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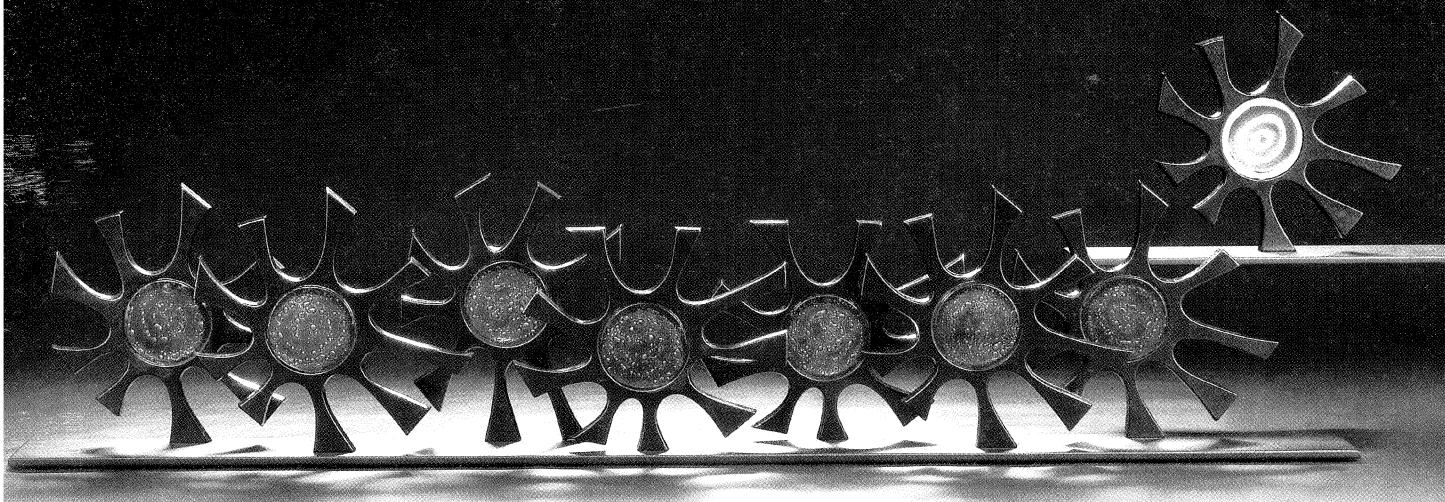
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INDIGENOUS LAW BULLETIN

JUNE / JULY 2008, Volume 7 / Issue 6



SPECIAL FORUM: RECONCILIATION AND CONSTITUTIONAL CHANGE
MAKING THE CASE FOR CONSTITUTIONAL REFORM
NATIONAL REPRESENTATION
RECONCILIATION: RHETORIC TO REALITY, PROMISE AND PROGRESS

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GOVERNMENT EXPROPRIATION FOR PRIVATE PROFIT

HITS ABORIGINAL LAND HARDEST

by Sean Brennan

Business often wants private land to run its operations and make a profit. But what if it cannot persuade a homeowner to sell up and move out for a commercial price? Should it be able to tap government on the shoulder and get it to use compulsory acquisition powers to turf out the owner?

It is a controversial idea. The makers of the popular Australian film *The Castle* knew that. Millions of viewers cheered for Darryl Kerrigan and his family in their fight against a corporate airport expansion. The NSW Planning Minister, Frank Sartor, knows it too. He has just backed down from proposals that would have authorised private-to-private transfers, using the compulsory acquisition powers of government.

The heat from the controversy proved too much for Sartor. It is politically embarrassing to look like you are siding with developers against the little guy. It is also difficult to get changes like this through the Parliament, especially when you do not control the Upper House.

That is how it should be. If a government wants to break the tradition of only using acquisition powers for public benefit, like roads, schools and hospitals, then it should have to make it as plain as day in legislation and run the gauntlet of public opinion.

That is exactly the attitude adopted by our common law tradition. Whether a pure private-to-private transfer is even possible depends on the local constitution. But if it is, the courts have said they interpret even wide powers of compulsory acquisition in a very strict fashion. If the words 'public benefit' or 'public use' are not there in the statute, the courts will often find they are necessarily implied.

This rule of statutory interpretation is canny judicial policy. Politicians tend to shy away from expressly authorising expropriations for private enrichment. The embarrassment factor works. The potential for cronyism and political corruption is also reduced.

However, Native Title holders in the Northern Territory are doubtless disappointed to discover that they cannot rely on this strong legal tradition of property protection. In a decision handed down in May 2008 by the High Court (*Griffiths v Minister for Lands, Planning and the Environment* [2008] HCA 20), the majority said that government powers could be used to force a private-to-private transfer on Native Title land.

After the Howard government made controversial changes to the *Native Title Act* in 1998, the Northern Territory Government, led by Shane Stone, changed their local land acquisition statute. It created a very wide acquisition power without spelling out that the power included private-to-private transfers.

The Government then issued dozens of compulsory acquisition notices. For Aboriginal people, unalienated land is amongst the precious remaining stock of recoverable country not taken after more than 200 years. But the Territory experience shows that, politically, it is precisely this category of land which stands in the firing line, vulnerable to being picked off and delivered into the hands of private operators. As the lawyer for the Aboriginal parties told the High Court, it may be 'that the Territory Government goes around acquiring freehold land for the purpose of allowing someone else to run a goat farm on it. It may happen, but we are not aware of it.'

There is no doubt a grey area where the distinction between public benefit and private use blurs. The courts have grappled with drawing that line when it comes to compulsory acquisitions and 'urban renewal', particularly in the era of public-private partnerships for building infrastructure. But in the Griffiths case, there was little to suggest a benefit to anyone except the commercial party who got their hands on the land. Even in the United States, where the federal government has a lot of latitude, the Supreme Court draws the line at pure private-to-private transfers.

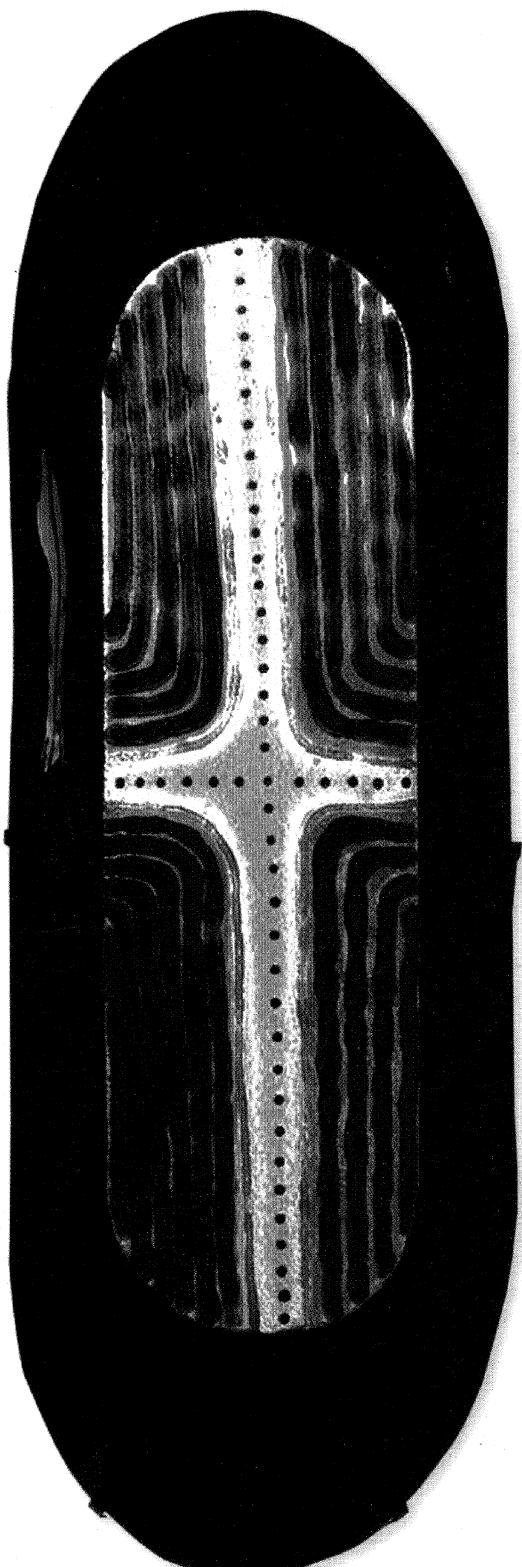
Banning such expropriations on Aboriginal land does not mean the end of economic development. It just means developers have to negotiate with Aboriginal people. Noel Pearson, a strong proponent of private economic activity, opposed recent changes to the *Queensland Aboriginal Land Act 1991* (Qld) that could have forced private-to-private transfers. He joined forces with Frank Brennan and others to lobby the State Minister. Like Frank Sartor in NSW, the Queensland Government backed down.

According to the Northern Land Council, the Territory Government issued 82 compulsory acquisition notices after the power was widened in the late 1990s. On every occasion, the land was claimed or claimable by Aboriginal people. It is the Federal Parliament that writes the rule book for extinguishment of native title in the States and Territories. It is called the *Native Title Act*. The courts have spoken and Aboriginal property rights are clearly vulnerable. The ball is now in the Rudd government's court.

Sean Brennan is Director of the Indigenous Rights, Land and Governance Project, Gilbert + Tobin Centre of Public Law and Senior Lecturer, UNSW Law School.

Euro – Glass Coolamon 2006
Sam Juparulla Wickman

*Kiln formed glass with hand painted infused enamel
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Printing Print & Mail Pty Ltd

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ISSN 1328-5475

Citation (2008) 7(6) Indigenous Law Bulletin (or ILB)

Produced with financial assistance from
the Australian Government Attorney-General's
Department

**Contribute**

The ILB welcomes articles from all interested contributors for any section of the magazine. In particular, Indigenous lawyers, paralegals and visual artists are encouraged to contribute their work for publication. Electronic submission is preferred.

Articles

Language: To ensure accessibility to a broad readership, technical and jargonistic language must be simplified into plain English. Aboriginal English is an exception to this rule but where necessary, translations will be provided in addition to the original expression.

Style: Australian Guide to Legal Citation
<http://mulr.law.unimelb.edu.au/aglcl.asp>

Word lengths (including footnotes): 1 page article 600; 2 page article 1200-1300; 3 page article 1800-2000; feature articles (maximum of 4 pages) 2400-2800.

Articles may be subject to anonymous peer review.

Art

Images of visual artworks in any medium that are suitable for reproduction in colour or black and white may be submitted for publication. Images may be submitted as slides, photographic prints, transparencies or 300 dpi electronic scans of the work. Graphics inserted in Word documents or obtained from the web are not suitable.

EDITORIAL

Since the Federal Government's Apology to the Stolen Generations, the question that frequently follows any discussion has been: what next? In particular, many people have questioned what the Apology means for reconciliation in Australia. Consequently, we at the Indigenous Law Centre have devoted this edition to exploring these questions.

Recently, Kevin Rudd flagged constitutional change as the next possible step in reconciliation between black and white Australia. Indigenous Law Centre Director, Megan Davis, writes on the difficulty of constitutional reform manifest in the historical conservatism of Australia's polity.

Pat Dodson suggested at 2020 this year that we urgently need to develop a new philosophical framework to underpin the reconciliation process. Tim Goodwin's article provides a similar perspective, eschewing the usual polemical nomenclature on unfinished business and positing the *Locke Project* — a treaty, agreement or other formal document — as the foundation in renewing the reconciliation process and the relationship between Indigenous and non-Indigenous Australia.

John Davis, an educator from South East Queensland and working with Dr Chris Sarra, writes on the role of education in reconciliation. Davis suggests a mandated national curriculum where reconciliation's symbolism can gain momentum and be truly embraced as a part of our national identity. According to Davis, a national curriculum provides a unique opportunity for our nation to develop a holistic understanding and acceptance of the rights of Indigenous people as an important part of our political, social, physical and cultural landscape.

Andrea Durbach questions the philosophical underpinning of reconciliation and argues that reconciliation has been largely symbolic in endeavours to meet an illusory objective. Durbach believes that this is a result of the failure to define reconciliation and a failure to link its progress to articulated principles for action.

Dr Sarah Maddison writes on the importance of national representation. Maddison considers the options for representation from a parliamentary option to an extra-parliamentary mechanism. Maddison explains the importance of representation for Indigenous Australia.

Sean Brennan writes an interesting piece on one of the areas of law and legislation Indigenous peoples believed

would be a key plank of reconciliation – Native Title. Native Title has been extremely disappointing for Indigenous Australians. Brennan describes in a short piece how state and federal governments have used compulsory acquisition laws to continually claw back Native Title.

Finally, Greg Marks writes on sovereignty. Marks observes that other jurisdictions have been able to reconcile Aboriginal sovereignty with the Westphalian concept of sovereignty in international law. However, Australia has failed in an attempt to live with and provide a legal and constitutional framework of Australia, though Indigenous peoples continue to understand the need for that, particularly in the context of reconciliation.

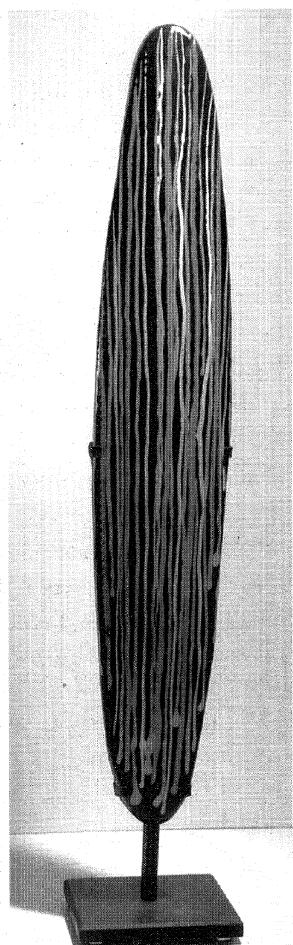
On a final note, the Indigenous Law Centre welcomes our new editor, Zrinka Lemezinka, who will produce the next edition of the *Indigenous Law Bulletin*.

The Editors

Wulu Pooku Shield 2005

Sam Juparulla Wickman

*Paint infused kiln glass on metal stand
85mm x 500mm*



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by Greg Marks

Contemporary Issues in International and Domestic Indigenous Law and Policy

is being offered at UNSW Law in December 2008. Taught by Megan Davis and Sean Brennan, this course will bring law students, legal practitioners, community organisations and public servants up to date with recent developments in international and domestic Indigenous law and policy.

For further information:
<http://www.ilc.unsw.edu.au/>

INDIGENOUS RIGHTS AND THE CONSTITUTION: MAKING THE CASE FOR CONSTITUTIONAL REFORM

by Megan Davis

Recently, Prime Minister Kevin Rudd revived John Howard's 2007 pre-election proposal to amend the preamble to the *Australian Constitution* to recognise Aboriginal and Torres Strait Islander people.¹ Rudd's announcement was prompted after Yolgnu and Bininj elders presented him with a Statement of Intent at the Federal Government's Community Cabinet meeting in Yirrkala, Northern Territory.² Prior to that, constitutional reform had been raised by participants in the Indigenous stream at the Federal Government's 2007 Summit in Canberra³ and at the Barunga Festival in the Northern Territory.⁴ In fact, it has been a perennial focus of unfinished business between Indigenous peoples and the state.

Given the presence of section 51 (xxvi) — the races power — in the Constitution that permits discriminatory legislation on the basis of race, it is a strange symmetry indeed to have a symbolic showcase like the preamble lauding the first peoples of Australia as being important to the Australian state, yet an operative provision that permits discrimination on the basis of race.⁵ Moreover, only eight out of 44 referendums have been successful in Australia's history and the difference between success and failure has been bipartisan support.

This article considers the slow momentum toward Constitutional recognition of Indigenous peoples. It will consider the difficulty in changing the *Australian Constitution* and canvass why Indigenous Australians will need to be more specific in articulating the importance of Indigenous recognition in the operative provisions of the Constitution. Indigenous peoples know that our rights are inherent and that few jurisdictions actually require Indigenous peoples to justify their recognition. We also know that the evidence is strong from comparative common law jurisdictions that constitutional recognition does result in better outcomes in employment, health, education and women's wellbeing. Yet given the inertia of the state in recognising Indigenous rights and because of the tenor of debate on Indigenous issues in Australia, we must establish the causal relationship between rights

recognition and improving the wellbeing of Indigenous peoples' lives.

Therefore, this paper argues that in advocating for constitutional reform, we need to emphasise the connection between dealing with disadvantage - an urgent and immediate priority - and the 'big picture' in terms of addressing unfinished business between Indigenous peoples and the state. The Indigenous community is diverse enough in leadership and expertise and committed enough to work toward both outcomes.

CONCEDING LITTLE GROUND

The Australian state has conceded little ground to the first peoples of this continent in terms of its public law and public institutions. While *Mabo* continues to be cited internationally as an example of Australia's progressive regard for Indigenous rights, Indigenous Australians know that what the High Court determined in *Mabo* and its statutory expression was diminished by Parliament and through flawed interpretation by the common law.⁶

The recent Apology to the Stolen Generations is another example of the state conceding little ground.⁷ Prior to the Apology, the preoccupation of the media, the Government and the Opposition was to assure Australians that no compensation would be granted. The state would cherry-pick the recommendations of *Bringing Them Home* and international principles of reparation to provide an apology without compensation. The state wanted to make a gesture without having to give anything up. This is despite the fact that the state had in the past made reparation without link of direct responsibility. For example, in 2001-2002, John Howard committed *ex gratia* payments of \$25,000 to Australian Defence Force prisoners of war, civil internees and detainees or their surviving spouses.⁸

Similarly, the public conversation about the preamble proposal to recognise Aboriginal and Torres Strait Islander peoples is based on a similar premise - that recognition is acceptable as long as it has no effect or creates no legal rights. Moreover, it will be acceptable as long as the Australian

state doesn't have to give anything up. As Tony Abbott argued about the preamble proposal, he is supportive as long it is done, 'without in any way detracting from the rôle of the rest of us'.⁹ Thus, the idea of apologising to Indigenous peoples or recognising Indigenous peoples in the preamble can only be done as long as it doesn't 'detract' from the dominant historical narrative and mythologies of Australia. Brendan Nelson even extraordinarily made this point in his Stolen Generations speech:

In offering this apology, let us not create one injustice in our attempt to address another. Let no one forget that they sent their sons to war, shaping our identity and place in the world. One hundred thousand in two wars alone gave their lives in our name and our uniform, lying forever in distant lands; silent witnesses to the future they have given us ... Theirs was a mesh of values enshrined in God, King and Country and the belief in something greater than yourself ... Neglectful indifference to all they achieved ... will be to diminish ourselves.¹⁰

Thus, despite the Apology being a day for a specific group in the Australian community, the Stolen Generations, the gesture couldn't occur without an assurance that it doesn't impinge upon Australia's established narrative about itself.

SISYPHEAN TASK: CONSTITUTIONAL REFORM

The task of amending the Constitution is fraught with difficulties, as Australia has a rigid Constitution that is almost impossible to amend. Section 128 of the *Australian Constitution* requires the amendment proposal to be passed by a majority of people in a majority of states and an overall national majority. Since Federation in 1901, Australia's Constitution has only been amended eight times out of 44 attempts.

One of the most important factors in successfully changing the *Australian Constitution* is manufacturing bipartisan support. Any proposal requires both sides of politics being on side. The Australian Labor Party has the worst record as a political party when it comes to constitutional change. They have propositioned 25 of the 44 amendment proposals and the last time they succeeded was in 1946.

Many Constitutional lawyers also speculate that the bipartisan support is required because of the poor civics knowledge of Australians, who have a tendency to *vote no if they don't know*. Comparatively speaking, Australians have a poor knowledge of their legal and political system and this is particularly damaging when it comes to ideas of reform in Indigenous affairs.¹¹ A recent ANU study found that 63.5 percent of Australians thought the High

Court could change the Constitution or didn't know how it was changed.¹² Therefore, where there isn't bipartisan support, any level of disagreement will confuse voters particularly when 'Australians have little understanding of how the current system of government works'.¹³

It has been 31 years since the *Australian Constitution* has been altered and this is the longest period Australia has gone without any Constitutional amendment. It may be likely that the next attempt to alter the Constitution is on the issue of four year parliamentary terms, which has already attracted support from both sides of politics. Furthermore, Rudd has also indicated his intention to hold a referendum on the Republic following national plebiscites dealing with questions of whether Australians want to become a republic and what model they want. It is clear there is growing momentum for Constitutional reform and a sense that the current compact as drafted is ill-suited to our modern democracy. Given the already crowded agenda, Indigenous peoples have to carefully consider how we fit with those proposals.

'KIDS CAN'T EAT THE CONSTITUTION': MAKING THE CASE FOR CONSTITUTIONAL CHANGE

The preamble proposal may get support because the very attractive marketing message for Australians would be that it will provide Indigenous peoples with no rights and have no impact upon their own rights. The preamble has no legal effect and has virtually no interpretive value in terms of the operative provisions of the Constitution.¹⁴ Rudd immediately assumed the Yolgnu elders were talking about preambular recognition, however, the Yolgnu elders weren't simply speaking about preambular recognition – they were talking about recognition of their pre-existing land rights in the body of the Constitution. Any proposal to have pre-existing Indigenous rights to land recognised in the Constitution will require a more targeted, long-term campaign that must seek to overcome poor civics knowledge, community racism and division and the idea that it involves giving rights to one group over another.

Keeping in mind the importance of strategy in effective constitutional reform, the strongest argument to the recognition of Indigenous rights in the Constitution must be one predicated upon the idea of democracy and the rule of law. This is because in a utilitarian democracy like Australia, a race-based critique is regarded as dissent and is neutralised by 'widespread apathy' and denigrated by those powerful agendas who have most to lose from a liberal polity that welcomes and accommodates diversity. Indigenous legal activists' use of democratic principles and

the rule of law was critical to the successful adoption of international standards on Indigenous rights – the *United Nations Declaration on the Rights of Indigenous Peoples*.¹⁵ It is a powerful argument to match the contemporary democratic *milieu*.

A well planned strategy designed around the language of ‘democracy’ rather than ‘sovereignty’ is suggested not to diminish the claim of sovereignty nor to alter the substance of the claim but because it is *realpolitik*. Any long-term strategy needs to be realistic about Australian politics and avoid the simplistic and divisive debates of state sovereignty, national borders and security. The language of political participation will be more effective in an era of ‘democratisation’, than continuing the post-colonial struggle for the recognition of sovereignty which gets mired and distorted in semantic debates.

CONCLUSION

In shifting the ground in public debate, Indigenous Australia needs to be strategic about adopting a new direction in advocacy for self-determination as underpinned by the *United Nations Declaration on the Rights of Indigenous Peoples* and informed by an emerging right to democracy at international law. Self-determination is regarded as the ‘oldest democratic entitlement’.¹⁶ This is a powerful argument that fits within the framework of the rule of law and equality for all.

For this reason, one of the strongest cases for Constitutional change is deleting or amending the races power. It is unacceptable for a modern liberal democracy like Australia to have a races power in the Constitution. Particularly with nascent discussions about a Charter of Rights and political rhetoric about Australian respect for human rights and the rule of law, a races power would be at odds with a non-discrimination clause in a statutory Charter. A more significant proposal for Indigenous peoples would be the repeal of the races power and the inclusion of a non-discrimination and equality provision in the Constitution. Given the universal appeal of a national commitment to non-discrimination and equality as underpinning our popular sovereignty, this proposal is more likely to succeed at a referendum.

The success of the wedge between ‘practical’ measures and ‘rights’ measures is possibly related to the failure of those advocating a rights approach to establish a causal relationship between Indigenous rights and improved outcomes in education, health or employment. It is not enough for advocates to amorphously refer to ‘Canada’ or ‘the Harvard project’ as evidence of that link.

Indigenous Australians have to emphasise the importance of addressing disadvantage immediately and urgently while also pursuing recognition of rights. Any strategy for Constitutional change needs to be well orchestrated and tailored to an Australian polity, to Australian conditions. It needs to appreciate the low level of civics knowledge, the limited media forum in which to have these debates and the stamina required for such a long-term project. It will require the Australian state to give something up, but it will require us to give ground as well. The hard work has only just begun.

Megan Davis is Director of the Indigenous Law Centre and Senior Lecturer in the Faculty of Law, University of New South Wales.

- 1 Communique to the Australian Government from Yolngu and Bininj Leaders at Yirrkala (23 July 2008) *Yolngu and Bininj Leaders' Statement of Intent* (Copy on file with Author); See, eg, Natasha Robinson, ‘Rudd revives push to recognise Indigenous rights in Constitution’, *The Australian* (Sydney) (23 July 2008) <<http://www.theaustralian.news.com.au/story/0,25197,24065029-601,00.html>>.
- 2 Ibid.
- 3 See, *Options for the future of Indigenous Australia* <http://www.australia2020.gov.au/docs/final_report/2020_summit_report_7_indigenous.doc>.
- 4 ABC, ‘Indigenous leaders call for Constitutional recognition’ *ABC News* (Sunday June 8) available at <<http://www.abc.net.au/news/stories/2008/06/08/2268308.htm>>.
- 5 Section 51 (xxvi) *Commonwealth of Australia Constitution Act 1900 (UK)*. See generally, *Kartinyeri v Commonwealth* (1998) 152 ALR 540.
- 6 *Mabo v Queensland (No 2)* (1992) 175 CLR 1; For example the common law’s misinterpretation of section 223, *Native Act Act 1993* (Cth).
- 7 The Hon. Prime Minister Kevin Rudd, ‘Apology to Australia’s Indigenous peoples’ (Speech delivered at House of Representatives, Parliament House, Canberra, 13 February 2008) available at <http://www.pm.gov.au/media/Speech/2008/speech_0073.cfm>.
- 8 Megan Davis and Andrea Durbach, ‘Rudd must make amends’ *The Canberra Times* (Canberra), 3 December 2007.
- 9 ‘Coalition concerned over Indigenous rights in the Constitution’ *The World Today*, Thursday 24 July, available at <<http://www.abc.net.au/worldtoday/content/2008/s2313335.htm>>.
- 10 The Hon Dr Brendan Nelson MP, Leader of the Opposition, ‘We are sorry – Address to Parliament’, Speech delivered at Parliament of Australia, Canberra, 13 February 2008.
- 11 Civics Education Group *Whereas the People ... Civics and Citizenship Education — Report of the Civics Expert Group* Australian Government Publishing Service, Canberra 2002; Megan Davis, ‘Civics Education and Human Rights’ (2003) *Australian Journal of Human Rights* 11.
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- 13 George Williams, ‘Why Australia kept the Queen’ (2000) 63 *Saskatchewan Law Review* 477-501.
- 14 Anne Winckel, ‘The Contextual Role Of A Preamble In Statutory Interpretation’ (1999) 23 *Melbourne University Law Review* 184; Mark McKenna, Amelia Simpson and George Williams, (2001) 24 ‘First Words: The Preamble To The Australian Constitution’ *University of New South Wales Law Journal* 382-400.
- 15 G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).
- 16 Thomas Franck ‘The Emerging Right to Democratic Governance’ (1992) 86 *American Journal of International Law* 46, 52.

NATIONAL REPRESENTATION:

WHY IT MATTERS

by Sarah Maddison

Since the demise of the Aboriginal and Torres Strait Islander Commission (ATSIC) in 2005, Aboriginal and Torres Strait Islander people have been without national representation. Many Indigenous leaders and activists have identified the formation of a new national and representative Indigenous organisation as a political priority. Such an organisation is seen by many as essential if Australian Indigenous peoples are again to have an effective voice in national politics.

Historically, the development of national Indigenous organisations coincided with the rise of identity politics and new social movements in the 1960s and 1970s. These movements saw questions of 'representation' acquire a new dimension. Many groups in Australian society, including Aboriginal and Torres Strait Islander groups, strongly asserted their collective identity and argued that it was their democratic right to see members of their group represented on decision-making bodies and in parliaments. By the 1970s, the idea of what is termed a 'politics of presence'¹ had begun to be widely accepted.

The 1967 referendum, which gave the Commonwealth government the power to legislate with respect to 'the Aboriginal race', also saw the focus of the Aboriginal movement shift to the national arena in an effort to transform the success of the referendum into real policy commitments.² As a result, Aboriginal people have had some form of elected national representation almost continuously since the 1970s, first with the National Aboriginal Consultative Committee (NACC), 1973–1977, then its replacement, the National Aboriginal Conference (NAC), 1977–1985. Two years after the NAC was wound up, the Hawke Labor government announced their intention to develop another representative body, which eventually began operation as ATSIC in 1990. The void left by ATSIC since its abolition by the Howard government in 2005 has been of great concern to many Aboriginal people around the country and meetings and other discussions regarding its replacement have been held since its termination was announced in 2004.

REPRESENTATION AND ITS CHALLENGES

Representation, in various forms, is considered to be central to a system of parliamentary democracy.³ Without representation, marginalised groups have no possibility of a voice in the political process and no say over the policies and programs that impact directly on their lives. Groups in the community may be represented in parliaments or through what is known as 'extra-parliamentary' representation, or the representation of particular groups and interests in non-government organisations and peak bodies.

Both types of representation have strengths and weaknesses. Representation in parliament gives groups a direct say in political debate and the passage of legislation. However, the constraints of party membership and the insistence by the major parties that all members of parliament abide by policy decisions even if they personally disagree with them (what is known as a 'binding caucus') can restrict the influence of critical voices within the parliament.

In contrast, extra-parliamentary representatives may have a high degree of independence, but little in the way of meaningful influence on policy, legislation and service delivery. Extra-parliamentary representative organisations may go in and out of favour as governments come and go or may become coopted or 'captured' by government over time, especially where government funding is their main source of income. Nevertheless, government funding is important for many extra-parliamentary representative organisations, and it makes sense for reasons of equity that governments fund these organisations in their advocacy role. Groups representing business and industry can already afford to represent their interests, but more marginalised and disadvantaged groups are likely to need government funds to do so.⁴

Aboriginal representation also has its own challenges. Tim Rowse has described what he calls the 'Janus-faced'⁵ dynamic of contemporary Aboriginal politics. Rowse notes the tendency to speak of Aboriginal political representation as though Aboriginal people's most important political

relationships were with the state rather than with each other. Rowse instead suggests the need for Aboriginal political leaders and activists to engage in a politics which 'faces two ways'. In other words, Aboriginal political representatives, whether in parliament or in representative organisations, must engage with both the political mainstream and with other Aboriginal people and communities.⁶

PARLIAMENTARY REPRESENTATION

There have only ever been two Indigenous people in Australia's Federal Parliament. The first was Neville Bonner, a Liberal Senator for Queensland from 1971 to 1983. The second was Aden Ridgeway, a Democrat Senator for New South Wales from 1998 to 2005. Some contemporary Aboriginal leaders and activists feel strongly that greater parliamentary representation may offer an alternative form of representative voice for Aboriginal people. Advocates for this form of representation have suggested that Australia pursue a system of 'reserved seats' in parliament, much like the Maori have in Aotearoa New Zealand.⁷ At the same time, however, the notion of seeking representation in non-Aboriginal institutions of government is deeply conflictual for many Aboriginal people. An Aboriginal representative in an Australian parliament may have to make sense of two apparently conflicting positions; on the one hand as a member of a sovereign Aboriginal nation, and on the other as an Australian citizen representing other Aboriginal and non-Aboriginal citizens in parliament.

From at least the 1930s, Aboriginal leaders and activists have expressed a desire for greater involvement in government and representation in parliament (Merlan 2005: 481).⁸ Today, however, there is a more ambivalent assessment of the capacity for parliamentary representation to actually deliver meaningful change. Accepting the constraints of both party policy and the rules of parliament itself may in fact act to restrict the autonomy of these representatives. But these views are not universally held. The HREOC Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, considers it a 'travesty' that there are no Aboriginal people in the Federal Parliament and argues that strategies must be developed to increase this representation because, 'The time for making decisions on behalf of Indigenous people is long gone'.⁹

EXTRA-PARLIAMENTARY REPRESENTATION

While parliamentary representation interests some, the greater consensus among Aboriginal people is for a new national representative body outside of the nation's

parliaments and outside of the control of government. Extra-parliamentary representation that provides a voice for marginalised groups and interests in Australian society is a necessary component of a healthy and robust democracy. Representative organisations are 'indispensable intermediaries' between community and government, conveying important information about the needs and preferences of a wide range of groups in the community to governments that would otherwise remain remote and uninformed.¹⁰ These organisations provide a conduit for otherwise marginalised citizens to make claims on government between elections. Indeed, it is a legitimate expectation that a meaningful democratic system will accord citizens the right and opportunity to be consulted between elections about the work of government.¹¹ Representative organisations provide one very important consultative mechanism that contributes to democratic governance.

There are questions, however, about what a new national representative body should do once created. Many people consider that a significant factor leading to the downfall of ATSIC was the requirement that it be a provider of services as well as a representative body. Many Aboriginal leaders and activists believe that ATSIC's demise was primarily brought about by its service delivery role, muddling its function as a representative body that could scrutinise and criticise government with the work of government itself. All are eager to avoid such pitfalls again, and are determined to develop a more autonomous national body that can neither be created nor abolished by the government of the day. While not everyone agrees that this was a problem, it seems unlikely that a new representative body would take on a service delivery role. Instead, a new extra-parliamentary representative organisation is likely to focus on advocacy, research, and the scrutiny of government policy.

Another key challenge involved in the formation of a new Indigenous representative body will be the method of selection of representatives. This issue goes to the heart of the question of 'representation': Who does an extra-parliamentary representative body claim to represent? Have they been chosen by popular votes or by some other representative criteria? Does whatever method used to select representatives ensure that they are seen as having a legitimate capacity to 'speak for the people'? For Aboriginal people, this issue is complicated by questions of local landholding, regional difference, and the need to represent a range of internal constituencies such as women, young people, those in remote communities and those in urban areas. This complexity suggests to many that a new system

of democratically elected representatives, like in the old ATSIC model, will not work. As Lowitja O'Donoghue once argued in a report to government on the workings of the NACC, a nationally elected advisory body 'is more likely to produce politicians than advisors'.¹²

Still, elected representation remains important to many people. For some, there is a retrospective recognition of what the mode of representation available under ATSIC had to offer. For others, there is a desire to have a direct say about who will represent them on the national political stage. Either way, the need for a strong national voice for Aboriginal people is clear.

FINDING A NEW VOICE

A better future for Aboriginal people in Australia does not rest with government alone. In order to make the most of the opportunities that a new government presents, Aboriginal leaders and activists must also take stock and rebuild. One legacy of the Howard era is the disarray in national representation created by the abolition of ATSIC. Around the country, Aboriginal people emphasise the need to focus on rebuilding their national representation and developing a strong national voice with which to speak to the new government.

The Rudd government has committed to developing a new national representative body, while research undertaken by the Centre for Indigenous Studies at the Australian National University in a discussion paper produced by the Aboriginal and Torres Strait Islander Social Justice Commissioner will form the basis for national consultation towards this goal. But the complexity of Aboriginal political culture and the diversity of Aboriginal people around the country will make rebuilding a national representative body challenging. What this process needs, according to Patrick Dodson, is a period of rebuilding a national leadership that will necessitate Aboriginal people going 'back to their roots' in order to 'acknowledge the inherent leadership that emerges out of culture'.¹³

A small population, like the Indigenous population in Australia, finds it harder to accommodate diversity and deal with disagreement than does a larger population. In a small population, there is a tendency to individualise disagreements rather than acknowledge the inevitable diversity of views and ideology. People become divided and, as Irene Watson suggests, Aboriginal people tend to 'turn on each other' in a context where the small population size is compounded by the inter-generational impacts of colonisation.¹⁴

Without a representative organisation, however, the fragmentation caused by political conflict only exacerbates the stress and frustration that many leaders and activists experience. To build a sustainable national representative body will take time and care, but it is work which will be crucial to the futures of Indigenous peoples in Australia.

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RECONCILIATION:

MOVING FROM RHETORIC TO REALITY THROUGH THE EDUCATION REVOLUTION

by John Davis

On the historic morning of 13 February, 2008, the newly elected Labor Prime Minister, Kevin Rudd, tabled a motion in Federal Parliament apologising to Australia's Indigenous people for the Stolen Generations and for past laws and policies which had 'inflicted profound grief, suffering and loss' (Rudd, 2008). This formal apology, an important moment in our shared history, allowed Australians to be moved with the power of this Prime Minister's words. This apology has been widely perceived and portrayed as a transformative experience for our nation. However, much more must be achieved if we are to realise the true extent of this post-apology potential. Reconciliation is not yet a reality.

At this moment in our nation's history, a significant step has been taken through the abandonment of Howard's ultra-conservative regime and the embracing of Rudd's reconciliation agenda. Reconciliation was the one tool that Howard's conservative party could use to clearly separate themselves from the political left. Howard's abject refusal to apologise, his (and now Nelson's) perpetuation of the 'don't blame me for the past' and 'the main perpetrators of removal meant well' mantra belittled and silenced the very real hurt, fear and loathing that former government policies placed on Aboriginal identity, spirituality and sense of self (*Bringing Them Home* report, 1997). The 'sorry' agenda was expertly used by Howard to polarise Australian society on Indigenous issues.

Community groundswell through lobby groups such as Australians for Native Title And Reconciliation (ANTAR) and Council for Reconciliation (now formed as Reconciliation Australia), in collaboration with other government and non-government organisations fought back in the Howard era. This 'sorry' agenda was symbolically placed in the hands and feet of the Australian people. Visual cues of awareness and protest were embodied in the 'Sea of Hands' (ANTAR) event and the memorable 'Bridge Walks' – marches across major bridges of every capital city in 2000 (Reconciliation Australia). Rudd's apology in 2008 ratified the purpose of these

political protests and rung true for so many Australians, both Indigenous and non-Indigenous.

In spite of its decisive inaction on Indigenous affairs for over a decade, the Howard administration could not ignore the complex realities lived by Indigenous Australians in his term at office. Australia's internationally embarrassing reputation for allowing its Indigenous people to live in conditions comparable to those in the poorest developing nations finally gained Howard's national attention through COAG forums in 2006–07 and the auspice and action of reports like *Little Children are Sacred* 2007 (Northern Territory Government). This led to Howard's one major attempt to rectify this inequality and disadvantage through the much debated Northern Territory Intervention.

So what's changed? Has there been a Rudd revolution with reconciliation – 'saying sorry'? Despite the watershed moment of Rudd's apology, the Howard era still echoes in the ears of our current political architects and still impacts daily upon Indigenous Australians. The continuation of his predecessor's Intervention does not allow Rudd to clearly separate himself from Howard's past policy processes.

It was through this very strategy that Howard demonstrated the political might and will of the coloniser. To no other group within Australian society, apart from the unfortunate asylum seekers imprisoned in our refugee camps, has the government exercised its political will upon its own people. Howard's calculated strategy recreated the dialogue surrounding the accountability of families and communities. It was through this Intervention that in the land of the fair go, it became apparent that you must be fair to get a go.

It can be argued that the challenges facing many Indigenous communities are also being experienced in low socioeconomic areas across the nation – from the western suburbs of Sydney to the southern suburbs of Brisbane to the outer suburbs of Perth. If interventions are 'the go', that is the order of the day, then fair go, let's

intervene for all challenged Australians. Call a spade a spade – disadvantage in non-Indigenous communities is just as insidious, dangerous and devastating as it is in Indigenous communities. Let's make all Australians financially accountable for their children's actions and develop alcohol and gambling restrictions for any community that is federally identified as disadvantaged or suffering from social isolation.

In Australia, unlike most of our OECD counterparts, an individual's postcode predetermines an individual's educational opportunity and performance (McGaw, 2008). Regardless of race, that is if you are unfortunate enough to live in a postcode that is classified as low socioeconomic, you are statistically at greater educational disadvantage and you are more likely to fail. It just so happens that the majority of Australia's Indigenous populations also live in these postcodes.

Reconciliation can only be realised once these core issues are addressed. The 'close the gap' rhetoric must be actioned through real people, realistic policy and collaborative process. 'New' ways of doing business requires governments and Australian society to deeply explore how their own practices, beliefs and values have led to this deficit. True reconciliation can only begin in education. Reconciliation is a process that involves cultural indoctrination. It is not a strategy. It is definitely not an intervention. Reconciliation can only become a reality through meaningful dialogue and collective, forward-looking sense making. Taking children away and garnishing incomes has not worked in the past and it is difficult to envisage how it could again in the future.

The deficit data that we see daily in educational settings across the nation must be acknowledged for what it truly means. The below benchmark results in state and national tests, decreasing attendance rates and significantly lower retention rates for Indigenous students are glaring signposts that tell us that our education systems' exploits are unsuccessful. Education has failed. Yet we persevere – we continue to undertake the same old programs and curricular and express our surprise (are we really?) when Indigenous students continue to fail. As professionals, we have become quite good at justifying these results through the development and perpetuation of folkloreish rhetoric – Indigenous students perform poorly since that's part of their identity, a malaise they suffer from being colonised. These vilifying values undermine the intent of any government policy. This is the battleground that needs to be the focus of Rudd's reconciliation agenda. Indigenous students do not perform poorly in today's

socially just society because of a lack of government policy or rhetoric. Indigenous students perform poorly in today's socially just society because the quality of our teaching is not as rigorous as it needs to be.

'Teacher bashing' is not the intent of this paper and would only defeat the purpose of raising these issues. What must be done, however, is to get more real about who and what we are talking about. This intense discussion must ensure that we apportion equal responsibility for our roles in 'closing the gap' between our Indigenous and non-Indigenous students. If the expectation is that our education systems are perfect and that all we need is for Indigenous people to 'see the light', to change their ways with whatever means necessary, then this gap will never be closed; practical reconciliation can not be achieved.

Shared responsibility through culturally appropriate engagement of all community members should shift to shared accountability (Sarra, 2004). The most telling national and international data indicates that it is at this nexus of teaching space – the classroom – that the most bridging occurs, that the gap is closed. The teacher is a vital, essential element in this process. It is here that government, communal and individual attention should be focussed.

The return of the national curriculum agenda (currently being drafted by Barry McGaw's National Curriculum Board) presents Rudd with an interesting opportunity to join the battlefield in the fight for practical reconciliation. It is here through a mandated national curriculum where reconciliation's symbolism can gain momentum and be truly embraced as a part of our national identity. It may take a generation, but this national curriculum provides a unique opportunity for our nation to develop a holistic understanding and acceptance of the rights of Indigenous people as an important part of our political, social, physical and cultural landscape. This national curriculum provides the potential to unearth Australia's hidden history – to silence the whispering in our hearts (Reynolds, 1998) that Howard so vehemently denied.

This national curriculum could give voice to our nation's power relations, the colonial power relations which still surface on occasion. Knowing, speaking and appreciating our shared history is an essential part of the healing process. This national curriculum presents a unique opportunity to craft a curriculum that moulds Australia's future; a curriculum for reconciliation; a curriculum for collective understanding. The power of that curriculum and the pedagogy that follows, however, can only be as

powerful as the depth of consultation and investment in social capital that occurs through its development. The power of that curriculum embodies the spirit of the 'bridge walkers'.

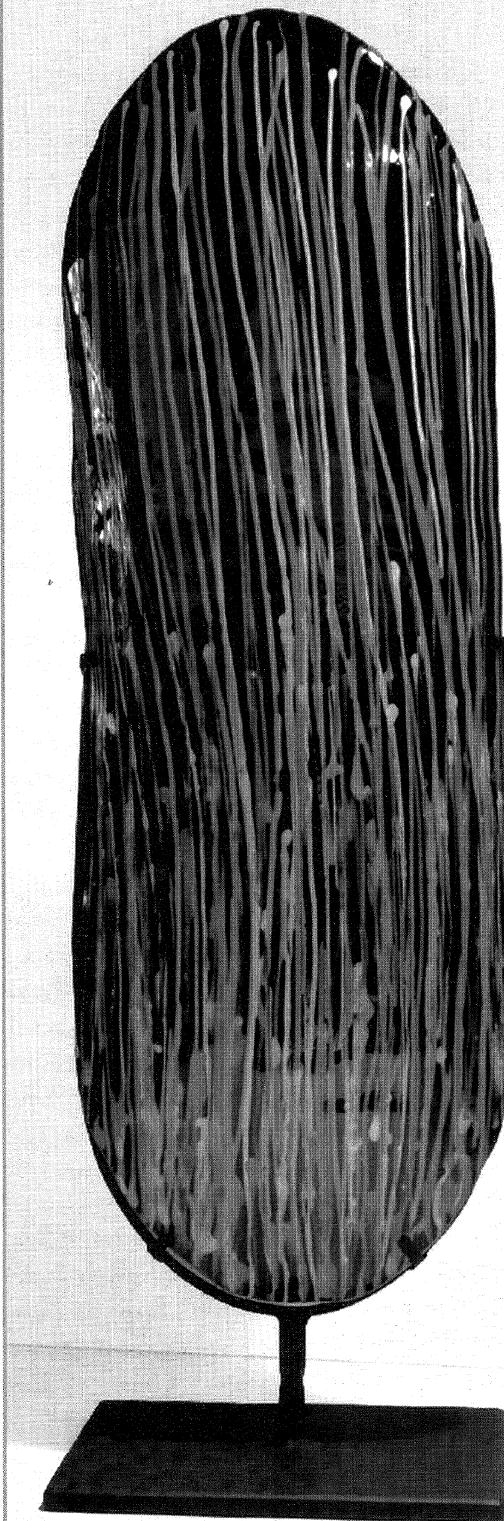
That's where our future lies – in a society that is educated and well versed on the Indigenous and non-Indigenous political and historical spectrum. Now is the time for Australians to construct our future. Education provides the forum in which this construction can occur and in which meaningful, measurable results can be delivered. Collective and collaborative understanding and recognition of the past, present and future, however, lines the pathway along which education needs to traverse if it is to achieve this real reconciliation. How we now act as a nation will determine whether or not we are ready to undertake this transformation; whether or not we are ready to realise the potential of Rudd's apology – shifting from rhetoric to reality.

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Wulu Pooku Coolamon 2005
Sam Juparulla Wickman

Paint infused kiln glass



'LITTLE MORE THAN A CLANGING GONG': THE PROMISE AND PROGRESS OF RECONCILIATION

by Andrea Durbach

What is reconciliation to us? Nothing much has changed in Gove where I live. Reconciliation is a big white fella word ... I was on Sydney Harbour Bridge when everybody walk across and they did that for 'reconciliation'. I don't understand your law. It always changes. The only thing that stays the same for the white man is that he never listens to our law, and our kids keep getting locked up with that mandatory sentencing. I don't understand your reconciliation.

Mr Barnaby Wunungmurra, submission to Senate Inquiry into Progress Towards National Reconciliation, 2003¹

(N)ot all Aboriginal people and Torres Strait Islanders are convinced about the process (of reconciliation). Some ask why should they reconcile when they've done nothing wrong - the wrongs have been done to them.

Reconciliation: Australia's Challenge, Final Report of Council for Aboriginal Reconciliation, 2000²

In its final report to Prime Minister John Howard in December 2000, the Council for Aboriginal Reconciliation ('the Council') concluded that after a decade of undertaking research and developing strategies for reconciliation between Aborigines and Torres Strait Islanders and 'the wider Australian community', 'true and lasting reconciliation (was) not a foregone conclusion' and that despite some progress, reconciliation was 'a long, winding and corrugated road, not a broad, paved highway'.³ Despite the Council's ambitious desire of a 'formal process of reconciliation between Aborigines and Torres Strait Islanders and other Australians' by the centenary of Australian Federation (2001), only symbolic endeavours to meet an illusory objective have emanated over a 10-year period. This is due, not to the impossibility of the task, but to an initial failure or reticence to define reconciliation and link its progress to articulated principles for action and designated outcomes. Such conclusions are grounded in the hopes and needs of those for whom reconciliation might offer some real prospect of healing.

The final recommendation of the 1991 Report of the Royal Commission into Aboriginal Deaths in Custody stated that if 'community division, discord and injustice to

Aboriginal people' (was) to be avoided, political leaders and parties should 'recognize that reconciliation between the Aboriginal and non-Aboriginal communities in Australia must be achieved'.⁵ That same year, the Commonwealth Government, led by Labor Party Prime Minister, Bob Hawke, passed the *Council for Aboriginal Reconciliation Act* 1991 ('the Act'), which established the Council for Aboriginal Reconciliation ('the Council'). The object of the Council was to promote the process of reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community

based on an appreciation by the Australian community as a whole of Aboriginal and Torres Strait Islander cultures and achievements and of the unique position of Aborigines and Torres Strait Islanders as the indigenous peoples of Australia, and by means that include the fostering of an ongoing national commitment to co-operate to address Aboriginal and Torres Strait Islander disadvantage.⁶

While the Act was silent on the meaning of reconciliation, it required the Council, in effecting its object, to advise the Prime Minister on policies and goals and objectives to promote reconciliation and strategies for their achievement.⁷ The Act ceased to have effect from 1 January, 2001⁸ and in December 2000, the Council presented its final report, *Reconciliation: Australia's Challenge*⁹, to the Prime Minister and the Commonwealth Government. The report contained the Council's *Australian Declaration Towards Reconciliation*¹⁰ and strategies for its implementation particularised in the accompanying *Roadmap for Reconciliation*¹¹. The four strategies comprised overcoming disadvantage, facilitating economic independence, promoting recognition of Indigenous rights and sustaining the reconciliation process.

With the end of the Council's term on 1 January, 2001, the report concluded that the future of reconciliation be placed 'squarely in the hands of the Australian people'.¹² It referred to the 1990s as the 'decade of reconciliation', culminating in the year 2000, 'the year for reconciliation' and declared that Australia's challenge was to 'continue (the) journey along the reconciliation road to its intended

'destination', namely a 'united Australia which respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all'.¹³ While the reconciliation 'destination' contained some clues about the meaning of reconciliation in the Australian context (respect for Aboriginal and Torres Strait Islander land and heritage and the provision of justice and equity), the report noted that the quantitative research commissioned by the Council in 1991-92 'to gauge community attitudes about reconciliation' suggested that the concept (of reconciliation) 'was difficult and abstract'¹⁴ and that 'people differ on exactly what reconciliation means and how to achieve it'.¹⁵

The absence of definition and the failure of successive Federal governments to lead by demonstrating 'real commitments to real outcomes'¹⁶ has meant that the progress of reconciliation has been primarily depicted and measured by symbolic gesture as opposed to tackling the historical and political reasons for ongoing 'community division, discord and injustice to Aboriginal people'. And while placing the future of the reconciliation process 'squarely in the hands of the Australian people' has undoubtedly contributed to sustaining the momentum underlying 'a growing recognition of and pride in the work of Aboriginal and Torres Strait Islander artists, performers and television stars'¹⁷, it has simultaneously allowed for an abdication¹⁸ by Federal governments of 'one of the most critical issues in the definition of the nation'.¹⁹ The Bridge Walks for Reconciliation, the emergence of local reconciliation groups across the country, the signing of Pledge Books, 'the public elation at the 400 metre win by Cathy Freeman'²⁰ at the Olympic games and the flying of Aboriginal and Torres Strait Islander flags on public buildings and at reconciliation events are all significant manifestations of an expanding appreciation by the Australian community 'of the unique position of Aborigines and Torres Strait Islanders as the indigenous peoples of Australia'. However, a focus on these events has obfuscated a critical understanding of the essential prerequisites for reconciliation and delayed the execution of a government responsibility to create mechanisms to secure economic, political and social justice for Indigenous Australians.

Towards the end of the 'decade of reconciliation', Patrick Dodson, the inaugural chairperson of the Council for Aboriginal Reconciliation, said he believed many Australians would think they had contributed in some way towards the process but will 'be confused about why Indigenous people are still concerned that there are matters of an unfinished nature to be pursued'.²¹ In his Wentworth

Lecture of May 2000, *Beyond the mourning gate - dealing with unfinished business*, delivered days before the Council's presentation of its *Declaration and Roadmap* to John Howard at Corroboree 2000, Patrick Dodson referred to Prime Minister Bob Hawke's agreement to a treaty process at Barunga and to Paul Keating's Redfern speech:

(t)hey were prepared to lead so that a majority of the citizens might be inspired to follow. Why was it so hard to seize those moments and deliver real and lasting change? Will we again fail as a nation to grasp this opportunity to change the political architecture of the country? Will we again fail to rise above the mediocrity that ties us to seeking incremental change through short-term stopgap bureaucratic solutions? Or can we work towards realigning the relationship between us?²²

More recently, the new Rudd government has been invited to lead on an issue that remains one of the primary barriers to reconciliation - the 'unfinished business' of providing reparations for members of the Stolen Generations. If the Australian nation is to grasp the opportunity to which Dodson refers, it is clear from the work undertaken by the Council for Aboriginal Reconciliation that the failure of reconciliation to date is a failure to articulate its relationship to justice. The objective underlying reconciliation emanates from a history of human rights violations and its legitimacy is dependant on structures which seek to affect accountability, remedy social, economic and political imbalance and redress the individual and collective scars of 'survivors of profound trauma'.²³ In its submission to the 2003 Senate Inquiry into the Progress Towards National Reconciliation, the Western Australia *Bringing Them Home* Committee told the Inquiry that

(m)any members of the Stolen Generations are skeptical of the national reconciliation process and say that justice has to occur before reconciliation can begin.²⁴

A similar point was made by Robert Tickner, the Minister for Aboriginal and Torres Strait Islander Affairs, in a statement to the UN Working Group on Indigenous Populations in Geneva soon after the establishment of the Council for Aboriginal Reconciliation when he noted that 'there can be no reconciliation without justice'.²⁵ For the thousands of Indigenous Australians separated from their families and severed from their land, language and culture, justice requires an acknowledgment of harm and reparation, including measures of restitution, rehabilitation, guarantees of non-repetition and compensation.²⁶

Distinguishing itself early in its first term of office from the Howard government's dismissive and intractable response to the harm incurred by Aboriginal children forcibly removed from their families, Kevin Rudd and

his government's comprehensive Apology to the Stolen Generations in February 2008 has the potential to regenerate a cautious belief in the process of reconciliation. To many Indigenous Australians, the national apology was considered a 'first step'²⁷ towards redressing the harm of the Stolen Generations; it was argued that a 'bare apology' would 'remain symbolic and of limited value unless reinforced by appropriate measures of redress and reparation'.²⁸ In 1999, the Senate Legal and Constitutional References Committee reviewed the implementation of recommendations contained in the *Bringing Them Home* report. The Committee's terms of reference included consideration of the establishment of 'an alternative dispute resolution tribunal to assist members of the Stolen Generations by resolving claims for compensation through consultation, conciliation and negotiation, rather than adversarial litigation'.²⁹ The Senate's report, *Healing: A Legacy of Generations*, recommended a reparations tribunal as the model best able to 'address the need for an effective process of reparation, including provision of individual monetary compensation'.³⁰ The Federal Government rejected the recommendation.³¹ The prospect of the provision of measures of reparation was again explored by the Senate Legal and Constitutional Affairs Committee in April 2008 when the Committee considered the *Stolen Generation Compensation Bill 2007 (Cth)*, proposed by Democrat Senator, Andrew Bartlett. Although recommending against the Bill (which provided for ex gratia payments to eligible applicants), the Committee report stated that 'monetary compensation is only one component of reparations' and concluded that a **reparations** scheme which allowed for a 'holistic, nationally consistent approach ... (was) the most appropriate means of promoting an effective model of healing'.³² Importantly, the Committee concluded that 'governments are under an obligation to resolve this issue as a matter of priority'.³³

'The only way that a mourning period can be ended,' wrote Patrick Dodson in his 2000 Wentworth Lecture, 'is when the proper protocols and practical arrangements' have been implemented. Pointing to a fundamental feature of reconciliation, he observed that its progress in Australia will be evident when people 'who have had a wrong or an injustice done to them have been accommodated by the action of those responsible'.³⁴ While the notion of reconciliation 'presents both conceptual and pragmatic challenges'³⁵, the need for accountability and remedy seem fundamental to a process that requires trust and belief in a society's capacity to transform. The creation of a national reparations scheme which provides for acknowledgement and a range of reparations (including

symbols of commemoration, funding for recording and teaching of Indigenous languages and cultural practices lost as a consequence of assimilation practices, inclusion of the Stolen Generations history in school curricula, educational scholarships for descendants of members of the Stolen Generations, access to appropriate counseling and compensation) will serve as a significant exemplar of justice, a demonstration by a new government that it is committed to resurrect and reorient reconciliation.

Much of the debate and documents promoting reconciliation speak of the need for governments to address Aboriginal and Torres Strait Islander disadvantage. This call erroneously seeks to equate measures of substantive reconciliation with the provision of resources for the enhancement of Indigenous health, housing and education, 'entitlements which every Australian citizen should enjoy'.³⁶ What is undisputed, however, is that the contemporary disadvantage which permeates Aboriginal and Torres Strait Islander communities can be traced to the consequences of forced removals and their impact on family and cultural life. It is the origins of disadvantage – physical and sexual abuse, racial discrimination, social exclusion, separation from family, denial of culture and language – and their specific manifestations, many of which are endemic to the Stolen Generations experience – that call out for redress. The 'realigning of the relationship' between Aborigines and Torres Strait Islanders and non-Indigenous Australians has a greater prospect of success if the Rudd government takes up the recent invitation from the Senate Legal and Constitutional Affairs Committee to act expeditiously and implement an 'holistic, nationally consistent approach' providing reparations to members and descendants of the Stolen Generations.

At the time of the apology to Australia's Indigenous peoples, Kevin Rudd assessed the 'the mood of the nation' as favouring reconciliation. 'Symbolism is important,' he said, 'but, unless the great symbolism of reconciliation is accompanied by an even greater substance, it is little more than a clanging gong'.³⁷ If a core goal of the Government is indeed to progress reconciliation, it now has the opportunity to move beyond the symbolic and an appreciation of another's culture, to a concrete recognition of rights and their effective and enduring realisation.

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and co-authored a submission with PIAC to the Senate Inquiry on the Stolen Generations Compensation Bill 2008.

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- 22 Daly and Sarkin ibid at p 132.
- 23 Senate Inquiry (2003) at p 52 note 139.
- 24 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, 28 July 1992 at <<http://www.cwsi.org/fwdp/Oceania/un-aust.txt>>.
- 25 Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law drafted in 1996 by the former UN Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights, Professor Theo van Boven.(the Van Boven Principles). See <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/85787a1b2be8a169802566aa00377f26?OpenDocument>>.
- 26 'Sorry' first step, where to now? SBS World News Australia, 14 February 2008 at <http://news.sbs.com.au/worldnewsaustralia/39sorry39_first_step_where_to_now_540454>.
- 27 Andrea Durbach and Megan Davis, 'Real reconciliation requires more than an apology', *Canberra Times*, 3 December 2007.
- 28 Senate Legal and Constitutional References Committee, Parliament of Australia, *Healing: A Legacy of Generations* (2000), <http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1999-02/stolen/report/c01.pdf>.
- 29 Ibid. at xviii (Recommendation 7).
- 30 Federal Government response To *Healing: A Legacy Of Generations*, 28 June 2001 at <http://parlinfo.aph.gov.au/piweb/view_document.aspx?ID=1902233&TABLE=hansards&TARGET=>
- 31 Report of Senate Standing Committee on Legal and Constitutional Affairs Committee, Stolen Generation Compensation Bill 2008, Committee View 3.122 at p 47 See <http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_generation_compensation/report/report>.
- 32 Ibid Committee view 3.127 at p 48.
- 33 Patrick Dodson ibid at p17.
- 34 Daly and Sarkin ibid at p xiii.
- 35 Transcript of address by Mick Dodson, Corroboree 2000, ABC Radio National, *Encounter*, 11 June 2000.
- 36 Prime Minister of Australia, 'Apology to Australia's Indigenous Peoples', House of Representatives, Parliament House, Canberra, 13 February 2008 at <http://www.pm.gov.au/media/Speech/2008/speech_0073.cfm>.

Wulu Pooku Clay Pan 2005

Sam Juparulla Wickman

*Paint infused kiln glass
185mm [w] x 350mm [h] x 85mm [d]*



THE LOCKE PROJECT

by Tim Goodwin

The fragility of Indigenous policy is best captured by the maddening history of the ever constant search for the perfect catchphrase. Regarding Indigenous policy as seen by policy makers and commentators, we have heard unsubstantiated evocations of 'self-determination' and 'self-government' in the 1980s to Geoffrey Blainey's classic phrase, the 'black armband view of history'. Paul Keating in his famous and historic Redfern Park speech spoke of an 'act of recognition' and a 'new partnership' whereas John Howard described Australia as 'one great tribe'. In *Mabo (No 2)*, Deane and Gaudron JJ discussed the acts of dispossession of Indigenous peoples from their land as 'the darkest aspect of the history of this nation'.¹ The decision of *Yorta Yorta* later described the need for 'continuous existence and vitality'² of traditional laws and customs for Native Title to survive. In the past decade, we have heard 'mutual obligation' change to 'shared responsibility' and eventually to 'emergency intervention'. Today, it seems every policy decision must fit the framework of 'close the gap'. Newspapers are the new battleground for the search for a catchphrase, printing headlines proclaiming 'rivers of grog', 'the Aboriginal industry' and 'a powder keg waiting to go up'.

MARKETING A TIRED PRODUCT

The unique attribute of Indigenous affairs is that it moves so fast in terms of how it is packaged or sold to the Australian public, and yet meaningful and sustainable change itself moves so slowly.

Indigenous people and communities remain behind on virtually all socioeconomic indicators. This is besides the evident feeling the Australian community has that, no matter the statistics or profiles or reports, drastic action must attempt to end Indigenous disadvantage as expeditiously as possible. Australia is at a crucial point in its history where goodwill, intellectual prowess and a desire to do differently all meet at the same point. The Apology to the Stolen Generations by the Australian Government on 13 February, 2008 represented a shift in the heart of the Australian people and a true sense of awakening and healing for many. Most young people, both Indigenous and non-Indigenous, have had access to a better education than many of their forebears and many are ready to use that knowledge in the pursuit of social justice.

The problem with the debate that occurs is that it has no framework within which to conduct itself. There are no guiding principles governing the way Indigenous policy is debated, expressed, created and implemented. Due to the brevity of this article, only a brief discussion will be outlined in order to present some form of coherency to the argument for a fundamental shift in the foundations of Australian democracy.

BUILDING ROOFS BEFORE SETTLING CONCRETE

In a typical society, the framework by which people accept to be governed is established by both philosophy and institutions. Without endorsing John Locke's theory of social contractualism, in this context it is a helpful conceptualisation of political theory. For example, simplistically, it could be argued that most Western societies organise themselves philosophically on the basis of a 'social contract' between citizens and rulers, the governed and the government. With the social contract as foundation, citizens permit, within the rule of law, government power to be exercised. Indigenous Australians, indeed most Indigenous peoples of the world, were never able to participate in the evolution of these structures but instead were forced, by violence and coercion, to accept them. Indeed, the notion of choice and coercion has been a major criticism of the acceptability of the theory of social contractualism.

Therefore, at a fundamental level, the relationship between Indigenous people as citizens and the Australian Government has never been confirmed or properly acknowledged and/or accepted. As a result of this dysfunctional relationship, government and Indigenous Australia have been unable to work with and within the structures of either to the best effect. Accordingly, Australia has failed to make a sustainable positive impact in Indigenous affairs as opposed to confined victories amidst general policy failure. If real, lasting and meaningful change is to occur in Indigenous affairs, we must create the foundation whereby Indigenous Australians are an equal part of the Australian social contract. In legal terms, we must amend or revise the contract to include a number of new terms and conditions that take account of the unique place of Australia's Indigenous people.

Such an amendment or revision should be captured by a treaty, agreement or some other formal document. This will require intense negotiation as befits such a major undertaking. In order to move the debate beyond the politics of semantics, which has particularly been used by detractors as a method to derail any discussion of a 'treaty', this article will refer to such a treaty, agreement or other formal document as the *Locke Project*. The *Locke Project* is a major piece of the unfinished business to which many Indigenous and non-Indigenous people refer regarding the lack of foundation in the relationship between Indigenous and non-Indigenous Australia.

The criticism of the need for a treaty or similar document as a left-wing utopian ideal is no longer valid. Most Western countries with governments of both political persuasions have been able to negotiate and implement treaties or other agreements with their Indigenous peoples. Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shain recently edited a book, *Honour Among Nations? Treaties and Agreements with Indigenous People*,³ which catalogues a history of agreement making within Australia in various contexts. Noel Pearson, a strident critic of the left-wing in Australia, wrote in his article for *The Monthly* for June 2008

I believe that the racial question in countries with oppressed racial and ethnic minorities cannot be settled until the constitutional issue of the minority's rights is properly settled and honoured.

The *Locke Project* is a necessary endeavour to build a framework within which Indigenous policy may be created and implemented. Without such a framework to guide Indigenous policy-making, Australia will continue to fund ad hoc policy creations that serve no greater benefit to Indigenous communities.

THE MECHANICS OF AUSTRALIA'S OSLO NEGOTIATIONS

The process of the *Locke Project* will no doubt be complicated, political and require large amounts of energy and goodwill. In these brief words, it would not be possible to capture the undertaking required to negotiate the proper settlement terms of the unfinished business of Australian colonial history. However, briefly a number of the mechanics needed for the *Locke Project* can be highlighted.

First, in order to ensure the process is stable and continuous, a certain period should be legislated by government to allow for consultation and negotiation during the *Locke Project*. The Council of Reconciliation

initiated by the Hawke government is a good model on which to base this process. A statutory authority should be mandated with the task of coordinating the *Locke Project* over a defined period of time, which could be suggested to be between five and 10 years, and to present to the government, Indigenous Australians and the broader Australian public a formal document that presents the negotiated position of all parties.

Second, the first step of the *Locke Project*, and the statutory authority responsible for its carriage, should undertake intense negotiation with Indigenous communities. As highlighted by the National Indigenous Youth Movement of Australia at the Treaty Conference in 2002, the Indigenous position on a treaty or similar document is unclear and fragmented. Indigenous Australians themselves will require time to learn about the concepts involved in a final negotiation and then finesse a coherent united position upon which to enter into negotiations with the state.

Third and finally, young people must have a central role in the *Locke Project*. Almost 65 per cent of Aboriginal and Torres Strait Islanders are under the age of 30.⁴ When discussing Indigenous Australians, one is primarily discussing Indigenous young people. As a result, they will be most affected by any negotiations regarding their place in the Australian system of government and should play a key role in those negotiations. Further, young people generally will have carriage for the successful implementation of the outcome of the *Locke Project*. Accordingly, young people should be central to its development.

CONCLUSION

The brevity of this article can only capture a superficial view of the larger nation building exercise Indigenous people refer to as unfinished business. However, discussion and debate are the only methods by which supporters can introduce the topic to the Australian public and their own communities, Indigenous or otherwise.

Tim Goodwin is a member of the Yuin Nation of New South Wales and graduated from the Australian National University with a Bachelor of Arts and Bachelor of Laws (Hons). He is currently Deputy Chair of the National Indigenous Youth Movement of Australia.

1 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 109.

2 *Yorta Yorta v Victoria* (2003) 214 CLR 422, 444 (Gleeson CJ, Gummow and Hayne JJ).

3 2004, Melbourne University Press, Carlton, Victoria.

4 Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians* (2006).

OWNERSHIP, SOVEREIGNTY AND COEXISTENCE:

INTRODUCTORY REMARKS TO ILA/HREOC SEMINAR *INDIGENOUS*

PEOPLES AND SOVEREIGNTY 14 NOVEMBER 2004

by Greg Marks

It is customary now to acknowledge, in a forum such as this, that the land on which we stand, or on which this building stands, is Aboriginal land. This is an entirely appropriate acknowledgement.

But such a simple formulation does not take us very far and indeed its potential for glibness or for providing an element of parading one's enlightened consciousness can cover over the real issues: Who owned the land when Europeans arrived? Who now owns the land? What are the implications of such ownership? And this, of course, is a question wider than property or real estate law – it is not just who owns parcels of land in terms of proprietorship (although, this a central consideration). Rather, it is who owns the total extent of the land that is the territory in question, in terms of control and decision making. It is ownership as the constituent of sovereignty.

If we look at what happened to the Aboriginal people of this area, we see a disaster which unfolded quickly despite the apparent good intentions of Governor Phillip. It was a disaster not just of misunderstandings and cross-cultural confusion. It was a disaster inherent in the decision to occupy the land of another people. The contradiction between the humane intentions of the British and the expropriation of the land belonging to another society was not recognised. As Ian Jacobs in his *History of the Aboriginal Clans of Sydney's Northern Beaches* observes:

In hindsight, it seems quite bizarre that the well-meaning and well-intentioned Phillip was deliberate in his attempts to establish friendly relations when his purpose was to secure land from its traditional owners.¹

Here, I think, we see the working of the concept of *terra nullius* in practical terms. The British did not see the legal rights of the inhabitants, rights which it can be argued are not merely moral rights, but rights which have been recognised in the law of nations going back many centuries.

The frontier in Australia is very recent. This is easily forgotten living in the midst of a complex, modern and largely urban society. In a world of rapid technological progress, intense engagement at the global level, and the

increasing sophistication and cosmopolitanism of Australia, we can readily lose sight of the fact that the frontier is only a few generations ago. Take, for example, the life of Olive Pink, an eccentric Daisy Bates-type character who lived and worked with Aboriginal people for a long period in central Australia. When she camped to the northwest of Alice Springs with the Warlpiri in the 1930s to undertake ethnographic studies, it was – for many of these Warlpiri – either a first or a very early contact situation. Traditional life had scarcely been touched by the European intrusion into their lands, just then getting underway.²

My own grandmother was born on a station in northern New South Wales and was cared for and looked after by traditional Aboriginal people – one couple in particular. She was an eyewitness to many of the events later re-told by Thomas Keneally in his book *The Chant of Jimmy Blacksmith*. At home, we often heard about those tragic events from our grandmother, long before Thomas Keneally heard and re-told the story. So, the frontier is close to us in Australia – almost within living memory. Thus, questions of sovereignty – whose land it was, how it came to be taken over and on what terms, and whether there are continuing claims to some sort of sovereignty that can stand up in law, domestic or international – are questions that arise out of our immediate past. The legacy of the frontier remains highly contested, and the resolution of these issues remains central to Australia's legitimacy and the justice of our legal and constitutional arrangements.

However, the issue of sovereignty of Indigenous peoples has been contested for a long time, since the original European expansion into the New World in the 16th century. By what right did Europeans acquire the territories of others, the Indigenous peoples, without their agreement? The question was studied, debated and contested at the very beginnings of international law, especially by Spanish jurists and theologians such as Francisco de Vitoria and Bartolome de Las Casas.³

The complex issues raised then always centred around the concept of sovereignty. They still do. If we ignore them, they will continue to haunt us. Issues

of sovereignty and jurisdiction both in terms of historical grievances on the part of Indigenous peoples, and their continuing claims for autonomy will not go away from the discussion of Indigenous rights. This is despite the efforts of many states and their domestic courts to refuse to acknowledge the continuing claims of Indigenous people to international status.⁴

The Australian courts continue to deny outright that there is any continuing Aboriginal sovereignty or law-making capability past the date of acquisition of sovereignty by the Crown.⁵ Similarly, the courts refuse to recognise that there is any ongoing responsibility, or fiduciary obligation, in respect of Indigenous peoples, arising from the usurping of their ownership and control of their lands. In fact, the Australian High Court characterises the complete destruction of Indigenous sovereignty and hence of any law-making or self-governance capacity – as a ‘cardinal fact’.⁶ As per Chief Justice Gleeson and Justices Gummow and Hayne in the Yorta Yorta decision, the Court asserts that ‘there could be no parallel law-making after the assertion of sovereignty’.⁷ Thus, the Indigenous peoples of Australia who suddenly appeared on the legal landscape with *Mabo*, did so on a pretty limited basis. They now had some, however vulnerable, property rights. But the door has stayed firmly shut on sovereignty.

Apart from Native Title, Indigenous Australians have no distinct and inherent rights. They are entirely subject to the vagaries of Australian law – even the international protection that should have been provided by Australia voluntarily ratifying human rights treaties can, it seems, be ignored with relative ease by the Australian Government.

However, others have found a different path. In particular the US Courts and Governments have been able to recognise a form of Indian sovereignty, albeit constrained and limited. The doctrine of Indian tribes as separate nations – domestic and dependent, but nations nevertheless – was set out in a trilogy of cases by US Chief Justice Marshall in the early 1830s.⁸ This doctrine remains the basis of relations between Indian tribes and the federal government of the United States of America to this day and provides Indian tribes with a level of legal rights and self-government unimaginable in Australia. And yet the US shows no signs of falling apart as a result of this recognition of ongoing sovereign rights.

It has been persuasively argued that US law in respect of Indian tribes reflects the doctrines of Indigenous rights argued by Francisco de Vitoria and others in the 16th century.⁹ Perhaps de Vitoria provides a conceptual

framework for dealing with the fact of two peoples sharing the one land. Denying the application of *terra nullius* to the Americas, de Vitoria, in a famous passage, concluded that:

The aborigines in question were true owners, before the Spaniards came among them, both from the public and private point of view.¹⁰

However, he also allowed for very wide rights for the Spaniards in terms of sociability and trade, going as far as rights of residence and of exploitation of resources. In a way, this was a formulation of a coexistence regime, and although it was at root unjust to the Indians, it nevertheless provided for an ongoing Indigenous sovereignty and for sets of legal rights existing side by side with those of the colonists.

Such an attempt to live with and provide a legal framework for the necessary ambiguity of settler societies has barely surfaced in the legal and constitutional framework of Australia. However, Indigenous Australians have discerned the need. Responding to the 10 Point Plan by which the government of the day proposed to amend the *Native Title Act* in response to the Wik decision,¹¹ Indigenous negotiators advanced an argument for coexistence,¹² that is for coexistence of legal rights of pastoralists and Aborigines – one land, two owners.

I want to conclude with some brief general observations about the way the concept of *terra nullius* has worked to be the essentially racist justification of colonisation. The Roman law concept, which was the international manifestation of *res nullius*, that is a thing not owned by anyone but available to ownership by the first person to seize it with the requisite intention to become its owner for as long as they controlled it, was shifted by degrees from applying to lands that were genuinely empty, to lands that were in fact occupied, but occupied by so-called ‘uncivilised races’. These were races allegedly not socially or politically organised. In the words of the American international lawyer Christopher Joyner, speaking in respect of the Americas:

Despite the manifest inhabitation of the land by Indian tribes, European jurists conveniently reasoned that all Indians were barbarians and savages by instinct, and therefore incapable of self-government.¹³

Terra nullius, racism and destruction of a people's sovereignty are intrinsically linked in Australia as in other former colonies.

Finally, no matter how these issues are dealt with by domestic courts and governments, sovereignty is,

essentially, an international law concept. Since World War II, the rights of Indigenous peoples have re-emerged for consideration, affirmation and development at the international level. Sovereignty's modern application to Indigenous peoples under international law has largely centred around the Indigenous demand that the international norm of self-determination should apply to them as to other peoples.

Greg Marks is a Canberra-based consultant and researcher specialising in international human rights law and Indigenous policy. He is Rapporteur of the International Law Association Committee on the Rights of Indigenous Peoples.

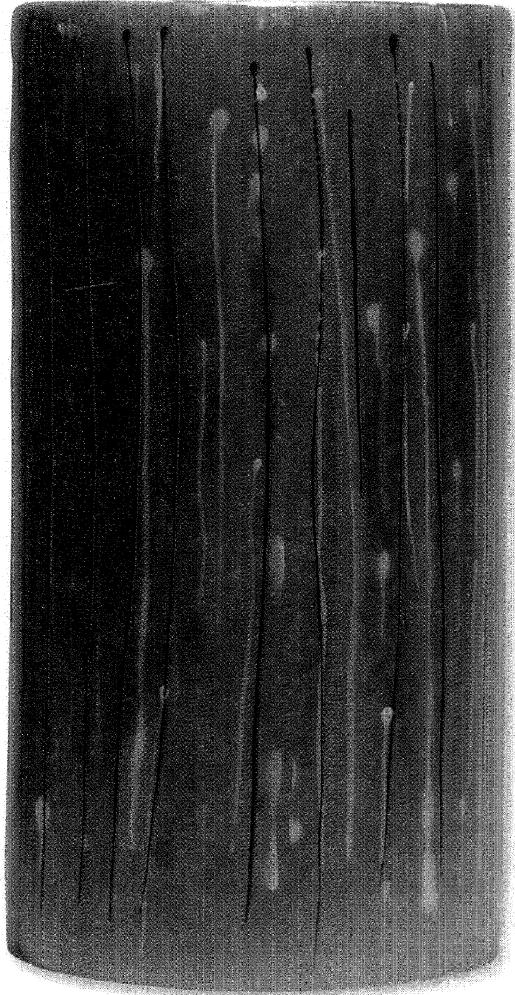
- 1 Jacobs, Ian, *A History of the Aboriginal Clans of Sydney's Northern Beaches*, Northside Printing 2003, p 27.
- 2 Markus, Julie, *The Indomitable Miss Pink – A Life in Anthropology*, UNSW Press, 2001.
- 3 Marks, G C, 'Indigenous Peoples in International Law: The

Significance of Francisco de Vitoria and Bartolome de Las Casas' (1992) AYIL 13, pp1-51.

- 4 See Anaya, James, *Indigenous Peoples in International Law*, Oxford University Press, 2nd ed, pp26 -31.
- 5 For example, *Coe v Commonwealth* (1979) 53 ALJR 403 and *Walker v New South Wales* (1994) 185 CLR 45.
- 6 *Western Australia & o'res v Ward & o'res* [2002] HCA 28 (8 August 2002) ('Miriuwung Gajerrong').
- 7 *Members of the Yorta Yorta Aboriginal Community v Victoria & o'res* [2002] HCA 58 (12 December 2002) per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [44].
- 8 *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823); *Cherokee Nation v Georgia* 30 US 1 (1831); *Worcester v Georgia* 6 Pet 515 (1832).
- 9 Cohen, F, "The Spanish Origins of Indian Rights in the Law of the United States" (1942) 31 Geo LJ1.
- 10 Vitoria, F, *De Indis and De Jure Belli Relectiones*, (1st ed np 1557) reprinted in Scott JB (ed) *Classics of International Law Series*, 1964 (Bates J trans).
- 11 *Wik Peoples v Queensland* (1996) 187 CLR 1.
- 12 National Indigenous Working Group, *Coexistence – Negotiation and Certainty*, Canberra April 1997.
- 13 Joyner, C, 'The Historical Status of American Indians Under International Law', 11 *The Indian Historian* No 4, at 31.

Wulu Pooku Totem Pole 2005
Sam Juparulla Wickman

*Paint infused kiln glass
185mm [w] x 350mm [h] x 85mm [d]*



ARTIST's NOTE

Font Cover Art Seven Sisters & the Morning Star 2005

Sam Juparulla Wickman

Glass set in cast aluminium, powder coated in onyx black

1500 x 150 x 310mm, 500 x 150 x 315mm

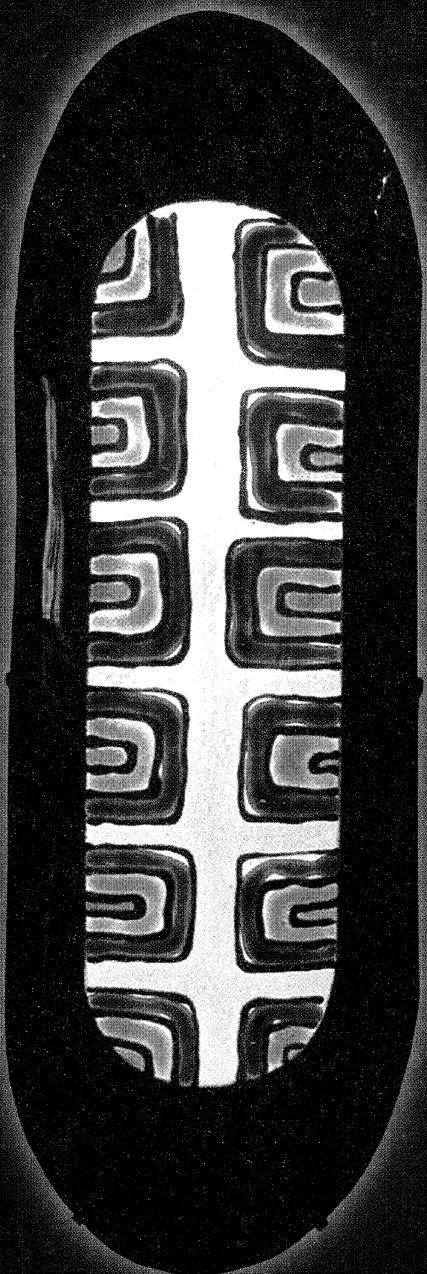
Sam Juparulla Wickman was born in Alice Springs in 1952, the traditional country of his Father, the Arrernte Nation of Central Australia. Sam's Aboriginality comes from both his mother and his Father. His Mother was a full Ceremonial woman of the Luritja, Pitjantatjara, Yankuntatjara people south of Alice Springs. Sam's Father was an Arrernte and Luritja man with strong roots to Mbarntu Country (Alice Springs).

Sam also has strong links to the Warlpiri Nation through his ceremony obligations. He is a Wati (fully initiated man) from Central Australia, and his art reflects this.

Sam has been working with glass since the year 2000 and is recognised as a leader in this medium demonstrating that Aboriginal art is not static and that his culture is very much alive. His interest in glass stemmed from a research paper he completed "Glass in the Aboriginal tool kit" referring to the manufacture of glass tools.

The glass art of Sam Juparulla contains images of sacred men's business ceremony from in and around the MacDonald Ranges of Central Australia. The ranges stretch across central Australia like a huge boomerang for over four hundred miles and are the home place of many Ancestral and Dreamtime (Jukurrpa) sites.

He is a founding member of Australia's leading Indigenous art glass studio, Bonegilla Glass, with partners Paul Sanders and Summer Matthews. Sam is recognised as one of Australia's leading emerging Indigenous artists and has already seen his work sought after by both glass and Aboriginal art collections including Sydney City Council and Aboriginal Affairs Victoria as well as many other overseas and Australian private collections.



MacDonnell Ranges – Glass Coolamon 2006
Sam Juparulla Wickman

Kiln formed glass with hand painted infused enamel
200 x 600mm