuncture between the realities of indigenous people and the Australian legal system' that requires reconciliation.¹²² It was this gap that necessitated the overturning of previous cases explicitly undertaken in *Mabo*. Yet the High Court has not alleviated this disjuncture by maintaining what is often little more than the legal fiction of extinguishment. When held up to the reality of Aboriginal life, or in a wider sense, Australian society,

the word 'extinguishment' is a misnomer. The Common Law may not recognise those rights, but government and lawyers should not fool themselves that a declaration of extinguishment will make the laws and customs of indigenous people disappear...Our laws and customs are real. They are tenacious. They do not disappear at the whim of

¹¹⁹ Paul Patton, 'Mabo and Australian Society: Towards a Postmodern Republic', *The Australian Journal of Anthropology*, vol. 6, no. 1 & 2, 1996, p.86.

¹²⁰ M.J Detmold, 'Law and Difference: Reflections on *Mabo*'s Case', *Sydney Law Review*, vol. 15, no. 2, June 1993, p.166.

¹²¹ Dodson, 'Human Rights...', p.165.

¹²² *ibid*, p.162.

western jurisprudence and will continue to be observed regardless of what the common law says.¹²³

Ritter suggests maintaining this gap between law and reality may be ‘the price that was paid in order to re-legitimate the existing social hierarchy’.¹²⁴ In doing so, the Court also helps to re-legitimate an Aboriginal status that fails to address any independent political base.

In recognising an inherent right to land, *Mabo* undoubtedly strengthens the position of Indigenous peoples in political negotiations, and was at the time at least, regarded even by government as ‘a substantial boost for the proposals for a document, agreement, treaty or compact’. Even the state saw that the recognition afforded Aboriginal people means they ‘are now able to address Australia on the basis of legal right rather than one of moral claim’.¹²⁵ This offered the potential to further shift the relationship between peoples toward the preferred Aboriginal discourse of inherent rights, and away from a discourse only of welfare. No longer would it be tenable to argue, as Interior Minister Peter Nixon had in the late 1960s, for the ‘normalisation’ of Aboriginal land tenure under same title system, ‘to avoid measures which set Aboriginal citizens permanently apart from other Australians’.¹²⁶ Unarguably, *Mabo* had this effect in law, although it remained to be seen whether the decision was indicative of what Hocking described as a ‘sea change’ at the political level.¹²⁷ Garth Nettheim, perhaps more cautiously, viewed the timing of the decision as opportune, and noted the potential for it to be

¹²³ *ibid*, pp.161-2. Along these lines, human rights lawyer John Treacy suggested many Indigenous people where he works (Central Australia) refer to European or Australian law as ‘table cloth law’. It must be acknowledged at certain times, but the law that informs their reality to a much greater extent is Aboriginal customary law – evident as the table itself, still existent as it always has been, once the flimsy table cloth of whitefella law has been removed. (Treacy, personal communication, Brisbane, September 27, 2001)

¹²⁴ Ritter, *op cit*, p. 32.

¹²⁵ United Nations, Working Group on Indigenous Populations, Tenth session, 20 - 31 July 1992, Statement by Mr Robert Tickner, MP, Minister for Aboriginal and Torres Strait Islander Affairs, Geneva, 28 July, 1992.

¹²⁶ Cited in Rowse, *Obliged*, p.39.

¹²⁷ Hocking, *op cit*, p.198.

a key element 'in a much broader and decisive review of the political relationship between Australia and its Aboriginal peoples'.¹²⁸

That it created a space for this broader review is perhaps the most important legacy of the *Mabo* decision. There is evidence to suggest such a review was at least begun in the period following 1992. The Keating government was 'reasonably supportive' of Aboriginal and Torres Strait Islander claims to self-determination, and was becoming 'less hesitant' in using such language.¹²⁹ The government's apparent willingness to reassess the question of Aboriginal status was seen in a speech given by Aboriginal affairs minister Robert Tickner to the UN in 1992. He saw the opportunity for 'substantial evolution in indigenous and non-indigenous relations'.¹³⁰ In acknowledging the continued legacy of colonialism in his landmark Redfern Park speech, Keating raised Indigenous hopes that true change was indeed on the horizon.¹³¹

Perhaps predictably – given the course of Aboriginal affairs to this point – the legislative response to *Mabo*, the *Native Title Act 1993* (Cth) did not definitively address the question of Aboriginal status. A number of Aboriginal leaders were included in the negotiations leading up to the passing of legislation, to the extent that it was felt to herald an unprecedented 'entry

¹²⁸ Nettheim, *op cit*, p.223-4.

¹²⁹ *ibid*, p.234.

¹³⁰ Statement by the Hon Robert Tickner MP Federal Minister for Aboriginal and Torres Strait Islander Affairs to the tenth session of the United Nations Working Group on Indigenous Populations, Geneva, 20-31 July, 1992.

¹³¹ In a speech to mark the Australian launch of the International Year of the world's Indigenous People on 10 December 1992, Keating suggested finding 'just solutions to the problems which beset the first

Australians' required an 'act of recognition. Recognition that it was we who did the dispossession. We took the traditional lands and smashed the traditional way of life. We brought the disasters. The alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion. It was our ignorance and our prejudice. And our failure to imagine these things being done to us. With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We failed to ask - how would I feel if this were done to me?' Text of the speech can be found at

http://www.antar.org.au/keating_redfern.html

into the main game of politics'.¹³² Yet the legislation failed to grant Aboriginal rights the protection many Aboriginal leaders demanded, leaving them vulnerable, once again, to arbitrary interference at the hands of those, often within Parliament, whose unreconstructed attitudes were plain to see, despite (or because of) the High Court's arguments in *Mabo*.¹³³

The Native Title Act

Foreshadowing a legislative response to *Mabo*, in April 1993, representatives of Aboriginal land councils and legal services presented the Prime Minister with an 'Aboriginal peace plan'. It sought to establish a process of genuine political participation by Aboriginal people.¹³⁴ Discussions between Aboriginal leaders and organizations resulted in the 'Eva Valley Statement', which outlined the principles Aboriginal representatives felt should underlie native title legislation.¹³⁵ The resulting legislation compromised these principles, leaving some Aboriginal leaders dissatisfied. This may be a reflection of the fact that Keating saw the issue not primarily in terms of the rights of Aboriginal peoples, but as a question of 'co-operative federalism'.¹³⁶ Thus, final discussion took place between the Commonwealth and states, with Aboriginal people not conceived as a distinct and legitimate party to federal negotiations. Despite this fact, Michael Dodson views the process by which the outcome was reached as 'a

¹³² See Christine Jennett, 'Indigenous Peoples in Australia: The Keating Record', in Michael Hogan and Kathy Dempsey (eds.), *Equity and Citizenship Under Keating*, Public Affairs Research Centre, 1995, p.81.

¹³³ See Gary D. Meyers and Simone C. Muller, *Through the eyes of the media (Part I): a brief history of the political and social responses to Mabo*, Murdoch University Environmental Law & Policy Centre, Murdoch, W.A., 1995.

¹³⁴ Michael Dodson, 'Towards the exercise of Indigenous rights: policy, power and self-determination', in *Race and Class*, vol. 35, no. 4, 1994, p.71.

¹³⁵ An historic meeting of about 500 Aboriginal organisations and communities from around Australia met in Eva Valley in the Northern Territory between August 3-5 to work out a united response to the *Mabo* case. It subsequently issued the Eva Valley statement to Prime Minister Paul Keating. *ibid*, p.72.

¹³⁶ Rowse, *Obliged...*, p.205.

crucial shift in terms of power', where 'for the first time...indigenous people played an active role in negotiating an outcome'.¹³⁷

That outcome, the Native Title legislation, would have mixed results for Aboriginal peoples. The main aims of the legislation were to protect native title, and to facilitate transactions relating to the title.¹³⁸ This was done by a process that relied heavily on the 'juridification' of native title rights.¹³⁹ It is possible to observe a number of difficulties that emerge from this 'legislative intervention into social relations',¹⁴⁰ particularly when these intercultural relations are to be 'translated', then permitted only limited entry into what is largely a monocultural legislative response.

Native title is to be managed via the creation of specific native title corporations.¹⁴¹ There exist real questions as to whether such a process negates the possibilities of real intercultural negotiation and management. For as Mantziaris and Martin suggest, 'the corporate law relationship between group members and the corporation has come to be expressed through a *particular type* of governance model based on values and practices which are mostly foreign to the cultural experience of many indigenous people'.¹⁴²

¹³⁷ Rowse, *Obliged...*, p.205.

¹³⁸ s3 of the NTA states: 'The main objects of this Act are: (a) to provide for the recognition and protection of the title; and (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings. Cited in Christos Mantziaris and David Martin, *Native Title Corporations: A legal and anthropological analysis*, Federation Press, Sydney, 2000, p110.

¹³⁹ *ibid.* Mantziaris and Martin define juridification as 'the tendency within modern legal systems, towards the increased use of positive law to identify and enforce obligations arising from social relations hitherto regarded as non-legal.' (p.107.)

¹⁴⁰ *ibid.*, p.128.

¹⁴¹ See *ibid.*, *passim*.

¹⁴² *ibid.*, p.117. Emphasis in original.

The Native Title Act made no provision for overriding standard principles of corporate governance which may not be appropriate to Indigenous native title holders.¹⁴³ Furthermore, the legal complexities created between the native title holding group and the title holding body have meant that Aboriginal individuals have been ill equipped to make informed decisions as to the institutional design of their representative body.¹⁴⁴ The results have been that it is not the traditional practices of Indigenous peoples that are determining the shape of native title, rather, the legal relations generated by the corporate form are being assimilated into, and may eventually structure, the Indigenous domain.¹⁴⁵ This is even more alarming when it is noted that the nature of this non-Aboriginal response appears to have been developed at least partly 'on the run'. It is a system that is 'emerging haphazardly',¹⁴⁶ with the legislative process showing little evidence of a 'guiding set of principles for native title management'.¹⁴⁷

As seen by the development of native title management bodies, while Aboriginal rights to land have been recognised, the management of these rights continue to be through non-Aboriginal mechanisms. As Justice French suggested:

The process must seem perverse to those who maintain their association with their country and upon whom indigenous tradition confers responsibility for that country. The operation of past grants of interest to irrevocably extinguish native title, regardless of the current use of the land, reflects a significant moral shortcoming in the principles by which native title is recognised.¹⁴⁸

Mantziaris and Martin suggested some legal complexity and governance problems could have been avoided 'if the design of management structures had been more sensitive to some of the

¹⁴³ Mantziaris and Martin, *op cit*, p.118.

¹⁴⁴ *ibid*, p.121.

¹⁴⁵ *ibid*, p.127. See also Patrick Sullivan, 'A Sacred Land, A Sovereign People, an Aboriginal Corporation: Prescribed bodies and the Native Title Act', *North Australia Research Unit Report Series*, Report No. 3, NARU, ANU, Casurina, 1997.

¹⁴⁶ Mantziaris and Martin, *ibid*, p.107.

¹⁴⁷ *ibid*, p.109.

¹⁴⁸ *Waanyi* (1995) 129 ALR 118

standard features of indigenous organisational structure'. Yet the key problem may be that 'at a deeper level, the legislation has made no attempt to reconcile legal forms with indigenous values and practices'.¹⁴⁹ Andrew Lokan points out that post-*Mabo*, Aboriginal rights from first possession are now recognised in common law, and rights to equality are recognised in the *Racial Discrimination Act 1975* (Cth). However, he suggests that without a strong independent basis for recognising and protecting Aboriginal cultural identity in its own right, Australian law in this area remains something of a 'two-legged stool'.¹⁵⁰ This type of conclusion has meant that the normative tradition of legal reasoning in the common law has probably done what it can for native title. This argument suggests for the future protection of native title we must look to the political process.¹⁵¹

While native title is largely controlled by and for non-Aboriginal interests, little scope currently exists for the recognition of broader rights *on* land (such as that of self-government), as well as *to* land. Thus, Indigenous activist Jaqui Katona characterises the current native title debate as 'very very narrow', not yet encompassing the 'rules about how you negotiate and trade and how you relate to different groups...Aboriginal people aren't being given an opportunity to use those rules.'¹⁵² Again, it is possible to see the maintenance of a gap between 'law' and 'reality' as they are experienced by Aboriginal peoples. This has led some Indigenous people to make a distinction between their Aboriginal title – 'that which is in us'¹⁵³ – and the NTA. In relying on traditional Aboriginal practices, Katona asserts the approach is not about any 'return to the stone age'. Rather,

¹⁴⁹ Mantziaris and Martin, *op cit*, xvii.

¹⁵⁰ Andrew Lokan, 'From Recognition to Reconciliation: The Functions of Aboriginal Rights Law', *Melbourne University Law Review*, vol. 23, 1999, p112.

¹⁵¹ Pat Kavanaugh, 'Native Title as an issue in moral philosophy', *Australian Journal of Law and Society*, vol. 14, 1998-99, p.100.

¹⁵² Katona interview, *op cit*, p.30.

¹⁵³ *ibid*.

it's about working through processes that are grounded in an Aboriginal world view, which are grounded in an indigenous paradigm...it has to be adapted to deal with the dominant paradigm, but it's still grounded in our values and beliefs. And that's not impossible. It shouldn't be impossible. It should be something which is supported, developed and resourced.¹⁵⁴

That support has been largely lacking from non-Indigenous authorities. The ultimate explanation for this reluctance appears to lie in the desire for governments to maintain, rather than challenge, what Katona describes as the 'nexus of control' they have historically enjoyed in relations with Aboriginal peoples in Australia.¹⁵⁵ This preference for maintaining control at the expense of recognising inherent Aboriginal rights has been evident in the philosophy and practice of the Howard liberal government which came to office in 1996, a year when another judicial decision on native title further opened the door to a decolonised future.

Wik

In the *Wik* decision,¹⁵⁶ the High Court determined by a 4 to 3 majority that the grant of a pastoral lease did not confer exclusive possession on the grantee. The rights of the grantee and those of the native title holder were said to co-exist, with native title rights yielding to the extent of any inconsistency.¹⁵⁷ In a sense then, *Wik*, as *Mabo* before it, maintained the

¹⁵⁴ Katona interview, *op cit*.

¹⁵⁵ *ibid*.

¹⁵⁶ *The Wik peoples v The State of Queensland and Ors; The Thayorre People v The State of Queensland and Ors* (1996) 187 CLR 1.

¹⁵⁷ For discussion of *Wik* see Richard Bartlett, 'Wik: equality and the fallacy of 'extinguishment'', *Indigenous Law Bulletin*, vol. 4, no.1, April 1997, pp.11-13; Gordon Brysland, 'Legal fundamentalism and *Mabo*', Based on paper presented to Western Australian Council of Social Service Annual General Meeting, *Alternative Law Journal*, vol.18, no.5, October 1993, pp.212-215; Peter Butt, 'Native title takes off', *Australian Law Journal*, vol. 69, no.1, January 1995, pp.8-12; Neva Collings, 'The *Wik*: a history of their 400 year struggle', *Indigenous Law Bulletin*, vol. 4, no.1, April 1997, pp.4-7; Rick Farley, 'Wik - the way forward', *Land, Rights, laws: issues of native title*, Issues paper no. 13, Native Title Research Unit, AIATSIS, February 1997, pp.1-8; Phillip Hunter, 'Judicial activism? The High Court and the *Wik* decision', *Indigenous Law Bulletin*, vol. 4, no. 2, May 1997, pp. 6-8; Kent McNeil, 'Co-existence of Indigenous and non-Indigenous land rights: Australia and Canada compared

hierarchy of cultures established at colonisation. Yet it can also be viewed as a further step down the road to a decolonised future, in that it pointed to the possibility of some form of co-existence within a form of tenure that existed on 42 per cent of the continent.¹⁵⁸

Writing in the wake of *Wik*, Justice Robert French, the President of the National Native Title Tribunal, pointed out 'there has been no systematic, orderly and committed approach by governments and industry anywhere in Australia to seek with indigenous people practical models for the working of the relationship between native title and pastoral rights and interests.'¹⁵⁹

The *Wik* decision certainly provided such an opportunity. Undoubtedly, it had created a new level of uncertainty for leaseholders, but it fundamentally reaffirmed the legitimacy of their tenure. Again, as with *Mabo*, it also opened up the possibility for a new process of negotiations to address this uncertainty. The peak Indigenous body, the National Indigenous Working Group on native title, took a reasonably moderate position, stressing the need for co-existence rather than lamenting the continued relegation of native title to a lesser interest.¹⁶⁰ Canadian expert Kent McNeil described the decision as 'a cautious step towards reconciling the pre-existing land rights of the indigenous peoples with the interests of non-indigenous Australians'. He pointed out that Canadian decisions 'have gone much further'.¹⁶¹ Nettheim suggested that what was required in the wake of *Wik* was something

in light of the *Wik* decision', *Indigenous Law Bulletin*, vol. 4, no. 5, August-September 1997, pp.4-9; Henry Reynolds, 'Pastoral leases in their historical context', *Aboriginal Law Bulletin*, vol. 3, no.81, June 1996, pp. 9-11; Maureen Tehan, 'Co-existence of interests in land: a dominant feature of the common law', *Land, Rights, Laws: issues of native title*, Issues paper no. 12., Native Title Research Unit, AIATSIS, January 1997, pp.1-8.

¹⁵⁸ Garth Nettheim, 'Responding to *Wik*: First, define the problem', *Indigenous Law Bulletin*, 1997.

¹⁵⁹ Justice R.S. French, '*Wik* - What do we do know?', speech, 22 January, 1997.

¹⁶⁰ NIWG, *Coexistence - negotiation and certainty: Indigenous position in response to the Wik decision and the government's proposed amendments to the Native Title Act, 1993*, NIWG, 1997.

¹⁶¹ Kent McNeill, *op cit*, p.4.

other than the usual Australian resort to lateral legislated solutions. There needs to be negotiation at the national level to devise an overall strategy which might be supplemented by agreements at a regional level.¹⁶²

It may be speculated that given its comprehensive – if flawed – response to *Mabo*, the Keating government would have continued in a similar vein with respect to *Wik*. As at all other times, however, Aboriginal rights remained something of a prisoner to the broader political process. This meant it would not be the Keating Labor government, but the recently elected Howard coalition that would formulate the national response to *Wik*. While this response did look to facilitate the negotiated agreements Nettheim saw as necessary, it did so within an approach that looked to wind back, rather than recognise and protect, title rights. The pendulum had swung too far in favour of Aboriginal people, Howard decreed, and it was time to reset the ‘balance’.¹⁶³

The Native Title Amendment Act

The position taken by the Howard government which has set the course for Aboriginal affairs at the beginning of the new century can be regarded in some senses as akin to the classic liberal individualist approach. As such, the Howard era represents, for the first time since the official abandonment of assimilation, something of a return to a philosophical approach to Indigenous affairs. Perhaps ironically, this ‘new’ approach shares much in common with previous eras, leaving little room for the conception of a distinct Aboriginal status.

¹⁶² Garth Nettheim, ‘*Wik*: On Invasions, Legal Fictions, Myths and Rational Responses’, *University of NSW Law Journal*, vol. 3, no. 2, 1997. Cited from <http://www.austlii.edu.au/au/journals/UNSWLJ/1997/9.html>

¹⁶³ Howard stated: ‘Getting *Wik* right, getting native title right is very important to the long term economic future of Australia, but it’s also important for the social cohesion of the nation. We have to get the balance right. The pendulum has swung too far in the direction of Aborigines in the argument. What I’m trying to do is bring it back

While the limitations of the Northern Territory Land Rights Act, the recognition contained in *Mabo* and *Wik*, and legislative responses to them were pointed out above, the trajectory of such events was certainly towards increased recognition (and management) of rights based in the Aboriginal collective. At least in as far as they are consistent with Aboriginal demands for recognition of their inherent rights, they may be viewed positively. Yet under the Howard regime, efforts have been made to roll back these gains. Under the Howard rhetoric at least, recognition of difference is minimal, while maintenance of the assumed unity (seen as uniformity) of the Australian polity is seen as a priority. Previous efforts to accommodate and manage 'Aboriginal difference' have largely been replaced with the conception of Aboriginal peoples as one interest group whose wishes must be weighed 'equally' against those of other groups such as pastoralists, and farmers.¹⁶⁴ It is this latter constituency that Howard most identifies with, describing them, rather than Aboriginal peoples, as the group most deserving of 'our sympathy'.¹⁶⁵ The stress put upon individual and economic rights rather than communal or political rights was seen in a headland speech titled 'Indigenous Affairs in the New Millennium', given by Howard's long time Minister for Aboriginal Affairs, Senator John Herron. The speech concluded by suggesting

At the end of the day, the nation as a whole will benefit when indigenous people participate equally in the economy of the country. That day will come when welfare recipients become taxpayers. We can't change the past but we can shape the future.¹⁶⁶

in the middle...'. Transcript of the Prime Minister, 'Face to Face', Network Seven, 18 May, 1997.

<http://www.pm.gov.au/news/interviews/1997/faceface.html>

¹⁶⁴ See the full text of Howard's native title defence in *The Australian*, 1 December, 1997.

¹⁶⁵ Howard stated: 'Of all the groups in the Australian community, there is none more deserving of our sympathy than the farmers.' 'The World Today', ABC Radio, 21/4/98.

¹⁶⁶ 'Indigenous Affairs in the new Millenium', Keynote Address by Senator The Hon. Dr John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, presented to the 70th Annual Conference of the Pastoralists and Graziers Association of Western Australia. Perth, 25 February, 2000.

Any conception of a distinct Aboriginal status or political realm is absent, with Aboriginal identity conceived only in terms of being either 'welfare recipients', or the preferred 'tax payers'. This philosophy was put into action immediately the Howard government gained office, when it cut ATSIC's budget by \$400 million, and directing where the cuts be made.¹⁶⁷ Yet this 'blind liberalism' was most evident in its response to *Wik*. For Dodson, the 'hysterical' arguments post-*Wik* were 'all too familiar'. He noted the 'ambit claims and scare tactics', particularly of the Queensland government, were taken up by Howard to shift debate and redefine any position short of blanket extinguishment as moderate.¹⁶⁸

In what Dodson described as 'a plain mockery of justice',¹⁶⁹ the limited gains Aboriginal peoples made under the NTA were wound back through the eventual passage of the Native Title Amendment Act. The main thrust of the legislation was to further constrain the limited Aboriginal right to negotiate contained in Keating's original legislation. The UN Committee for the Elimination of Racial Discrimination commented on the exclusion of Aboriginal peoples in the drafting process, noting the contrast with the original NTA.¹⁷⁰ As such, the conception of native title failed to reflect Indigenous views, and was further distanced from having equal status to non-Aboriginal property. Native title was conceived, rather, as 'a divergent and disruptive interest in land' which had to be accommodated, but in a manner for

¹⁶⁷ See Michael Dodson, 'Coalition's policy a betrayal of Aborigines', *Sydney Morning Herald*, 16/8/96; Mike Secombe, 'Forget cost-cutting, this is paternalism', *SMH*, 14/8/96. For an article which illustrates the similarities in tactics and philosophy between the Howard government and the previous Fraser government see Alan Ramsey, 'At budget time some things never change', *SMH*, 17/8/96.

¹⁶⁸ Dodson. *Fifth Report*, pp.23-4.

¹⁶⁹ *ibid*, p.11.

¹⁷⁰ Committee Rapporteur Gay McDougall regarded consent of Aboriginal people as critical to the legitimacy of the 1993 NTA. By contrast there was a noted 'lack of effective participation by Indigenous communities in the formulation of the amendments'. CERD concluded '...while the original 1993 Native title Act was delicately balanced between the rights of Indigenous and non-Indigenous title holders, the amended act appears to create legal certainty for governments and third parties at the expense of Indigenous title...' Cited in Gatjil Djekurra, Gatjil, 'Indigenous peoples, Constitutions and treaties', a paper for presentation at A Dialogue on Indigenous Rights in the Commonwealth Institute of Commonwealth Studies, London, 23 July 1999, p.19.

the government to determine 'at will, unconstrained' by the RDA.¹⁷¹ Langton suggested 'these amendments substantially stripped Aboriginal people of their customary property rights' and constituted 'the deterioration of Aboriginal rights' in Australia.¹⁷² Dodson pointed to the similarity with (recent) historical policy in that Howard's amendments offered Aboriginal people 'the illusion of formal equality while in substance they relentlessly, parcel by parcel, continue the historical dispossession of Indigenous Australians.'¹⁷³

Michael Dodson further alluded to both the philosophical underpinnings, as well as the practical effects of Howard's native title policy when he suggested it was 'not purely, or even primarily, a question of land'.¹⁷⁴ The vehemence of Howard's response suggested there were deeper issues at play than just property rights. These are investigated in the following chapter.

V. Conclusion

Conventional wisdom suggests that the period beginning with the early 1970s can be characterised by progress in the area of Aboriginal rights in Australia. This has been identified in the move away from an official policy of assimilation towards the recognition of distinct Aboriginal rights to land contained in the Northern Territory LRA, and more profoundly, recognition of inherent rights to land in *Mabo*. Yet, framing the period by reference to the issue of Aboriginal status throws the substance of this popular assumption into some doubt.

¹⁷¹ Dodson, *Fifth Report*, p.11.

¹⁷² Langton, *op cit*.

¹⁷³ Dodson, *ibid*, p.12.

¹⁷⁴ *ibid*.

Although the mechanisms by which it was achieved may have become more sophisticated, at the beginning of the twenty-first century, denial of Aboriginal status continues. Consistent to all non-Indigenous initiatives in the last three decades, whether judicial, legislative, or administrative, has been a logic of 'domestication'.¹⁷⁵ Even as a distinct Aboriginality is recognised, that recognition only takes place to the extent that the State can maintain, and extend, its control over Indigenous political expression.

The logic of this denial owes much to the discourses of domination whose origins, as we have seen, extend back beyond the Middle Ages. The official state position, as exemplified by Prime Minister Howard, reflects what Tully referred to as 'the empire of uniformity', whereby an Indigenous identity that retains any inherent autonomy is, by definition, deemed incompatible with the modern Australian state. The next chapter investigates the philosophical basis of this dominant position, before detailing an alternative to this dichotomous view put forward by Patrick Dodson, who sees no conflict between a distinctly political Aboriginality and Australian citizenship. As such, the chapter may be seen as something of a link. It acts to summarise my historical investigation of Aboriginal status in Australia, as well as looking forward to an alternative treatment of the question provided by the mechanism of treaty.

¹⁷⁵ Isabelle Schulte-Tenckhoff, 'Reassessing the Paradigm of Domestication: The Problematic of Indigenous Treaties', *Review of Constitutional Studies*, no. 4, 1998.

Chapter 6

Back to the Future, or Towards Treaty?

- I. Howard's way: citizenship *not* Aboriginality
- II. Dodson's vision: Aboriginality *and* citizenship
- III. Introducing sovereignty
- IV. Conclusion

As relations between Indigenous and non-Indigenous peoples in Australia enter a fourth century, two starkly opposed positions are apparent. The dominant view, epitomised by Prime Minister John Howard, seeks to integrate Aboriginal people into the state in the same way as other citizens: the articulation of a distinct Aboriginal identity is acceptable only to the extent that it does not undermine the notion of 'one Australia'. The tendency here is to reinforce rather than ameliorate the state's historic non-recognition of Aboriginal status – a status viewed only in terms of its ability to upset the unity of the state. The suggestion of a treaty relationship does not arise, therefore, because Howard's position is implacably opposed to any need for a treaty relationship; it is also deemed to be conceptually incoherent to 'treat with oneself'.

An alternative view has been presented by Patrick Dodson. In his 'Wentworth Lecture' of 2000,¹ he argued the need to depart from European 'traditions of superiority' (what I have called 'discourses of domination'), and enter a new phase of dialogue. Contrary to Howard, Dodson argues the twin Aboriginal aspirations of exercising a distinct identity *and* retaining the protection of Australian citizenship can be realised in such a way that strengthens rather than undermines the unity of the state. This, he believes, can take place through a formal process which sets out the proper protocols for a just relationship between peoples.

I analyse these two competing views. The chapter can be read as a summary of the thesis to this point, while foreshadowing what is to come when I examine, in detail, the nature of the treaty relationship. Howard's position is felt to share much with previous discourses which have denied Aboriginal status – despite continued demands for recognition. The consistency of Aboriginal demands suggests a position which seeks merely to maintain the status-quo will be untenable in the long term. In this light, Dodson's cogent argument for a treaty relationship can be read as suggesting a politics of transition capable of moving relations beyond the current impasse, particularly when a notion of shared sovereignty is introduced.

I. Howard's way: citizenship *not* Aboriginality

In line with a liberal individualistic ethos, the Howard government has eschewed the rights agenda in favour of a policy of 'practical reconciliation', one which focuses instead on alleviating socio-economic disadvantage. The Prime Minister stated:

¹ Patrick Dodson, *The Wentworth Lecture 2000. Beyond the Mourning Gate – Dealing with Unfinished Business*, AIATSIS, Canberra, 2000. The speech can also be found at

We are determined to design policy and structure administrative arrangements to address these very real issues and ensure standards in education and employment, health and housing improve to a significant degree...That is why we place a great deal of emphasis on practical reconciliation.²

Dodson and Strelein suggested that, 'at best', practical reconciliation seeks to address Australia's failure to guarantee the rights of Indigenous peoples to equal enjoyment of the privileges of citizenship. This means taking action to address issues such as health, housing, education and employment as isolated examples of disadvantage suffered by Indigenous individuals.³ Yet these issues should be addressed as part of normal public service policy and provisions. The inference in labelling them with the slogan 'practical reconciliation' is that without this policy, Aboriginal people could expect *none* of the routine services and standards provided for all other Australians.

While acknowledging the targeting of policy in particular socio-economic areas is important, Larissa Behrendt points out that relying *solely* on such policy cannot provide the structural and systemic change that is necessary to address Aboriginal disadvantage.⁴ For my purposes, the policy is most notable for its antagonism to any suggestion of a collective approach to Aboriginal status, let alone one which readily acknowledges Indigenous experiences of colonisation, and their ongoing effects. Intensive government programs directed at bringing about equality with other citizens cannot bring about the justice Aboriginal people seek.⁵ Criticisms of practical reconciliation go beyond issues of economic policy, raising important questions about the philosophical underpinnings of the current approach. Dodson and Strelein

http://www.aiatsis.gov.au/lbry/dig_prgrm/wentworth/wentworthcontents.htm

² Howard cited in Larissa Behrendt, 'Unfinished Journey – Indigenous Self-Determination', *Arena Magazine*, no. 58, April-May 2002, p.26.

³ Michael Dodson and Lisa Strelein, 'Australia's Nation-Building: Renegotiating the relationship between Indigenous peoples and the state', *University of New South Wales Law Journal*, vol. 24, no. 3, 2001, pp.832-833.

⁴ Behrendt, *op cit*, p.27.

⁵ Dodson and Strelein, *op cit*, p.838.

see it as ‘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.⁶ Behrendt agrees with this analysis, while also questioning the success of the approach even in its stated aims. She argues:

The Howard government’s policies have done nothing to alter the socio-economic disparities between Indigenous and non-Indigenous Australians. This embrace of an assimilation policy as the new cornerstone in Howard’s Indigenous policy is a dangerous direction and it is disturbing that there has not been more vocal opposition to this reversion to policies that were rejected more than thirty years ago as being fundamentally flawed. It highlights the fact that the federal government has no vision on Indigenous issues and can only repeat antiquated and out-dated policies.⁷

Yet, underlying the Howard approach there is a vision, of sorts. Residing within government policy is a core ideological belief that any distinct Aboriginal status must be denied in order to maintain an imagined national unity – or rather, uniformity. Howard seems to want to ‘protect’ his idea of an undifferentiated citizenship from aspects of Aboriginality which have the ability to ‘split the nation’. Under this view, the right of an *individual* to pursue her or his culture may be supported by the state. However, a distinctly political, *collective* Aboriginal identity receives no recognition as it is conceived only in terms of a challenge to that state.

In analysing the motivations behind the Howard approach, Michael Dodson sees it as reflecting ‘genuine fear’.⁸ This ‘fear’ arises because full acceptance of the Aboriginal experience is regarded as a challenge to core ‘Liberal (Party)’ values. The ambiguity of Aboriginal status is reinforced, in that even as Howard champions Australia as ‘one indivisible nation’, his philosophy is dichotomous, suggesting a ‘fundamental division between the interests of Indigenous people as a minority and the interests of the mainstream Australian

⁶ Dodson and Strelein, *op cit*, p.832.

⁷ Larissa Behrendt, ‘Blood from a stone’, *Arena Magazine*, no. 60 August-September 2002, p.34.

society'.⁹ The latter constituency is under siege from increased recognition of an Aboriginal identity which should be inseparable from the mainstream in any meaningful (for our purposes, political) way.¹⁰

The existence of this fear may account, in part, for the phenomenal success of a politician such as ex-Liberal turned independent, Pauline Hanson, who was disendorsed by the Liberals for her comments on Aboriginal people.¹¹ Her success may indicate the continued survival of what I have described as 'the colonial mentality' as part of the Australian identity. Again, using Howard as an exemplar, the consistency, vehemence, and even uncharacteristic passion¹² with which the Prime Minister seeks to deny recognition of Aboriginal peoples beyond roles determined and controlled by the state, such as 'disadvantaged minority', and latterly 'Australian citizen' and 'taxpayer', suggests the issue runs deeper than simple economics, or even pragmatic power politics.

I suggest that the question of identity is a key element in the denial of Aboriginal rights and status. As we have seen, a distinctly Australian identity emerged, in part, on the basis of

⁸ Michael Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fifth Report*, AGPS, Canberra, 1997, p.4.

⁹ Dodson, *ibid*, p. 6.

¹⁰ For example, see the comments of former High Court justice Sir Harry Gibbs that 'a claim by the Aboriginal peoples to pursue their economic, social and cultural development within the law, and to take part in the decision-making processes which affect themselves, *in the same way as other Australians* may do, and within the legal structure of the nation, must of course be supported.' [emphasis added.] Gibbs, 'Two Rules of Law?'. <http://www.samuelgriffith.org.au/papers/html/volume9/v9chap3.htm>

¹¹ Norm Dixon suggested, 'Hanson was not dumped for her crudely racist views, which are representative of the members of the Coalition parties in that part of the world (how else was Hanson endorsed in the first place?), but because she lacked the PR nous to utter them only behind closed doors or out of earshot of reporters.' Dixon, 'Ratbags in the Ranks: Hanson, the coalition and the Far right', *Green Left Weekly*, 30 July 1997. Hanson's 'One Nation' party gained 10 per cent of the national vote at the 1996 election. For a humorous but important insight into Hanson's politics see Margo Kingston, *Off the Rails: the Pauline Hanson trip*, Allen & Unwin, St Leonards, N.S.W, 1999.

¹² Howard was roundly criticised for his speech at the 1997 Reconciliation conference where he vigorously defended his position on Aboriginal affairs. Robert Manne suggested he 'hector'd' the audience, many of whom responded by turning their backs in silent protest. Manne, 'Mabo: a moral crisis festers', *The Age*, May 27, 2002.

denying the rights of those peoples already present. Whether or not it is actually the case, as embodied in the Prime Minister, non-Aboriginal Australians seem to see their identity being fundamentally challenged by the assertion of Aboriginal rights. Brian Keon-Cohen recognised that analysing responses to *Wik* (and *Mabo*)¹³ is a complex social, political and psychological undertaking. The visceral responses to these decisions, he argues, have something to do with ‘the way the issue of native title challenges our sense of history, our national sense of self’. Leaders who are incapable of facing this ‘crisis of national conscience’ then resort to the ‘unnecessary and draconian’ amendments seen in *Wik*¹⁴ as a means of reasserting the ‘old’ view of an homogeneous political community just as it is under most threat. This is one compelling explanation for a form of denial that, when viewed in an historic and comparative context, appears unusually enduring.

In a manner which should by now be familiar, Howard’s (re)construction of Australian identity relies fundamentally on a shift away from pluralism towards the reassertion of a unitary value system. Also in common with previous centuries, this move is regarded as non-ideological, common sense and ‘natural’¹⁵ – there is but ‘one right way’.¹⁶ In this sense, the exclusion of 2001 effectively mirrors the exclusion of 1901.¹⁷ Diversity is obscured by construing Australia, and the people that constitute the state, as homogeneous. Aboriginal people who challenge this ‘natural’ unity by their very existence are thus characterised as

¹³ For description and analysis or reactions to *Mabo* and *Wik* see Gary D. Meyers and Sonia Potter, *Mabo, through the eyes of the media*, Murdoch University Environmental Law & Policy Centre, Murdoch, W.A., 1999.

¹⁴ Brian Keon-Cohen, ‘Wik: Confusing Myth and Reality’, *University of New South Wales Law Journal*, vol. 3, no. 2, 1997.

¹⁵ Andrew Markus, *Race: John Howard and the Remaking of Australia*, Allen and Unwin, Sydney, 2001, p.104.

¹⁶ See chapter 4, footnote 27, for discussion of Pope Innocent’s suggestion there is ‘one right way’ for people to live.

¹⁷ The suggestion being made is that as with Howard’s Australia of 2001, at Federation, exclusion of Aboriginal people from the newly formed state is best understood not as being deliberate and racist (though we can now view it as this), but rather as ‘natural’ and unthought of. See chapter 4.

'unnatural' – unless they give up their claims for a distinct status. In what may be viewed as something of a triumph of the 'discourses of domination', Aboriginal peoples are allowed entry into the political community only at the cost and consequence of giving up their cultural *and political* distinctiveness – you can be 'one of us' as long as you deny who you are. A colonial history of differential treatment is conveniently forgotten, and equality is conceived not in terms of substantive outcomes, but as treating all people the same from this point onwards. The costs of this 'forgive and forget', 'level playing field' mentality – costs to the victims of colonisation – are eloquently described by Tatz:

It is they who must forgo the desire or need for retributive justice; it is they who must eschew notions of guilt and atonement and, all too often, compensation for harms done. It is they who must agree to the diminution, or even abolition, of that shared historical memory that holds victim groups together. It is they who must concur in the substitution of their memory and their history with our history.¹⁸

Judith Brett suggests it is difficult for contemporary Australian liberalism *not* to view today's Aboriginal society in terms more explicitly popular in previous centuries. This is because the individualistic philosophy of liberalism needs a means of stressing social unity at a time when previous sources of cohesion such as race, Britishness, and the monarchy are largely unavailable. What we are left with is the idea of 'the nation' as the only potentially unifying symbol to hold together individual citizens. As we have seen, Aboriginal people challenge not only this view of nation, but also what Brett sees as liberalism's 'deep psychological need' to make a line between a past riven with rival histories, and an unburdened future (in a land unsullied by 'history') that Australian settler society was based on. Given this background, when faced with contemporary Indigenous Australians' demands, Liberals tend to see pre-modern ('pre-historic') Aboriginal traditions only as holding people back, rather than as

¹⁸ Colin Tatz, *Genocide Perspectives*, Centre for Comparative Genocide Studies Macquarie University, Sydney, 1997, p.310.

sources of strength with the potential to change and adapt.¹⁹ It is very difficult for contemporary Liberals *not* to think that Aboriginal society is backward. This, she suggests, is the latent meaning of Howard's continual stress on alleviating Aboriginal 'disadvantage'. This shows not simply a preference for a welfare agenda over a rights agenda, but ultimately runs much deeper, to the perception of Aboriginal people themselves. And, I would argue, our (European) perception of ourselves. In an appraisal that echoes Innocent, Vitoria, Locke and others of less 'enlightened' times, Brett suggests 'the other meaning is that the Aboriginal people were and are disadvantaged and backward people who need help to be brought up to "our" standards and take their place in the modern world'.²⁰

Howard views the 'choice' for Indigenous Australians as either Aboriginality *or* citizenship. There is no choice here, just as there is no need for dialogue. When Aboriginality is perceived as inferior or deficient – as a 'restriction' on 'development' – there is no understanding that people wish to maintain and enhance that identity. Furthermore, if that identity is described in political terms, it is regarded as threatening the unity of the state, thus reinforcing its negativity, even its 'impossibility'.

¹⁹ This was seen recently in Minister for Reconciliation Philip Ruddock's comments that Aboriginal people remained disadvantaged primarily because they came into contact with 'developed civilisations' later than other Indigenous peoples. Supporting the Minister, National Party MP Ian Causley suggested Aboriginal people were 'not inclined to education.' See chapter 3, footnote 65.

²⁰ Judith Brett, 'The treaty process and the limits of Australian Liberalism', paper delivered to the AIATSIS seminar series 'Limits and possibilities of a treaty process', June 4, 2001.
<http://www.aiatsis.gov.au:80/rsrch/smnrs/papers/brett.htm>

No discussion – denying the idea of treaty

In this political climate, arguments for treaty appear not just as distractions from the 'main game' of practical reconciliation, but as internally incoherent. Reflecting the discourses of domination established in previous centuries, the Prime Minister recently suggested:

A nation, an undivided united nation does not make a treaty with itself. I mean, to talk about one part of Australia making a treaty with another part is to accept that we are in effect two nations.²¹

Howard has consistently rejected this picture of Australia as a 'multi-nation' state, but he has also rejected any *idea* which hints at the existence of a more complex, plural society which unsettles conceptions of the unitary state. Thus, in 1988, he viewed multiculturalism as synonymous with a loss of national direction. For Howard, multiculturalism suggested 'we can't make up our minds who we are or what we believe in...so we have to pretend we are a federation of cultures and that we've got a bit from every part of the world. I think that is hopeless.'²² In terms that foreshadowed the rise of 'Hansonism' nearly a decade later, he also stated at this time: 'I abhor the notion of an Aboriginal treaty because it is repugnant to the ideals of one Australia.'²³

As exhibited by the country's highest elected office holder, the idea of Australia as 'one nation' had, if it ever went away, returned as a dominant theme of our political culture at the

²¹ Tony Wright and Kerry Taylor, 'PM rules out divisive treaty', *Age*, 30/5/00 [emphasis added].

²² Cited in Markus, *op cit*, p.87.

²³ See Howard, 'Treaty is a recipe for separatism', in Ken Baker (ed), *A Treaty with the Aborigines?*, Institute of Public Affairs, Melbourne, 1988.

dawn of the twenty-first century. It is no coincidence that Hanson's party was called 'One Nation'. A number of commentators have pointed out the ideological similarities between Hanson and Howard, including a shared preference for a 'triumphal' version of Australian history.²⁴ For Howard, the (re)construction of Australia as 'one nation' involved the presentation of a 'simplistic, bipolar defence of Australian history and culture' which drew sharp lines of distinction between unambiguous truth and unacceptable interpretation.²⁵ Howard 'fundamentally rejected' arguments which stressed the colonial nature of Australia's history.²⁶ Following Geoffrey Blainey,²⁷ he described this position as a 'black armband' view of history. While Howard was openly critical of those, such as Henry Reynolds, who pursued this line, in the name of 'free speech' he supported Hanson's right to express views which denied Aboriginal people any distinct claim against the state.²⁸

If this colonial mentality persists, Australia appears condemned to experience a cycle of resistance and domination. One feature of conservative fear of community division is that it may turn out to be a self-fulfilling prophecy. The danger with continued denial of Aboriginal claims is that Indigenous peoples will come to see a radical rather than a more measured separatism as the only course, thus realising the conservative nightmare of a fundamentally divided polity. In this scenario, the fears of conservatives are realised – not, as they suggest, because of the nature of Aboriginal claims – but, paradoxically, because of their own intransigence. For example, conservative critics of 'Aboriginal separatism' appear to spend

²⁴ For example see Ghassan Hage, *White Nation: fantasies of white supremacy in a multicultural society*, Pluto Press, Sydney, 1998.

²⁵ Markus, *op cit*, p.83. For discussion of Aboriginal historiography in Australia see Bain Attwood (ed.), *In the Age of Mabo: History, Aborigines and Australia*, Allen & Unwin, Sydney, 1996.

²⁶ Cited in Mark McKenna, 'Different Perspectives on Black Armband History', Parliamentary Library Research Paper Number 5, 10 November 1997.

²⁷ Blainey first used the term in his 26th Latham Memorial Speech delivered on the 29th April, 1993. See Blainey, 'Goodbye to all that?', *Weekend Australian*, 1-2 May 1993, (p.16) for an edited extract.

more time discussing the issue of secession than Aboriginal people themselves.²⁹ Perhaps there is a certain amount of conscious strategy at work here. There is evidence to suggest that particularly in the realm of Aboriginal affairs where much of the general public may be unfamiliar with the issues, political leaders can be very influential in swaying public opinion. This has been evident both in the debate over a national apology to Indigenous people, and acceptance of the idea of treaty.³⁰ Similarly, publicising the risk of secession may assist in minimising public support for Aboriginal claims.

If the goal of Howard and other opponents of Aboriginal autonomy is to preserve what they view as a threatened national stability, their approach may be self-defeating. Jeremy Webber argues that the government's fierce criticism of land councils and ATSIC suggests (as I have indicated) that they would much rather deal with Indigenous issues as though they merely involved the effective delivery of services to individuals or, to the extent that some recognition of native title is unavoidable, the acknowledgement of specific rights held by specific individuals.³¹ This response will only perpetuate Aboriginal demands for distinct *collective*

²⁸ For a number of views that Howard tacitly supported Hanson, see Philip Adams (ed), *The retreat from tolerance : a snapshot of Australian society*, ABC Books for the Australian Broadcasting Corporation, Sydney, 1997.

²⁹ This issue has been raised primarily by Michael Mansell and the Aboriginal Provisional Government (see APG Papers at <http://www.faira.org.au/issues/apg.html>). Much more recently it has received a lot of attention from conservative historian Keith Windschuttle (for a number of papers denouncing 'Aboriginal separatism' in general, see <http://www.sydneyle.com/Separatism.htm>).

³⁰ A Newspan poll conducted on 7/6/00 found 45 per cent in favour of a treaty, with 37 per cent opposed. A significant 18 per cent remained uncommitted. (Debra Way, 'Political divide over treaty grows, AAP, 7/6/00.) An A.C. Neilsen poll of the same period came up with very similar results, finding 46 per cent support for a treaty with 40 per cent opposed. (Tony Wright, 'Young, Old divided on idea of a treaty', *The Age*, 3/6/00) The polls indicated a 'startling parallel' between the initial response to calls for an apology, and responses to the treaty call. In 1997 public support for an apology was then at around 50 per cent for and 40 per cent against. This was 'before John Howard led the no case'. Michael Gordon, 'Will treaty talk be a repeat of history?', *The Age* 3/6/00. In 1992 Aboriginal Affairs Minister Robert Tickner had suggested 65 per cent of Australians agreed there needs to be a treaty. (Statement by the Hon Robert Tickner MP Federal Minister for Aboriginal and Torres Strait Islander Affairs to the tenth session of the United Nations Working Group on Indigenous Populations, Geneva, 20-31 July, 1992.)

³¹ Jeremy Webber, 'Native Title as self-government', *University of New South Wales Law Journal*, vol. 22, no. 2, 1999, p.603.

recognition, ensuring instability continues while these demands are met with blanket denials.

As Webber suggests,

Durable solutions require the kind of carefully adjusted mechanisms that are only available through negotiations. And to have stable negotiated outcomes, one must have actors with whom one can deal. All parties, Indigenous and non-Indigenous, therefore have an interest in strong, representative and respected Indigenous political institutions.³²

Far from nurturing such institutions, Howard's ideology combines with state power to effectively deny any political expression of a distinct Aboriginal status, in a sense representing the triumph of the discourses of domination. Yet, also in common with previous centuries, the dominant discourses are never completely dominant. They merely paper over rather than destroy alternative views. One positive alternative posits the pursuit of Aboriginal land (and other) rights as firmly in tune with 'core Australian values', suggesting conservative fears are without legitimacy.³³ Another important articulation of this vision was put recently by Patrick Dodson. He summarised much Indigenous argument in presenting a picture which unified Aboriginality and citizenship through the negotiation of a treaty relationship.

II. Dodson's vision : Aboriginality *and* citizenship

In May 2000, Dodson, dubbed 'the father of reconciliation' as the first chair of the Council for Aboriginal Reconciliation, reignited the treaty debate with his Wentworth Lecture, 'Beyond the Mourning gate: Dealing with Unfinished Business'.³⁴ In June 2000, a meeting of Aboriginal leaders – perhaps unprecedented in Australian history – placed the negotiation of a

³² Jeremy Webber, 'Native Title as self-government', p.603.

³³ Michael Dodson, *Fifth Report*, p.5.

³⁴ Patrick Dodson, *op cit*.

treaty at the forefront of their demands.³⁵ The significance of Dodson's speech is that it represents a senior Aboriginal leader collecting and summarising a number of commonly held notions and feelings delivered in convincing style. Dodson challenged Howard's conventional independence/assimilation dichotomy that still tends to dominate formulations of the Indigenous *problematique*.

Dodson presented an argument for the recognition of a distinct and political Aboriginal identity within the Australian body politic. He sees coexistence not just as possible, but essential, if the Australian state is to be free of its colonial beginnings. This coexistence is achievable through the establishment of a treaty relationship which provides the framework for the historically consistent twin objectives of Australia's Indigenous people – exercising the rights that attach to both 'citizenship *and* Aboriginality'³⁶[emphasis mine]. While it will not be easily achieved, the attraction of Dodson's analysis is that through his emphasis on coexistence, he suggests that despite a colonial history of domination, there is a just place within the Australian state for both Aboriginal and non-Aboriginal peoples alike. Importantly, the conciliatory tone adopted by Dodson exemplifies the spirit of the treaty relationship for which he argues.

Dodson proposes the conclusion of a treaty between 'the Australian and Aboriginal peoples' as a means of finally establishing a 'proper' relationship between the First Australians and

³⁵ The meeting, chaired by ATSIC Chairman Geoff Clark, endorsed the campaign 'for negotiation of a treaty', and 'resolved that the treaty debate must be based upon close consultation with Aboriginal and Torres Strait Islander communities.' Participants at the meeting included ATSIC Deputy Chairperson, Ray Robinson, Commissioner Charles Perkins, Pat Dodson, Peter Yu, Marcia Langton, Michael Mansell, Bob Weatherall, Gary Foley, David Ross, Noel Pearson and (via telephone) Aden Ridgeway. *ATSIC News*, July 2001. http://www.atsic.gov.au/News_Room/ATSIC_News/June_2000/beyond_corroboree.asp

³⁶ Patrick Dodson, *op cit*, p.9.

those who came later.³⁷ In an age where Aboriginal title and other rights are often seen to be incompatible with the traditions, institutions and sovereignty of the modern state, Dodson's vision is remarkable for its ability to draw together the apparently disparate elements of a distinct Aboriginal status with a commitment to citizenship of the state. It appears that if the concept of 'Australian citizenship' is appropriate for Aboriginal people, it must be reflective of the new relationship rather than being shackled by the conceptions of the colonial mentality.

Dodson's vision takes us beyond conceptions of Australian citizenship that automatically begin by assuming the relinquishment of a distinct Aboriginal status. The establishment of an Australian treaty process will reflect Australian conditions, and requires the 'localising' of terms such as citizenship and sovereignty. Despite conservative fears of a fundamentally divided polity, Dodson's vision implies a form of 'measured integration' as opposed to say, First Nations in Canada's pursuit of 'measured separatism'.

Why treaty? Denial of Aboriginal status

Dodson reminds us that Aboriginal demands for recognition of their particular status and restitution for past wrongs have received in-principle support from a wide variety of local sources. For at least the last few decades, Aboriginal calls have been echoed in reports from the Human Rights Commission, the Social Justice Commissioner, the Aboriginal and Torres

³⁷ Patrick Dodson, *op cit*, p.15.

Strait Islander Commission (ATSIC), and the Council for Aboriginal Reconciliation (CAR).³⁸ They have been prominent in formal Aboriginal statements such as the Yirkalla Bark Petition,³⁹ the Barunga statement,⁴⁰ the Eva Valley statement⁴¹ and the Kalkaringi statement.⁴² Similar visions were expressed by Prime Ministers' Paul Keating in his Redfern park speech,⁴³ and Bob Hawke through his promise of a treaty process.⁴⁴ Even the Howard government recently agreed it was appropriate to acknowledge the 'special place of Indigenous people in the life and history of Australia' in certain Commonwealth ceremonies.⁴⁵ Yet these recognitions have all ultimately failed to secure lasting change.

The failure of these initiatives to produce the results asked for by their instigators prompts Dodson to ask a key question: 'Why has it been so hard for the larger questions of justice to be answered by governments in good time so that Aborigines can achieve some freedom and

³⁸ See for example National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home: report of the National Inquiry into the Separation of Aboriginal* [Commissioner: Ronald Wilson] Human Rights and Equal Opportunity Commission, Sydney, 1997, http://www.hreoc.gov.au/social_justice/stolen_children/; Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report*, AGPS, Canberra, 1993, and subsequent annual reports; ATSIC, *Recognition, Rights, and Reform: Overview, Proposed principles for Indigenous Social Justice, and Recommendations*, ATSIC, Canberra, 1996; ATSIC, *Report on Greater Regional Autonomy*, ATSIC, Canberra, May 2000; For a comprehensive review of the three social justice reports issued to that time, see Peter Jull, 'An Aboriginal policy for the millennium: the three social justice reports', *Australian Indigenous Law Reporter*, vol. 1, no. 1, 1996.

³⁹ Text of the petition can be found at http://www.foundingdocs.gov.au/places/transcripts/cth/cth_pdf/cth15_doc_1963.pdf

⁴⁰ Text of the statement can be found in *Public Law Review*, vol. 1, 1990, p.340.

⁴¹ Text of the statement can be found at <http://nativenet.uthscsa.edu/archive/nl/9308/0042.html>

⁴² For text see Sarah Pritchard, 'The Kalkaringi Convention', *Indigenous Law Bulletin*, vol. 4, no. 15, October 1998, p.15.

⁴³ Text of the speech can be found at <http://www.australianpolitics.com/executive/keating/92-12-10redfern-speech.shtml>

⁴⁴ For discussion of Hawke's Aboriginal policy generally, see Christine Jennett and Randal G. Stewart (eds.), *Hawke and Australian public policy: consensus and restructuring*, Macmillan, South Melbourne, 1990.

⁴⁵ Cited in a statement issued by the co-chairs of Reconciliation Australia, Fred Chaney and Jackie Huggins, as an initial comment on the Commonwealth Government's response to the final report and recommendations of the CAR. See the full statement in 'Welcome, but inadequate', *Koori Mail*, Wednesday October 30 2002, p.13. Michael Dodson noted, 'while the Prime Minister acknowledges the Aboriginal and Torres Strait Islander peoples as 'the original Australians and first inhabitants of this continent of ours, however one would wish to describe it, he is profoundly reluctant to recognize rights flowing from this status'. Dodson, Social Justice Commissioner, *Fourth Report*, AGPS, Canberra, 1996, p.7.

dignity in their lifetime?’⁴⁶ Throughout the phases of ‘our intertwined history’⁴⁷ identified by Dodson – those of establishing *terra nullius*; colonial expansion and dispossession; (he may have added here protection-segregation;) assimilation; and latterly reconciliation – there remains a striking sameness in the position accorded Aboriginal peoples in Australia. The key to the denial of Aboriginal aspirations, he suggests, is that ‘woven through all phases is an alarming virulent dynamic that has persisted on the non-Aboriginal side, enabling it to reject the legitimate status of who and what the Aboriginal people are, what we represent, and what rights we might enjoy’.⁴⁸

Essentially, this dynamic is what I have referred to in previous chapters as ‘the colonial mentality’: that is, a worldview, a way of thinking, which positions Aboriginal people as inherently Other and ‘less than’. Latterly, as we have seen, this dynamic has become more sophisticated in less overtly relying upon the obvious racial and biological classifications of old. Yet Howard’s doctrine indicates even rhetorical recourse to ‘equality’ – giving Aboriginal people ‘the same’ rights as everybody else – can act to maintain control over Aboriginal people by ‘negating the legitimate status of who and what they are’.⁴⁹

The potential of the reports, protests and promises listed above has never been realised. In analysing the apparent failure to initiate significant change, Dodson points decisively to the position of Aboriginal people as subordinate to, and reliant on, the state. The key problem is that ‘such reports rely upon Governments hearing them, adopting them and driving forward to achieve the intended outcomes’.⁵⁰

⁴⁶ Patrick Dodson, *op cit*, p.9.

⁴⁷ *ibid*, p.12.

⁴⁸ *ibid*, p.13

⁴⁹ *ibid*.

⁵⁰ *ibid*, p.10.

Dodson suggests that the fundamental, structural cause of the failure to advance Aboriginal aspirations refers to the key question of the status of Aboriginal peoples. He restates what others have said before him – the perennial difficulty for ‘Aboriginal Australians’ is that they remain slaves to an exclusionary political process that has to date shown little willingness to even address the questions that concern them. This is because to the extent that they have latterly been involved in the political process at all, their inclusion has been on the basis that collectively they represent no more than an interest group, or a minority – a categorisation that determines their marginal status within the political process. While majority rules, the priority of the government is securing votes, and it can use the excuse of electoral support as a mechanism of ‘obstruction and deferral’. Aboriginal rights don’t count when up against ‘government ideology and political pragmatism’.⁵¹ The treatment of Aboriginal peoples merely as a minority group effectively ensures only ‘incremental change’ to the *status quo* in the form of ‘short term stop gap bureaucratic solutions.’ Such ‘solutions’ are contrasted sharply with the ‘real and lasting change’ Dodson sees as necessary – change to ‘the political architecture of the country’ which aims at nothing less than fundamentally ‘realigning the relationship’ between Aboriginal and non-Aboriginal peoples in Australia.⁵²

Not only does the *status quo* deny the particularity of Aboriginal status as nation(s) or people(s), it seeks to deny even the idea of such status. In the contemporary political reality, where Australia has for the bulk of the last decade been ruled by a conservative Liberal government, the broader agenda has sought what is effectively a return to the assimilationist

⁵¹ Patrick Dodson, *op cit*, p.13

⁵² *ibid*, p.8.

ideals of the 1960s and prior years.⁵³ For Dodson, current denials of Aboriginal status are ultimately about 'removing community as the life centre' and positioning 'the individual as the essential unit of society'.⁵⁴

Sustaining Aboriginality, retaining citizenship

Dodson separates his vision of citizenship from these imposed solutions which 'attack the foundations of our community'. Citizenship for Dodson does not mean 'sameness', but 'substantial equality'.⁵⁵ Similarly, he speaks of the need for 'unity' rather than uniformity within Australia.⁵⁶ This goal reflects the reality that perhaps a majority of Aboriginal people are integrated into society in ways that do not apparently differ vastly to other Australians. What they seek, Dodson argues, is the freedom to determine their status within the broad boundaries of contemporary Australian society. That is, the freedom to live lives

similar to that of the majority in Australia but lives uniquely ours. Lives where we meet our obligations as citizens but where we are accommodated also as Aborigines.⁵⁷

Here, Dodson raises the relationship between 'sameness' and 'difference' in a novel manner. He argues not only need there not be a contradiction between the 'similarity' and 'uniqueness' he describes, but that Aboriginal Australians have *always* sought recognition of their right to live within these coexisting realities.⁵⁸

⁵³ See note 6 and surrounding text.

⁵⁴ Patrick Dodson, *op cit*, p.14.

⁵⁵ *ibid*.

⁵⁶ *ibid*, p.12.

⁵⁷ *ibid*, p.14.

⁵⁸ *ibid*, p.9.

As early as the Aboriginal 'Day of Mourning and Protest' in 1938, Aboriginal leaders voiced the twin demands that for Dodson would be echoed down the years in subsequent demonstrations: 'justice and equality'. The protesters demanded both 'the right to be Aboriginal people along with the right to enjoy the equality, responsibility and quality of being an Australian citizen'. Dodson argues, 'it was not a trade off – one set of rights for another'. He argues that the 'Day of Mourning' protestors recognised a fundamental truth – that 'both realities could co-exist and be enjoyed'.⁵⁹

The relationship between a distinct identity and a shared right are described when Dodson explains, 'in common with all other Australians, we must have the right to maintain our unique cultural identity without having our entitlements as Australian citizens held hostage'.⁶⁰ His reference here to cultural identity is suggestive of one way in which the tensions between Aboriginal rights and citizenship could be resolved in a way acceptable to the current government. For if Aboriginality is reduced merely to the 'colourful dress and ritual' aspects of culture, accommodation is relatively easy, and can occur in the same way the state has recognised the rights of ethnic minorities through its successful adoption of a policy of 'multiculturalism'. The Australian state has proven extremely enthusiastic in its appropriation of Aboriginal culture, to the extent where it is strategically deployed to present a distinct 'Australian' identity to the rest of the world. Here, in what is perhaps the dominant popular understanding, Aboriginal peoples are regarded as 'just another ethnic minority', even if a proudly local one. In this context, the current state policy towards Aboriginal peoples, 'Reconciliation', is achieved through non-Aboriginal Australians gaining a greater understanding and appreciation of Aboriginal culture. Such a conception of the position of

⁵⁹ Patrick Dodson, *op cit*, pp.8-9.

⁶⁰ *ibid*, p.20.

Indigenous peoples is lent weight by Dodson's equating them with 'all other Australians'.⁶¹ Aboriginal Australians become like Greek-Australians, Asian-Australians and other hyphenated Australians who may exercise their particular cultures (privately), yet remain part of the political community (citizens) in the same way as the dominant Anglo-European Australians who ultimately embody the state (publicly).

Dodson strongly distances himself from such an understanding of Indigenous status. His description of a 'unique cultural identity' also retains within it an essential political aspect. Thus, he refers both to the unique position of Aboriginal peoples in the contemporary Australian state (status), as well as the particular dynamics of colonialism which demands attention in the present (restitution). In the context of current state policy, the key is not merely recognition of culture: 'Reconciliation involves beneficial resolution of our status as the first peoples of this country and restitution for the way our inheritance as owners and custodians of the land have been taken from us.' Once this status is recognised, the second part of reconciliation can be addressed. Thus, 'it also requires us meeting our obligations and responsibilities in the changed world of contemporary Australian society'.⁶²

In referring to this 'changed world', Dodson realistically accepts the existence of Australian institutions that will continue to exert influence on Aboriginal lives. Given the fact of colonisation, it may be impossible for Aboriginal peoples to return to the complete independence seen prior to colonisation. Yet such recognition does not automatically render irrelevant the Indigenous laws and traditions which always formed the backbone of those societies. It is these traditions which Dodson sees as the key to maintaining a distinct

⁶¹ Patrick Dodson, *op cit*, p.20.

⁶² *ibid*, p.12.

Aboriginal identity, even (or particularly) one expressed within the geographical boundaries of the current state. At stake in the maintenance of these traditions is nothing less than the continued existence of Aboriginal peoples. He argues that 'if we lose our sense of value and meaning in the Aboriginal world then we become a successful clone of what assimilation policies and strategies sought to achieve'.⁶³

Dodson calls for the recognition within the state of a distinct Aboriginal identity that is based on prior occupation of the land – suggesting Aboriginal peoples holding a unique political status not attached to other Australian identities. Given the current reality that this status is situated within the state, he embraces rather than rejects the concept of citizenship. Yet – and this point is critical – the enjoyment of those rights which flow from the state is seen in no way to negate or extinguish those inherent rights that flow from the particular Aboriginal status as First Peoples. As Dodson suggests: 'For Aboriginal Australians the search has always been for governments to enter into serious dialogue about our position in the nation [or state] and for the Constitution to recognise us as the First Australians with our Indigenous rights, obligations and responsibilities respected and recognised.'⁶⁴

III. Introducing sovereignty

Despite Howard's fears, Dodson's acceptance rather than denial of 'the changed world of contemporary Australia' appears to greatly facilitate state recognition of a particular Aboriginal status that does not directly challenge its fundamental legitimacy. While resistance

⁶³ Patrick Dodson, *op cit*, p.9.

⁶⁴ *ibid*, p.15.

to notions such as 'shared sovereignty' are to be expected, Dodson's description should effectively calm statist fears about the secession of Aboriginal peoples and the dissolution of the state. Yet one of the key questions posed by his categorisation continues to be whether it does justice to Aboriginal peoples in terms of recognising their inherent rights which continue, along with those later rights that flow from the state. For many Indigenous people in Australia, as elsewhere, a key question is that of Aboriginal sovereignty and its assumed relinquishment on the basis of consent. In this context, ATSIC chair Geoff Clark points to the Australian Constitution. He asked:

How can it then be said that Aborigines gave up any sovereign rights we had to the parliaments and the courts through the formation of the Constitution in 1901? Such a declaration cannot be sustained. The self-serving declaration[s] that governments and domestic courts [have made] to the effect that Aborigines did lose their sovereign rights are ineffective.⁶⁵

Despite referring to this lack of consent, as well as stressing the question of Aboriginal status, there is still the danger that in linking the concepts of citizenship and Aboriginality, Dodson's conception damages claims to Indigenous sovereignty. Clark appears to situate Aboriginal people outside the purview of citizenship, acknowledging that 'citizens, or groups of citizens, cannot challenge the authority of the state in which they live'.⁶⁶ Yet it is just this authority, particularly its assumed legitimacy, that Dodson and others seeks to challenge.

I argue that there is a way in which Dodson's categorisation is workable both in recognising the inherent political rights of Aboriginal peoples who never ceded their authority, as well as securing their rights to citizenship through the establishment of a treaty relationship with non-Aboriginal Australians. The key remains the question of Indigenous status. In what may

⁶⁵ Geoff Clark, 'From Here to a Treaty', Hyllus Maris lecture, Latrobe University, 5 September 2000.
<http://www.treatynow.org/Publications/publications.htm>

⁶⁶ *ibid.*

emerge as an outcome of the negotiating process itself, non-Indigenous Australians must abandon the colonial assumption that Aboriginal peoples are subordinate to the Australian government. The establishment of a treaty relationship requires recognition of the Aboriginal people as an equal, self-governing, sovereign people who have the same inherent rights as other peoples. The act of assuming the equality of peoples enables the historical relationship between Aboriginal and non-Aboriginal peoples to be seen for what it is. Essentially this is a colonial relationship where the assertion of power over Indigenous peoples relies on assumptions of European superiority rather than the consent of the governed.

This recognition required of non-Aboriginal people is effectively mirrored by a prior act of recognition explicitly suggested within Dodson's framework, that is, a recognition by Aboriginal people of the right of non-Aboriginal people to govern themselves on the territory now known as 'Australia'. On the one hand, such recognition appears only to reflect the contemporary realities of the Australian demographics, institutions, and power distribution. Yet such recognition can also be viewed as a generous and conciliatory act on the part of the original owners of this land, given that even today, there remains real doubt as to the basis for the legitimate acquisition of such a right of self-government by Europeans. I would argue that such doubt must always remain until such time as the right is based on the consent of those peoples who were already present, in organised, self-governing societies. Ultimately, securing the just and legitimate place of non-Aboriginal Australians relies on their recognition of the prior Aboriginal right to grant such consent – a right held due to their status as an equal, self-governing, sovereign people.

Aboriginal and non-Aboriginal peoples are apparently destined to live lives which, at least in terms of the territory they now share, are bound together. Similarly, the acts of mutual

recognition described above are bound together, reflecting this shared destiny, with each party somewhat reliant on the other in securing a just position. It would seem to be entirely appropriate that the initial act of recognition comes from those who maintain at least temporal priority within this shared space, and that it be followed by an act of recognition on the part of those who came later, with whom the First Peoples must now share their territory.

The practical difficulties involved in achieving these acts of mutual recognition cannot be ignored. Some Aboriginal peoples refuse to recognise any legitimate basis for European sovereignty. Many, perhaps most, white Australians refuse to countenance a 'different' Aboriginal status. Yet such an act of mutual recognition is the first fundamental step identified by James Tully in the transition from a colonial to a just relationship.⁶⁷ Thus, these acts of recognition by the two parties – inextricably linked as they are – would themselves be characteristic of the new, altered relationship they wished to establish. The acts of mutual recognition reinforce the fact that the negotiation of a treaty involves far more than simply distributing rights, privileges, jurisdiction and perhaps sovereignty. These distributive functions can be regarded as being of secondary importance to the primary function of the treaty process – that of establishing a just and equal relationship based on mutual recognition, respect and continuity. The treaty process has the potential to transform the way each party views the other, but also to facilitate the self-reflection necessary – particularly perhaps on the non-Aboriginal side – for the first critical step of mutual recognition.

⁶⁷ See chapter 8.

The treaty (as) relationship

Dodson suggests currently that there are two clear options before us in the conduct of Indigenous-state relations. We may remain within what I have termed the colonial relationship, that governed by historic 'discourses of domination', or what Dodson refers to as European 'traditions of superiority'.⁶⁸ In this relationship, these traditions which largely retain their power today are relied upon to deny the possibility of Aboriginal authority flowing from their own social and political traditions. Thus, '[e]verything about us has to be subject and subordinate to the rules, practices and values of the dominant society'. It is this time that Dodson refers to as the 'mourning period' for Aboriginal people.⁶⁹

An alternative to these traditions of superiority is provided by the establishment of a treaty relationship – one which by its very nature relies on an understanding of the equality of peoples. In suggesting that it is only once 'the proper protocols and practical arrangements have been carried out' that we can move 'beyond the mourning gate',⁷⁰ Dodson does not, however, reify the power of one particular document. The point, rather, is the relationship that is established through the negotiation of such an agreement. It is not about a single event, but 'a continuous state of being for the government and society'.⁷¹ Ultimately, the treaty relationship has the potential to deliver to the (transformed) state 'the healing and unity it requires'.⁷²

⁶⁸ Patrick Dodson, *op cit*, p.13.

⁶⁹ *ibid*, p.17.

⁷⁰ *ibid*.

⁷¹ *ibid*.

⁷² *ibid*, p.13.

This is, perhaps, the most profound contribution to be made by the treaty relationship. It can facilitate the desirable quality of 'unity' without insisting on an inevitably destructive 'uniformity'. Similarly, it should be clear by now that the type of citizenship Dodson envisages for Aboriginal people will not be the same as that of non-Aboriginal people. What Indigenous Australians seek is (substantive) equality rather than sameness. So while Dodson's conception goes a long way to recognising the jurisdiction of the state, it also leaves room for the exercise of independent Aboriginal action. In a description reminiscent of the Iroquois Gus-Wen-Tah, or Two Row Wampum treaty belt,⁷³ Dodson distinguishes between 'Australian law' and 'Aboriginal law'. Thus, Indigenous Australians have always sought

the guarantee of their rights to live within our law and culture. To have recognition and respect in the Australian law that has assumed its power over our ancient rights and people. To be able to carry out our laws, customs and traditions through a formal accord recognising our status alongside the Australian law.⁷⁴

A mutually determined treaty process may be the formal accord Dodson speaks of here.

IV. Conclusion

Despite the gains of recent decades, Peter Read suggests that 'non-Aborigines have not yet, despite ATSIC, the Royal Commission, *Mabo*, the native title legislation, and the Social Justice Package, come to grips with the *differentness* of Aboriginal culture'.⁷⁵

⁷³ In a 'Statement concerning the Report of the Royal Commission on Aboriginal Peoples' in Canada, the Council of the Mohawk nation explained: 'The Gus-Wen-Tah or Two Row Wampum, defines how the two peoples relate to each other and coexist. The two rows symbolize the 'river of life.' The Haudenosaunee and the European nations would travel in two vessels side by side in parallel paths...Each nation's vessel contains the government, culture, laws, ways and knowledge of the respective nations, with neither imposing their ways on the other.' December 18, 1996. <http://sisis.nativeweb.org/mohawk/royal1.html>

⁷⁴ Patrick Dodson, *op cit*, p.16.

⁷⁵ Peter Read, review of H.C. Coombs, *Aboriginal Autonomy: Issues and Strategies*, Cambridge University Press, Melbourne, 1994, in *Sydney Law Review*, no. 3, September 1995, p.489.

In recent decades, in particular, this has not been due to any lack of attention to the issue. Since contact, our history has been characterised by non-Aboriginal attempts to come to grips with this difference. Yet the mechanisms chosen by the state were seen to be more concerned with maintaining the *status quo*, and managing Aboriginal status in such a way as to prevent it from disrupting existing arrangements. The emergence of Aboriginal difference at the official level was initially treated as an exercise in cross-cultural translation – (newly) legitimate Aboriginal interests were to be expressed in such a way that they could be recognised, and managed, by the state. Yet this state was guided by conceptions of Aboriginal peoples that had held sway in Australia for two centuries, and elsewhere for longer than that. If we had to deal with native title then, we would certainly do it on our terms.

This approach is both contradictory, and ultimately, ineffective. It is contradictory because it denied the fundamental reality that necessitated recognition in the first place – the continued existence of a set of rights and traditions that had their source not in English common law, or European history, but within Aboriginal peoples themselves. Notwithstanding a long history of attempts to do so, strategies aimed at negating or controlling such rights are bound to fail because they perpetuate conflict so long as they continue to deny rather than reflect contemporary Indigenous aspirations. Despite this reality, the twentieth century ended with a vigorous reassertion of these discriminatory discourses in Australia. This was further evidence that because the discourses of domination had been suppressed or refined rather than destroyed or transcended, they remained available to the state.

Concepts of national uniformity were used to deny Aboriginal status through the assertion of ‘one nation’. Yet not only are such assertions no longer credible in the face of increased

recognition of Indigenous rights internationally⁷⁶, they deny the reality contained within *Mabo* that 'Aboriginal law does now run in Australia'.⁷⁷ As Michael Dodson suggests, rather than continue to rely on them, we 'need to be moving away from legal theories based on discrimination and looking at the day-to-day realities of indigenous people'.⁷⁸ Yet consistent and strident assertions of Aboriginal identity and sovereignty have had the effect of undermining the legitimacy and confidence of Australian identity and institutions.⁷⁹ Even as they come under sustained attack (and because of such 'attacks'), the triumphal narratives of old are clung to by those who see their very identity at stake – from the Prime Minister down. However, we cannot replace one exclusive narrative with another if we are to promote a cohesive society. As such, Richard Mulgan suggested, 'what is needed is a theory of constitutional legitimacy that equally legitimates Aboriginal rights *and* the general citizenship rights of all Australians and the institutional framework that creates and supports these rights'.⁸⁰

It is apparent that many Aboriginal aspirants seek recognition of both the distinct rights *and* the 'general citizenship rights' Mulgan speaks of. Yet the expression of a distinct political status also assumes the right to choose the relationship Aboriginal people have with(in) this institutional framework. Dialogue on this subject, such as it is, has been constrained by those

⁷⁶ Perhaps the most prominent recent moves in the increasing globalisation of the 'Indigenous rights movement' have involved the development of the UN Draft Declaration on the Rights of Indigenous Peoples, and the establishment of a Permanent Forum on Indigenous Issues, whose first session was held May 13-24, 2002. See <http://www.unhchr.ch/indigenous/main.html>

⁷⁷ Barbara Hocking, 'Aboriginal Law Does Now Run in Australia', *The Sydney Law Review*, vol. 15, no. 2, 1993.

⁷⁸ Michael Dodson, 'Human Rights and the extinguishment of native title', in Eliot Johnson, Martin Hinton and Daryle Higney (eds.), *Indigenous Australians and the law*, Cavendish Publishing, Sydney, 1997, p.165.

⁷⁹ Thus, Peter Beilharz suggested at the end of the 20th century, Australia is 'an unhappy country, neither relaxed nor comfortable except in the immediate sense'. Peter Beilharz, 'Australian Civilisation and its Discontents', *Thesis Eleven*, no. 64, February 2001, p.65.

⁸⁰ Richard Mulgan, 'Citizenship and Legitimacy in Post-colonial Australia', in Nicolas Petersen and Will Sanders (eds.), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities*, Cambridge University Press, Cambridge, 1999, p.186.

wishing to maintain current power relations, but at a deeper level by the failure to recognise Aboriginal status as a distinct people. In this context, Tatz's call – some three decades ago – for a new framework 'for and about Aborigines' remains apt. He felt the need

...to find a framework and the right words with which to get across *a perception of people* – a consciousness and an attitude – different from that which has kept Aborigines inferior, aberrant, inept, oppressed, depressed, suppressed both in image and in reality... I see an urgent need for a new frame of reference for and about Aborigines.⁸¹

There is no easy formula for altering the 'perception of a people', particularly when it is informed by centuries of prejudice. Yet for 30 years Aboriginal peoples have been arguing for a 'new framework' which has the potential to facilitate such a shift. In political terms, it is the shift from 'consultation' to 'negotiation' that can only come about if Aboriginal peoples are seen as worthy of being, in Stanner's words, a 'full negotiating legal person *vis a vis* the Commonwealth'.⁸² Aboriginal peoples have consistently argued for a distinct political status, yet have been denied a hearing primarily due to non-Aboriginal perceptions of them as 'less than', and latterly 'the same as'. The circularity of Indigenous-state relations in Australia in the last 30 years suggests the need for some sort of 'circuit breaker' which can transform both non-Indigenous perception, as well as Aboriginal status.

The treaty process offers the potential for just such a national conversation about the just status of Indigenous peoples. While not proposing a treaty as a 'solution', the next chapter outlines the basis of a treaty relationship as a viable alternative to current arrangements which are ultimately based on statist, hierarchical, unitary notions that have denied the rights of Indigenous peoples as peoples in Australia. The establishment of a treaty relationship, reliant

⁸¹ Colin Tatz, *Aborigines and Uranium and other Essays*, Heinmann Educational Australia, Richmond Vic, 1982, p.5.

⁸² Rowley, *Recovery*, p.42.

as it is on an ongoing dialogue between peoples, offers the potential not only to transform the status of Aboriginal peoples, but to facilitate the radical alteration that appears necessary in the perception of non-Aboriginal peoples.

That frame of reference cannot continue to be determined by ancient prejudices. Echoing Dodson's plea for a theoretical framework that addresses the Aboriginal reality, Michael Detmold noted:

We have made Aboriginal Australians citizens by our Constitution. But that is just our idea. A treaty stretches beyond the idea of Constitution into the reality of people in place.⁸³

It is towards an examination of this treaty relationship that I now turn.

⁸³ Michael Detmold, 'Australian law: freedom and identity', *Sydney Law Review*, vol. 12, March 1990, p.563.