28. THE PROCESS OF RECONCILIATION
(RECOMMENDATION 339)

Recommendation 339: That all political leaders and their parties recognise that reconciliation between the Aboriginal and non-Aboriginal communities in Australia must be achieved if community division, discord and injustice to Aboriginal people are to be avoided. To this end the Commission recommends that political leaders use their best endeavours to ensure bi-partisan public support for the process of reconciliation and that the urgency and necessity of the process be acknowledged.¹

The reasoning behind Recommendation 339, the final recommendation of the Royal Commission into Aboriginal Deaths in Custody (‘RCIADIC’) is explored in Chapter 38 of the National Report.² It is described by Commissioner Elliott Johnston QC as “the emergence of the support for the concept of reconciliation, the proposal of government for a process of reconciliation and some features which I see as essential to the success of such a process.”³

It is timely to remember that the RCIADIC was convened because, during the period 1 January 1980 to 31 May 1989, when 99 people from the Indigenous community died in prison, police custody or juvenile detention institutions.⁴

In spite of the National Report and the reconciliation process that followed, on 26 January 2008, Australia Day, Elder Mr. Ward⁵ was arrested for driving under the influence of alcohol on back roads near Laverton Western Australia. Mr Ward was refused bail after a 10 minute hearing with no lawyer present or offered. Mr Ward was then transported 400 kilometres through desert to Kalgoorlie gaol in a metal van with no air conditioning in upwards of 50 degree heat. He was not monitored during the four hour journey and when he was discovered unconscious in the back of the van, he had suffered third degree burns where his body collapsed to the floor. He died shortly afterwards.

The following is a summary of developments in a process of reconciliation and healing on a National, State and Territory level. It also involves a discussion of possible future directions for ongoing inter-community dialogue and healing to

ensure that the root causes of these tragedies are eradicated permanently from Australian society.

1. Pre 1991 national shift towards reconciliation

Throughout the National Report, the Commissioner identified the elements which had combined to create a situation of disadvantage, resulting in the over-representation of members of the Indigenous community in the penal system. Inevitably, this led to an inherent sense of mistrust and bitterness amongst Indigenous Australians toward non-Indigenous Australians and, in turn, a perceived validation by non-Indigenous Australians of biases they held against Indigenous Australians.

The Commissioner noted that significant progress had been made in relations between the Indigenous and the non-Indigenous communities in the 25 years preceding the National Report, usually associated with sincere and concerted efforts to reduce Indigenous disadvantage and increase respect for Indigenous opinions.

1.1 1967 Referendum

Commissioner Johnston identified that the first shift toward a reconciliation between the Indigenous and non-Indigenous communities was in the Referendum of 1967, wherein Australian voters approved, by a margin of 90.77%, deletion of the following text (in bold) from the Constitution, Section 51 Clause xxvi: "The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws" and to delete in its entirety Section 127: "In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted". The Federal Government, buoyed by the support of the wider public, could now implement policies to benefit the Indigenous community.

Following this Referendum, the Federal Government established the Council for Aboriginal Affairs and the Office of Aboriginal Affairs. Over the next decade, successive Prime Ministers issued statements acknowledging Indigenous rights to self-determination and preservation of culture. The Whitlam government established a dedicated Department of Aboriginal Affairs to coordinate State programs based on self-determination for Indigenous people. The period from 1975 to 1976 saw the introduction of progressive legislation such as the Racial Discrimination Act and the Aboriginal Land Rights (Northern Territory) Act. In 1987, the Hawke government proposed amending the Constitution to provide for a treaty with Indigenous people.

Commissioner Johnson recognised these developments as acts supporting the idea of inter-community reconciliation, even if they were not yet identified as such. However, he noted that: "Each new report which detailed Aboriginal disadvantage, each new program which failed to achieve its objectives, each new incident which highlighted the divisions between Aboriginal and non-Aboriginal people and the

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mounting signs of Aboriginal anger and frustration with the pace and direction of reform, served to remind us that the process of reconciliation had to take place. There had to be more than a piecemeal approach, issue by issue, to the divisions within the Australian community. ⁸

At the time of the drafting the National Report in 1991, the Commonwealth government had issued a discussion paper proposing a strategy to achieve “reconciliation and social justice” for Indigenous people.⁹ The Commissioner noted it contained four elements which he considered essential to a successful outcome:

- acting immediately to confront disadvantage and to establish self-determination is crucial: it cannot await the outcome of a process of reconciliation;
- any reconciliation between the Indigenous and non-Indigenous communities requires majority support on both sides, including bipartisan political support;
- the approach should concentrate on the process of reconciliation: later on, discussion about an instrument might be appropriate; and
- neither side should confine themselves to pre-conditions in advance.¹⁰

The Commissioner saw reason to be optimistic about the development of more positive relations between both communities.¹¹

2. Post 1991 national movement for reconciliation

Reconciliation between Indigenous and non-Indigenous communities is now a recognised imperative, but has it been implemented as Commissioner Johnson envisioned since the National Report was issued?

The following discussions on the history of the reconciliation process are largely based on timelines¹² of events determined to be key stages in the development reconciliation history by the Council for Aboriginal Reconciliation and Reconciliation Australia.

2.1 Council for Aboriginal Reconciliation

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The Federal government enacted the (now superseded) *Council for Aboriginal Reconciliation Act 1991*\(^{13}\) which established the Council for Aboriginal Reconciliation (‘CAR’) as a statutory authority on 2 September 1991. The Act recognised the prior occupation and subsequent dispossession of the land of Australia’s Indigenous people by the British Crown. The Act sought to establish a formal reconciliation process by establishing the CAR “to promote a process of reconciliation between [Indigenous people] and the wider Australian community… by means that include the fostering of an ongoing national commitment to co-operate to address [Indigenous] disadvantage.”\(^{14}\)

In what appears to be an acknowledgement of the National Report, the Preamble states that the Federal Government would seek inter-governmental coordination and cooperation with the Aboriginal and Torres Strait Islander Commission\(^{15}\) “… to address progressively Aboriginal disadvantage and aspirations in relation to land, housing, law and justice, cultural heritage, education, employment, health, infrastructure, economic development and any other relevant matters in the decade leading to the centenary of Federation.”\(^{16}\)

CAR went through 3 phases of strategic plans:

- **1992-1995** - The first strategic plan established goals and programs under the headings of communication, consultation, cooperation and community action. Its main function was to educate the public about the reconciliation process and ensure it was being advanced from government to community level.

- **1995-1998** - The second strategic plan sought to capitalise on the new awareness and enthusiasm raised in relation to the reconciliation process by realising tangible positive outcomes in local communities, such as fostering cross-community consultation and cooperation on issues of mutual concern.

- **1998-2000** - CAR sought to build on the lessons and issues arising from the Australian Reconciliation Convention held in May 1997. The convention helped to identify the general public's preferred options for change. The third strategic plan focused on three key goals that sought to achieve recognition and respect for the Indigenous people through a national document of reconciliation and by acknowledgment within the Australian Constitution, to forge commitments by governments, business and community groups to form partnerships which promote social and economic development and to encourage a community movement for reconciliation which would continue beyond the term of the Council.\(^{17}\)

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\(^{13}\) *Council for Aboriginal Reconciliation Act 1991*(Cth).

\(^{14}\) *Council for Aboriginal Reconciliation Act 1991*(Cth) s 5.

\(^{15}\) The Aboriginal and Torres Strait Islander Commission (ATSIC) was dissolved on 30 June 2005. As of 27 January 2006, the policy and coordination role of ATSIC became the responsibility of the Office of Indigenous Policy Coordination in the Department of Families, Community Services and Indigenous Affairs.

\(^{16}\) *Council for Aboriginal Reconciliation Act 1991* (Cth) preamble (e).

2.2 The *Mabo* and *Wik* decisions

The status of Indigenous people as the traditional owners of Australia was legally recognised in June 1992 in the High Court decision in *Mabo and others v Queensland (No 2)*\(^1\) ("Mabo"). Prior to this decision, land tenure in Australia had been based on the concept that Australia was 'terra nullius' (land belonging to no-one) when it was first colonised on behalf of the British Crown. In *Mabo*, the High Court rejected the doctrine of terra nullius, establishing the concept of 'Native Title':

"Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of Native Title must be ascertained as a matter of fact by reference to those laws and customs…"

The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of Native Title has disappeared.\(^2\)

Accordingly, only those Indigenous communities whose 'continuous connection' to the land and observance of traditional customs can be established are eligible to claim Native Title to land under Australian law. This ruled out claims to major population centres long inhabited by non-Indigenous Australians, but applied to many remote communities whose occupation had been comparatively less disturbed since European colonisation.

The Plaintiffs in *Mabo*, members of the Meriam people, were able to make a successful claim because they could establish continuous connection to the Murray Islands. The Federal Parliament responded to the *Mabo* decision by passing the *Native Title Act 1993*\(^3\), which established a process by which Native Title rights can be established.

However, in the first test of new Native Title rights across a large area of mainland Australia, the High Court held that the rights of pastoralists would prevail in the event of inconsistency with rights under Native Title. The case in question was known as *The Wik Peoples v State of Queensland & Ors; The Thayorre People v State of Queensland & Ors*\(^4\) ("Wik"). It concerned a Native Title claim by the Wik and Thayorre people over land covered by pastoral leases. The *Wik* decision eroded the gains Indigenous people had made under *Mabo* and led to uncertainty regarding land rights.\(^5\)

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\(^1\) *Mabo and others v Queensland (No 2)* (1992) 175 CLR 1.
\(^2\) *Mabo and others v Queensland (No 2)* (1992) 175 CLR 1, [64], [66].
\(^3\) Council for Aboriginal Reconciliation Act 1991 (Cth). Note this Act has now been superseded.
On 5 February 1996, the Cape York Heads of Agreement was signed by the Cattlemen’s Union, the Wilderness Society, the Australian Conservation Foundation, the Cape York Land Council and the Aboriginal and Torres Strait Islander Peninsula Regional Council. It was designed to protect Indigenous cultural heritage and the Cape York environment while also aiding the pastoral industry. The original agreement was revised in September 2001 and the State of Queensland was added as a signatory.

It was hailed as a positive example of organisations with dissimilar interests agreeing on separate uses for common land. The agreement is viewed as a precursor to a possible Regional Agreement as referred to in the Preamble of the Native Title Act.

2.3 The reconciliation movement gathers momentum

1993 was the International Year of the World’s Indigenous People. In Sydney, the occasion was launched with a speech by Prime Minister Paul Keating on 10 December 1992 in Redfern, Sydney. Redfern is significant to Indigenous Australians as it has a sizeable Indigenous population and serves as an unofficial national capital: Mick Mundine, CEO of the Aboriginal Housing Commission has described it as "Blackfella Gathering Ground Number One". Keating’s speech was momentous as it was the first open acknowledgement by an Australian Prime Minister of the injustices inflicted upon Indigenous people by non-Indigenous Australians.

In perhaps the most powerful passage of the speech, Keating argued that finding solutions to the problems faced by Indigenous people began with "Recognition that it was we [non-Indigenous Australians] who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the disasters. The alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion. It was our ignorance and our prejudice. And our failure to imagine these things being done to us. With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We failed to ask - how would I feel if this were done to me? As a consequence, we failed to see that what we were doing degraded all of us."

September 1993 witnessed the First National Indigenous Business Conference (NIBEC) in Alice Springs, organised by Indigenous activist, Dr Charles Perkins, and the Aranda (aka Arrernte) Council. The conference attracted a number of Indigenous business owners and academics. The NIBEC Conference Report recommended that a national Indigenous business body should be established to create a platform for

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Indigenous business owners to help them connect with the wider community (which eventually led to the establishment of the Indigenous Business Council of Australia\textsuperscript{28} in 2009).

In the same month, a CAR initiative, the first national Week of Prayer for Reconciliation was held with support from all major religious groups. During the week which runs every year from 27 May to 3 June (respectively the anniversaries of the 1967 Referendum and the \textit{Mabo} decision) churches are encouraged to reflect on their communities' relationships with Indigenous people and to perform gestures of reconciliation such as extending invitations to members of their local Indigenous community to attend services or activities or performing an Acknowledgement of Country before services.\textsuperscript{29} In July 1994, the Uniting Church National Assembly issued a formal apology\textsuperscript{30} for its past wrongs against Indigenous people.

In October 1993 at Fitzroy Crossing, representatives of the Kimberley Land Council and Aboriginal pastoralists, the Pastoralists and Grainhandlers Association, and the WA Farmers Federation had their first wide ranging meeting in 100 years.\textsuperscript{31}

CAR set up the Joint Council on Aboriginal Land and Mining (J-CALM) in March 1994 with the dual aims of improving consultation between the mining industry and Indigenous peoples and to increase the number of Indigenous people employed in the mining industry.\textsuperscript{32}

Senior mining executives and senior Aboriginal leaders met at Camp Coorong, South Australia. They discussed ways to resolve the conflict between Indigenous values and the mining industry practices. This interaction has continued and resulted in initiatives such as a 'Doing Business with Aboriginal Communities' conference in Alice Springs in June 1995 and the Minerals Council of Australia and the Australian Youth Foundation jointly launching a major scholarship program for Aboriginal and Torres Strait Islander youth.

In July 1994 CAR held its first cultural awareness training for journalists in Western Australia’s Kimberley region.

The report “Walking Together: The First Steps”\textsuperscript{33} was presented to Parliament in November 1994, setting out CAR’s findings over the previous 3 years. Patrick Dodson, CAR Chairperson, described it not only as a response to Minister Tickner’s invitation to find ways of developing better understanding and respect between Indigenous and other Australians, but also to:

\begin{itemize}
\item \textsuperscript{28} Ibid.
\end{itemize}
"...the reality that the Federal Parliament was serious about finding multi-party approaches to the ongoing questions of disadvantage and discord that have their source in the denied rights and inadequacies of program delivery and policy initiatives to indigenous Australians...

Reconciliation is about constructive co-operation and improvements in cross-cultural indigenous relationships that may lead to a formal expression of that achievement through some document or documents of reconciliation."  

In 1994 the Australian Football League released a new code of conduct on racism which received endorsement from CAR.

In 1995 CAR presented "Going Forward: Social Justice for the First Australians" to Prime Minister Paul Keating. It contained 78 recommendations covering a range of issues including access to land, protection of culture and heritage, and the provision of adequate health, housing and other services.

In July 1995 the Federal Government amended the Flags Act 1953 to give official recognition to the Aboriginal and Torres Strait Islander flags.

CAR launched the first National Reconciliation Week in May 1996. Currently the annual theme for the week is set by CAR's successor organisation, Reconciliation Australia. Events are held around the country in schools, offices, parks and community centres, etc.

CAR announced a project in conjunction with the Deans of Australian Medical Schools in June 1996. It provided for the production of materials to be used in the training of medical students. A group of nominees from each of Australia's 10 medical schools prepared materials including a video and training manual for cross-cultural medical education. The package, called 'Indigenous Health: A Cultural Awareness Program for Medical Education', was launched on 24 June, 1998.

CAR convened key stakeholders meetings on Native Title in June 1996, with representatives from Indigenous organisations and from the pastoral, farming, mining and exploration industries, to exchange views on Native Title issues. The combined Indigenous and industry National Working Group stated that "voluntary agreements are the preferred first option for resolving Indigenous land use issues and Native Title claims".

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34 Ibid, Preface.
40 D.E. Smith, 'Indigenous Land Use Agreements: New Opportunities and Challenges under the amended Native Title Act' (Regional Agreements paper no. 7, Native Title Research Unit, Australian Institute of Aboriginal and
2.4 Acknowledging the Stolen Generations

The Stolen Generations is the term which has become ascribed to Indigenous children who were removed from their families between the late 1800s and the 1970s by Federal and State government agencies and church missions under specially drafted Acts of Parliament. These children were placed into government-run institutions or fostered/offered up for adoption to white families as part of a policy to assimilate them so they would live as white Australians.41

The 'Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families'42 was released in April 1997, investigating the long-term effects on Indigenous people of forced removal laws and policies which had operated in Australia. The inquiry determined that people subjected to forced removal suffered extremely negative effects: harsh conditions, basic education, physical and sexual abuse, loss of cultural knowledge and the grief of the family members left behind were recurring themes amongst survivors. The effects of separation were found to be ongoing into adulthood and down through generations.

The 'Bringing Them Home' Report issued 54 recommendations, including an acknowledgement and apology from institutions involved in removals, restitution in the form of counselling services, assistance in maintaining records, language, culture and history centres, rehabilitation in the form of mental health programs, parenting services and monetary compensation.43

The Australian Reconciliation Convention of May 26 - 28, 1997 was a key milestone in the movement towards national reconciliation. It was convened by CAR and attended by 1,800 people including lawyers, teachers, health workers, religious leaders, government officials and students who had participated in meetings across the country in the foregoing year and served to energise the grassroots imperative toward reconciliation.

The event was not without controversy: in Prime Minister John Howard's opening address he referred to Australians "acknowledging the blemishes in [Australia's] past history". This was not well-received, coming as it did shortly after the release of the 'Bringing Them Home' Report. Indigenous delegates were insulted by the Prime Minister's dismissal of the history of brutality experienced by Indigenous people as a 'blemish'. As a form of protest, they turned their backs on the Prime Minister as he spoke.44

In spite of this, the Convention was hailed as a great success in promoting understanding and healing, such that by December 1997, 6 months after the Convention, there was a notable growth in interest in the movement for reconciliation at grassroots level which was reflected in the number of local reconciliation groups established by this time.

By February 1998 CAR had identified three objectives for its final term: a Document of Reconciliation; partnerships to achieve social and economic equality for Indigenous people; and a people's movement to sustain the reconciliation process beyond 2000.

The first National Sorry Day was held on 26 May 1998, a year after the release of the 'Bringing Them Home' Report. The 'Bringing Them Home' Report had recommended there be a national 'Sorry Day' held each year. A National Sorry Day Committee was established on the same day to oversee implementation of the 'Bringing Them Home' Report and coordinate events such as Sorry Day. On 26 May each year schools, community groups and workplaces are encouraged to hold events in their local areas to commemorate the suffering and celebrate the survival of the Stolen Generations.

On June 3 1999 CAR launched a Draft Document for Reconciliation, followed by a nation-wide consultation process to record the views of the Australian people towards the draft document and their views on reconciliation in general.

The draft was discussed at over 300 meetings across the country. Responses came from these public meetings, public submissions and from 3,000 individual response forms. A Memorandum of Understanding between ATSIC and CAR secured extensive Indigenous input: ATSIC representatives co-chaired many regional meetings.

To reflect a true representation of the thoughts of the nation as a whole, CAR commissioned independent social research to objectively test the draft, which indicated broad support for reconciliation. It also identified a need to educate the public and to address divisive issues. After considering the results of these consultations, the draft was finalised in late April 2000.

At Corroboree 2000 on 27 May 2000, following a walk by approximately 300,000 people across Sydney Harbour Bridge as a show of solidarity with Indigenous Australians, CAR presented two documents of reconciliation to the nation:

- **Corroboree 2000: Towards Reconciliation**, which included the Australian Declaration Towards Reconciliation, an aspirational statement that the Council hoped would be embraced by all Australians; and


• *Roadmap for Reconciliation*\(^{49}\), containing four national strategies proposing practical acts and symbolic gestures that could be implemented from federal to local level to achieve reconciliation:
  - Achieving Economic Independence\(^{50}\)
  - Overcoming Disadvantage\(^{51}\)
  - Recognising Aboriginal and Torres Strait Islander Rights\(^{52}\)
  - Sustaining the Reconciliation Process\(^{53}\)

It also presented six formal recommendations:

• The Council of Australian Governments (COAG) and the Aboriginal and Torres Strait Islander Commission (ATSIC) work together to set a program of measurable, publicly reported performance benchmarks agreed in partnership with Indigenous communities.

• All parliaments and local governments pass formal motions of support for each of the reconciliation documents and incorporate its basic principles into legislation appropriate to their jurisdictions.

• The Commonwealth Parliament prepare legislation for a referendum which recognises Australia’s Indigenous peoples as the first peoples of Australia in the Constitution and replace Section 25 with a new section making it unlawful to adversely discriminate against any people on the grounds of race.

• All levels of society from governments and business to individuals should recognise the progress made on reconciliation, affirm the two reconciliation documents and provide resources for reconciliation activities in their work, educational and public-awareness campaigns and to support an ongoing national focus on reconciliation.

• All COAG members should acknowledge that Australia was settled by non-Indigenous people without treaty or consent, and that agreements or treaties and negotiation of a process to protect the political, legal, cultural and economic position of Indigenous peoples were required in order to advance reconciliation.

• Council also provided a draft of suggested legislation to be enacted by the Commonwealth Parliament for an agreement or treaty through which unresolved reconciliation issues can be resolved.

These documents were tabled in Federal Parliament in June 2000 in accordance with section 6(1)(h) of the *Council for Aboriginal Reconciliation Act 1991*.


The end of the CAR's mandate coincided with the 1 January 2001 Centenary of Federation and it disbanded. As part of its commitment to sustaining the reconciliation process beyond its term, one of its final acts was to launch Reconciliation Australia, a not-for-profit foundation formed to promote reconciliation and to dispel stereotypes and discrimination between Indigenous and non-Indigenous Australians.

The 'Reconciliation Place' garden, containing sculptures on the theme of reconciliation designed by Indigenous artists, was officially opened in Canberra on 22 July 2002 as a memorial to the Stolen Generations and a symbol of the government's commitment to the ongoing reconciliation process. It is located between the National Library of Australia and the High Court of Australia to represent reconciliation as a concept which is "physically and symbolically at the heart of Australian democratic and cultural life".

Between 30 and 31 May 2005, a National Reconciliation Planning Workshop was held in Canberra; attended by prominent Indigenous Australians and dignitaries including the Governor General, Prime Minister and the Leader of the Opposition. Dr Mark Byrne, Project and Advocacy Officer at Uniya Jesuit Social Justice Centre in Sydney, was a participant at the workshop. He published a personal reflection wherein he expressed the view: "While whitefellas were focused more on advancing the reconciliation process in areas as diverse as racism and race relations and business and governance, Indigenous attendees were still reeling from the disbanding of ATSIC. They expressed their anger at no longer having a national voice, and also for not being consulted at a national level about the SRAs" [Social Responsibility Agreements between Indigenous groups and Australian governments based on the principle of mutual obligation].

ATSIC had been established in 1990 under the Hawke Government as an Australian Government body through which Indigenous people were formally involved in developing Indigenous policies. The agency was abolished in 2004 for being ineffective, with John Howard PM describing it as "...too preoccupied with...symbolic issues and too little concern with delivering real outcomes for indigenous people". SRAs were introduced in place of ATSIC but were unpopular because, as Dr Byrne points out, "...there is a fundamental power imbalance when local communities have to negotiate one-on-one with the federal bureaucracy".

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60 Dr Mark Byrne, Uniya Jesuit Social Justice Centre, Two nations, one conference – A personal reflection (3 June 2005) <http://www.uniya.org/talks/byrne_3jun05.html> accessed 29 March 2015.
Dr Byrne noted there were three conclusions arising from the workshop: there must be a new representative body for Indigenous people; to be meaningful Indigenous people required both practical and symbolic reconciliation, such as the protection of rights and formal acknowledgement of their status as First People and that there was support across the board for a treaty to legitimise European occupation as well as to protect the rights of Indigenous people. This was "perhaps the biggest agenda item of “unfinished business” between Indigenous and other Australians".  

In 2006, Reconciliation Australia launched the Reconciliation Action Plan (RAP) program which encourages organisations such as government agencies, local councils, not-for-profit organisations, all sizes of businesses, schools and universities to develop business plans that pledge to do what they can to contribute to reconciliation in Australia. These RAP agreements outline practical actions the organisation will take to build relationships with and enhance respect for Indigenous people and their culture.

The 40th Anniversary of the 1967 Referendum was commemorated nationally during Reconciliation Week 27 May to 3 June 2007 under the theme “Their Spirit Still Shines”.

In June 2007 the Howard Government introduced the Northern Territory National Emergency Response (also known as "the intervention") in response to allegations of widespread child abuse and neglect in Northern Territory Indigenous communities addressed in the Little Children are Sacred Report.

The intervention included:
- Introducing alcohol restrictions on local Indigenous land;
- Introducing welfare reforms to ensure funds allocated for child welfare were used for that purpose;
- Linking income support and family assistance payments to school attendance and providing meals for children at school at parents' cost;
- Introducing compulsory health checks for all Indigenous children to identify and treat health problems and any effects of abuse;
- Acquiring townships identified by the Australian Government through five year leases, including payment of compensation;
- Increasing policing levels in prescribed communities;
- Cleaning up and repair of communities to make them safer and healthier by local workforces through work-for-the-dole;
- Banning possession of pornography; and
- Removing customary law as a mitigating factor for sentencing and bail conditions.

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61 Ibid.
The intervention was criticised by much of the Indigenous community as a pretext for land grabbing.65 Some Indigenous activists such as Noel Pearson and Bess Price criticised aspects of it but in general they supported the response as being necessary.66

However, the intervention has met with a lot of criticism,67 both domestically and internationally, for failing to consult with Indigenous communities about the intervention, unfairly stigmatising them and for the fact that the intervention was exempted from the Racial Discrimination Act 1975.68

2.5 The Apology

Kevin Rudd PM's Apology to the Stolen Generations69 delivered to the Australian Parliament on 13 February 2008 was a watershed moment in the history of reconciliation and Australian history in general.

Following the first traditional Indigenous 'Welcome to Country'70 ceremony to be held in the Federal Parliament, the Prime Minister apologised to the Stolen Generations on behalf of the Australian Government for the policies of past governments. The repeated use of the word 'sorry' by the Prime Minister throughout the apology was conscious, as it is significant in Indigenous culture. It is described by Reconciliation Australia as follows: "...sorry is an adapted English word used to describe the rituals surrounding death (Sorry Business). Sorry, in these contexts, is also often used to express empathy or sympathy rather than responsibility."71

The 'Bringing Them Home' report had recommended the proffering of an official apology in 1997, but then Prime Minister John Howard had declined to go as far as apologising. He maintained it was inappropriate for the Parliament to apologise for the actions of previous Parliaments and that it could lead to a deluge of compensation claims.72 As an alternative, on 26 August 1999 Mr Howard moved a

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68 Racial Discrimination Act 1975 (Cth).
72 Ibid.
Motion of Reconciliation\textsuperscript{73} with an expression of “\textit{deep and sincere regret}” for the injustices of the past. Opposition leader Kim Beazley made an attempt to replace this motion with an unreserved apology, but was rejected.

All State and Territory governments have issued formal apologies between 1997 and 2001, but fears of a subsequent rush of compensation claims were ultimately unfounded.\textsuperscript{74} Following the Apology and as part of a COAG strategy to eradicate Indigenous disadvantage, $26.6 million was provided in the 2009-10 budget to establish an Indigenous Healing Foundation,\textsuperscript{75} on 30 October 2009. The Foundation was set up to confront the negative legacy of non-Indigenous incursion, with a particular focus on Stolen Generations survivors and their families who continue to suffer as a result of those experiences.

It facilitates locally run Indigenous healing programs nationwide, funds education and research on Indigenous healing, supports members of the Stolen Generations, develops relationships between communities and up-skills workers.

In the spirit of the Apology, on 3 April 2009 a largely symbolic step was made towards reconciliation when Jenny Macklin MP, then Minister for Families, Housing, Community Services and Indigenous Affairs reversed the earlier position of the Australian Government by issuing a Statement of Support\textsuperscript{76} for the United Nations Declaration on the Rights of Indigenous Peoples\textsuperscript{77} which was adopted by 144 countries on 13 September 2007.

The Declaration is a non-binding, aspirational instrument encouraging equality, consultation and cooperation between Indigenous peoples and governments. It does not create new rights but enunciates the existing international human rights of Indigenous people.

Most of the rights outlined in the Declaration were already recognised and protected in Australian domestic laws or other international conventions and treaties which had been adopted.\textsuperscript{78} In spite of this, Australia had originally voted against the Declaration, along with New Zealand, the United States and Canada. Senator Marise Payne set out the government's objections at the time, which included concerns that the Declaration would encourage a misconception that Indigenous people had rights

\textsuperscript{73} Parliament of Australia, Press releases, Prime Minister John Howard, \textit{Motion of Reconciliation} (26 August 1999) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=(ld:media/pressrel/23e06);rec=0;> accessed 29 March 2015.


2.6 Constitutional recognition

The imminent objective for proponents of reconciliation is constitutional recognition of Indigenous people as the First Australians and the complete abolition of Section 25 which allows States to prevent people from voting based on their race and Section 51(xxvi) of the Australian Constitution which permits the Federal Parliament to make laws for classes of citizens based on their race.

In 1999, Prime Minister John Howard proposed Indigenous recognition in the preamble to the Constitution as part of the republic referendum, but it was defeated. In 2007, Mr Howard promised that if re-elected as Prime Minister, he would hold a referendum to recognise Indigenous Australians in the Constitution: he was subsequently defeated by Kevin Rudd, but the referendum proposal had bilateral support.

In July 2008, Indigenous people of Arnhem Land presented Mr Rudd with a statement calling on the Government to work towards constitutional recognition, which he agreed to support.

In 2010, as part of a deal to form government, Prime Minister Julia Gillard agreed to hold a referendum on constitutional recognition by the 2013 election. In December 2010, after calling for nominations by the public, membership of the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples was announced, consisting of Indigenous and community leaders, constitutional experts and parliamentary members.

The Expert Panel held a national public consultation throughout 2011. It reported its findings to the Prime Minister in January 2012.

The Expert Panel Report made the following recommendations regarding the Constitution:

- Remove Section 25, which allows States to ban people from voting based on their race;
- Remove section 51(xxvi), which could be used to pass laws that discriminate based on race;
- Insert a new section 51A which recognises Indigenous people and to maintain the Federal Government’s power to pass laws that benefit Indigenous people;

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80 The Constitution (Cth).


• Insert a new section 116A which bans racial discrimination by government; and
• Insert a new section 127A which confirms that English is Australia’s national language while recognising that Indigenous languages were Australia’s first languages.

The proposed 2013 constitutional referendum was subsequently delayed to rally public support in advance.\textsuperscript{83}

A people’s movement called Recognise\textsuperscript{84} was established under the auspice of Reconciliation Australia to lobby for constitutional change.

The \textit{Aboriginal and Torres Strait Islander Peoples Recognition Act 2013}\textsuperscript{85} was introduced as an interim measure to pave the way for a constitutional referendum. It was drafted with a sunset provision of 2 years to encourage Parliament not to postpone resolution of the matter indefinitely.

In recent times the movement for constitutional recognition has gathered pace. Current Prime Minister Tony Abbott pledged\textsuperscript{86} at a citizenship ceremony in Canberra on Australia Day 2014 to finalise a draft for amending the Constitution to constitutionally recognise Indigenous people by September 2014, maintaining that national debate was needed in the meantime to ensure the amendment drafted was acceptable to all Australians. Despite the fact that no draft amendment has yet been presented, Tony Abbott has maintained that it is close to finalisation.\textsuperscript{87}

3. Reconciliation in the States and Territories

The following are summaries of the efforts made toward reconciliation on a State and Territory level from 1997 onwards, when the imperative towards reconciliation moved from a predominantly Federal level and began to gain traction nationwide.

\textsuperscript{84} Recognise, \textit{About Recognise} \texttt{<http://www.recognise.org.au/about>} accessed 29 March 2015.
\textsuperscript{85} \textit{Aboriginal and Torres Strait Islander Peoples Recognition Act 2013} (Cth).
3.1 Australian Capital Territory

The Chief Minister of the Australian Capital Territory, Kate Carnell, moved a motion in the Territory Assembly on 17 June 1997 "that this Assembly apologises to the Ngun(n)awal people [Canberra's traditional owners] and other Aboriginal and Torres Strait Islander people in the ACT for the hurt and distress inflicted upon any people as a result of the separation of Aboriginal and Torres Strait Islander children from their families." The Motion was passed.

ACT Government organisations and community organisations such as YWCA Canberra have developed RAPs to incorporate into their programs.

The aforementioned Reconciliation Place is located in the nation's capital as a national focal point for the national contemplation and atonement.

The Australian National University in Canberra holds an Annual Reconciliation Lecture. Canberrans take part in what has become an annual National Sorry Day bridge walk across Commonwealth Avenue Bridge.

3.2 New South Wales

On 18 June 1997, following an address by Ms. Nancy de Vries, a member of the Stolen Generations, the Premier of New South Wales Bob Carr moved that the House "apologises unreservedly to the Aboriginal people of Australia for the systematic separation of generations of Aboriginal children from their parents, families and communities." The Motion was passed unanimously.

With effect from 25 October 2010, the Constitution Amendment (Recognition of Aboriginal People) Act 2010 introduced a new Section 2 which amended the preamble of the NSW constitution to formally recognise Indigenous people as the first peoples in the State. However, Section 2(3) states that "Nothing in this section creates any legal right or liability..." so the inclusion is symbolic only.

The New South Wales Reconciliation Council (NSWRC) (first known as the New South Wales State Reconciliation Committee (SRC)) was formed in 1997 to develop...
reconciliation initiatives in New South Wales. It is governed by an 8 member Management Committee, elected annually at the Annual General Meeting by members. NSWRC raises awareness and understanding of reconciliation and Indigenous issues and advocates for Indigenous rights.

It provides "a bridge between communities and government in the development of reconciliation initiatives in NSW" by running events such as the Schools Reconciliation Challenge and the NSW Reconciliation Conference held in 2009.

A diversity of organisations ranging from Legal Aid NSW to the Sydney Opera House have RAP plans in place.

New South Wales is the first State to offer full compensation for Stolen Wages, a practice which operated nationally between the 1880s and 1970s whereby Indigenous people worked, often from a young age and for many years, but were paid 'pocket money' while the bulk of their wages was paid to the State to hold for their 'welfare'. This money was invariably spent on projects which did not benefit the local communities of the Indigenous people who earned it.

The Aboriginal Trust Fund Repayment Scheme was operational between December 2004 to June 2010, repaying Indigenous people whose money was put into trust funds operated by the Aborigines Protection Board and later the Aborigines Welfare Board, between 1900 and 1969, and not repaid.

The New South Wales Government did not cap repayments and both direct and descendant claimants were eligible to apply until 31 March 2009. Taking into account interest and inflation, for every $100 owed in stolen wages the New South Wales Government committed to repay $3,521 in 2005.

Queensland and Western Australia also have compensation schemes, but these have been criticised for offering maximum compensation of between $2,000 - $4,000 per claimant. These States have pleaded inability to prove what is owed due to loss and destruction of financial records over time to justify such small awards to

those who are often claiming for wages due for a lifetime's work. Other States and Territories have not yet addressed the issue.\footnote{See Creative Spirits, Repaying Stolen Wages <http://www.creativespirits.info/aboriginalculture/economy/repaying-stolen-wages> accessed 25 March 2015.}

### 3.3 Northern Territory

Clare Martin, Chief Minister of the Northern Territory, moved a motion on 24 October 2001, which included the words “that this Assembly apologises to Territorians who were removed from their families under the authority of the Commonwealth Aboriginals Ordinance and placed in institutional or foster care... [and] calls upon the Commonwealth government to make a formal and specific apology to all those persons removed pursuant to the Aboriginals Ordinance, acknowledging that the Commonwealth failed in discharging its moral obligations towards them.”\footnote{Legislative Assembly of the Northern Territory, Hansard (24 October 2001), Stolen Generation - Apology <http://notes.nt.gov.au/lant/hansard/hansard9.nsf/WebbyMember/778F27C156DD72A669256B12001F9728?openDocument> accessed 25 March 2015.}

The Motion was passed.

Northern Territory Government departments such as the Department of Education and Children's Services (DECS) have RAP plans in place. The DECS RAP plan involves running cultural awareness programs for staff, developing RAP’s visual branding by requiring all DECS workplaces display their RAP in a prominent location, encouraging schools to develop a RAP and to encouraging staff to attend occasions such as National Reconciliation Week events.\footnote{Northern Territory Government Department of Education and Children’s Services, Reconciliation Action Plan 2012 - 2013 <http://www.education.nt.gov.au/__data/assets/pdf_file/0020/34238/DECS-ReconciliationActionPlan2012-2013.pdf> accessed 25 March 2015.}


May 2013. In return, the media student taught the journalist about her culture, that of the Yolgnu people of Arnhem Land.\textsuperscript{110}

### 3.4 Queensland

On 3 June 1997, Kevin Lingard MP moved the following motion, that: "\textit{the Parliament of Queensland on behalf of the people of Queensland expresses its sincere regret for the personal hurt suffered by those Aboriginal and Torres Strait Islander people who in the past were unjustifiably removed from their families.}"\textsuperscript{111}

On 26 May 1999, Premier of Queensland Peter Beattie moved a motion which included the following: "\textit{This house recognises the critical importance to Indigenous Australians and the wider community of a continuing reconciliation process, based on an understanding of, and frank apologies for, what has gone wrong in the past and total commitment to equal respect in the future.}"\textsuperscript{112} The Motion was passed.

The Constitution (Preamble) Amendment Act 2010,\textsuperscript{113} with effect from 25 February 2010, introduced a Section (c) in the Preamble to the Queensland Constitution honouring Indigenous people as the First Australians and paying tribute to their culture, but also introduced a new Section 3A which stated that the Preamble did not "create in any person any legal right or give rise to any civil cause of action".

Reconciliation Incorporated Queensland (RQI) was established to combat racism and discrimination, support Indigenous cultural revitalisation and advocate for Indigenous rights.\textsuperscript{114}

Australia Day has always been a divisive issue for Indigenous people: the commemoration of the arrival of the First Fleet is perceived by Indigenous Australians as a celebration of the commencement of an illegal invasion and of a sustained ethnic cleansing of their people and culture.\textsuperscript{115} One of RQI's initiatives\textsuperscript{116}

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was a public screening on Australia Day of an episode of ‘Redfern Now’, the first television series written, directed and produced by Indigenous Australians. The drama promotes better inter-community understanding by giving viewers from all backgrounds an insight into modern issues and problems faced by an urban Indigenous community from their own perspective. One of the themes explored in the drama is that "Forgiveness is an essential part of reconciliation".

The Queensland Government holds annual Queensland Reconciliation Awards to recognise businesses and organisations making efforts to advance reconciliation in Queensland through employment, training or local community initiatives.

The Queensland Government as a whole has its own RAP.

3.5 South Australia

On 28 May 1997 Dean Brown, Minister for Aboriginal Affairs, issued the following Parliamentary apology: "the South Australian Parliament expresses its deep and sincere regret at the forced separation of some Aboriginal children from their families and homes which occurred prior to 1964, apologises to these Aboriginal people for these past actions and reaffirms its support for reconciliation between all." The Motion was passed unanimously.

The South Australian Government established the Aboriginal Affairs and Reconciliation Division. Its purpose is to support the Minister for Aboriginal Affairs and Reconciliation in creating and implementing policies to support Indigenous culture and improve Indigenous quality of life, but as the name suggests there is an emphasis on furthering reconciliation.

Bruce Trevorrow became the first member of the Stolen Generations to successfully sue a State Government for his ill-treatment. On appeal in March 2010, the Full Court of the South Australian Supreme Court upheld an award for $775,000 made against the South Australian Government. Bruce had died in June 2008 before learning the South Australian Government’s appeal was unsuccessful.

On 21 March 2013, South Australia’s Constitution was amended to recognise Aboriginal peoples as the traditional owners and occupiers of South Australian land and waters. However, as with the recognition amendments to the Constitutions of other States, Section 2(3) states “The Parliament does not intend this section to have any legal force or effect.”\textsuperscript{125}

Reconciliation South Australia was established as a not-for-profit organisation to promote a people’s movement for reconciliation in South Australia, to develop an understanding of the shared history of all South Australians and to recognise and support Indigenous rights.\textsuperscript{126} It has a very comprehensive website which documents Indigenous history in South Australia, explains the concept of reconciliation and why it is imperative, has resources for schools and maintains a reconciliation timeline.

Recent events organised by Reconciliation South Australia include a speech by Ken Wyatt AM MP, son of a member of the Stolen Generations and lobbyist for Constitutional Recognition at the 6th Anniversary of the National Apology to the Stolen Generations: Recognising the Stolen on 13th February 2014 which was followed by a community barbecue.\textsuperscript{127}

3.6 Tasmania

On 13 August 1997 the Tasmanian Premier, Tony Rundle, moved a parliamentary motion that included the words: “That this Parliament, on behalf of all Tasmanians, expresses its deep and sincere regrets at the hurt and distress caused by past policies under which Aboriginal children were removed from their families and homes, apologises to the Aboriginal people for those past actions and reaffirms its support for reconciliation between all Australians.”\textsuperscript{128} The Motion was passed unanimously. It was followed by an address by Ms Annette Peardon, a member of the Tasmanian Stolen Generations.

There does not appear to be an organised State-wide reconciliation association in Tasmania, but there are organisations at grassroots level, such as the Glenorchy Reconciliation Group (formed under the banner of Landcare, a volunteer movement for individuals and groups who want to improve their local area).\textsuperscript{129} The Glenorchy group unites Indigenous and non-Indigenous people and builds appreciation and respect for Indigenous cultural heritage by undertaking projects such as weed

removal, protection of Indigenous heritage, repopulating the local area with local plants and educating the community.

Tasmania has adopted an Aboriginal and Dual Naming Policy for geographical place names.\textsuperscript{130} Section 2 'Principles' states: "The Tasmanian Government acknowledges that places in Tasmania were named by Aborigines long before the arrival of Europeans. The Tasmanian Government acknowledges prior Aboriginal ownership and is committed to preserving Aboriginal heritage and language by ensuring that Aboriginal place names can be restored to Tasmanian geographic features and places."

Tasmania also became the first State to offer compensation to the Stolen Generations, introducing the Stolen Generations of Aboriginal Children Act 2006 which came into effect on 18 October 2006.\textsuperscript{131} Premier Paul Lennon released a statement pledging $5 million to be divided among survivors and families of the Stolen Generations.\textsuperscript{132}

### 3.7 Victoria

On 17 September 1997 the Premier of Victoria, Mr Jeff Kennett, moved a parliamentary motion that included the words: "That this House apologises to the Aboriginal people on behalf of all Victorians for the past policies under which Aboriginal children were removed from their families and expresses deep regret at the hurt and distress this has caused and reaffirms its support for reconciliation between all Australians."\textsuperscript{133} The Motion was passed.

The \textit{Constitution (Recognition of Aboriginal People) Act 2004}, effective from 9 November 2004, inserted a new Section 1A which recognised that Victoria was settled "...without proper consultation, recognition or involvement of the Aboriginal people of Victoria" and that Indigenous Victorians have "...a unique status as the descendants of Australia's first people", similar to the other states which recognise the special status and contribution of their Indigenous citizens, Section 1A(3)(a) ensures this gesture does not "...create in any person any legal right or give rise to any civil cause of action".\textsuperscript{134}


Reconciliation Victoria was established in 2002 "by a group of individuals keen to address the unfinished business of the 'Roadmap to Reconciliation'" which had been initiated by the CAR. The organisation supports the establishment of local Reconciliation Groups, works with young people, develops strategic partnerships and advances cultural awareness and education in the wider community. Initiatives include the concert "dirtsong by Black Arm Band - Music of the Australian Indigenous Experience" on 26 March 2015, events around Australia commemorating the 7th anniversary of the National Apology to the Stolen Generations on 13 February 2015. The Melbourne Indigenous Arts Festival took place between 5 and 16 February 2014.

The Victorian Government received praise for its Native Title claims settlement under the Traditional Owner Settlement Act 2010 (Vic) with the Dja Dja Wurrung people (traditional owners of central Victoria) in 2013. Prof Mick Dodson commented in his November 2013 article for The Age that Indigenous people from urban areas find it particularly difficult to prove Mabo's "continuous connection" test: it requires costly legal and anthropological research as well as a search through historical tenure records to establish if any extinguishing acts have taken place.

Prof Dodson states that the Victorian legislation has moved "beyond the inquisitions of continuity and extinguishment. It simply acknowledges that there are Victorian Aboriginal people today who are traditional owners by virtue of their own shared knowledge of family, history, country and place, linking back to the mid-1800s, when Victoria was rapaciously colonised…"

The settlement agreement was formally signed by the Victorian Government and representatives of the Dja Dja Wurrung people at a ceremony in Bendigo on 28 March 2013, followed by a celebration after its registration, which was also held in Bendigo on 15 November 2013.

3.8 Western Australia

On 27 May 1997 the Western Australian Premier, Richard Court, issued a Parliamentary statement: "It is appropriate that this House show respect for Aboriginal families that have been forcibly separated as a consequence of

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government policy in the past, by observing a period of silence.” The House stood for a minute silence.

The following day, Dr Geoff Gallop (Western Australian opposition leader) moved a motion: “that this House apologises to the Aboriginal people on behalf of all Western Australians for the past policies under which Aboriginal children were removed from their families and expresses deep regret at the hurt and distress that this caused.” The Motion was passed unanimously.

Reconciliation WA was established in 2013. Western Australia appears to have an active RAP community: a Western Australian Reconciliation Action Plan Forum for Western Australian RAP members was held on 26 September 2011 to discuss constitutional recognition.

The event was hosted by mining corporation Rio Tinto, which has developed its own RAP. Rio Tinto’s website claims to have developed an Indigenous policy as early as 1996 which was "considered 'landmark' for the resources sector". It also asserts that in 2012 it was the largest private sector employer of Indigenous Australians (who made up approximately 7% per cent of Rio Tinto’s Australian workforce).

On 26 March 2015 it was announced that a joint parliamentary committee in Western Australia had recommended that the preamble of the Western Australian constitution be amended to read in part, "the Parliament resolves to acknowledge the Aboriginal peoples as the first Peoples of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation with the Aboriginal people of Western Australia." This constitutional amendment has received bipartisan support and is expected to be in place by 1 June 2015.

4. The Next Steps

A resolution to the question of Constitutional recognition appears imminent and, despite the delay to the release of the draft amendment, this amendment will open

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the subject to a national debate. If properly drafted, the prospects for success are generally positive according to Helen Irving from the Constitutional Reform Unit of University of Sydney Law School as set out in her paper "A Referendum on Indigenous Constitutional Recognition – What are the Chances?".

If, as anticipated, a referendum is passed and Indigenous people are recognised in the Constitution as the First Australians, what is the next progression in the path toward reconciliation?

4.1 The Treaty Debate

Indigenous people were not represented or consulted in the drafting of the Australian Constitution. Australia is the only Commonwealth country without a treaty with its Indigenous peoples.

Saxe Bannister, the first Attorney General of New South Wales (and author of *Humane Policy; or Justice to the Aborigines* (1830), and *British Colonization and Coloured Tribes* (1838)) first posited the idea of a treaty with Indigenous peoples in a 1837 submission to the Select Committee of the House of Commons on Aborigines. Explorer John Batman, credited as one of the founders of modern Melbourne, entered into a 1835 treaty with the Kulin people which was subsequently declared invalid as it was negotiated privately by Batman rather than a representative of the Crown.

The next significant national dialogue regarding a treaty did not arise until 1979 when the Aboriginal Treaty Committee was formed by a group of well-known Australians from outside the Indigenous community (such as economist H.C. "Nugget" Coombs, first Governor of the Reserve Bank of Australia, who became the Committee’s Chair). The Committee, which was active until 1983, published a number of books and pamphlets in support of its cause.

The Senate Standing Committee on Constitutional and Legal Affairs released a 1983 report Two Hundred Years Later, ruling out the possibility of negotiating a

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May 2015
treaty with Indigenous people. The Report determined that "...as sovereignty is understood in contemporary international law, it refers to a singular and exclusive power in any one State". Because Indigenous social structure does not have one central political authority "...the Committee concludes that, as a legal proposition, sovereignty is not now vested in the Aboriginal peoples except insofar as they share is [sic] the common sovereignty of all peoples of the Commonwealth of Australia. In particular, they are not a sovereign entity under our present law so that they can enter into a treaty with the Commonwealth". In the alternative, the Standing Committee proposed an agreement described as a 'compact', which could be inserted into the Constitution by referendum.

Australia Day 1988, marked the 200 year anniversary of the arrival of Captain Arthur Phillip with a fleet of eleven ships carrying the first Europeans to establish a settlement in Australia. While most of the non-Indigenous Australian population celebrated, the Indigenous community and their supporters were deeply offended that what they regarded as an illegal invasion preceding ethnic cleansing of much of Indigenous society would be commemorated.

On 2 September 1987, Prime Minister Bob Hawke in a radio interview proposed a compact with Indigenous Australians, but he denied that it had been proposed in order to diffuse protest in the bicentennial year. He said he had made it clear to Bicentennial Authority organisers that there should be "nothing in language or action which implies that the only thing of importance is the last 200 years...there should be a compact of understanding as we go into 1988 of just what that 200 years represents; it is, as I say, coming on top of 40,000 years of Aboriginal history".

On that day, 26 January 1988, as an alternative to marking the Bicentennial, more than 40,000 people, Indigenous people and non-Indigenous supporters, travelled from across Australia to congregate in Sydney and staged a march from Redfern to Hyde Park calling for land rights. Indigenous leaders and activists addressed the crowd, including activist Gary Foley, who was heartened to see: "...black and white Australians together in harmony. This is what Australia could and should be like."

In June 1988 then Prime Minister Bob Hawke attended the Barunga Festival, an annual community event held in the Katherine region celebrating local sports, music, art and culture which had been inaugurated 3 years previously. Indigenous leaders and Chairmen of both Northern and Central Land Councils, Galarrwuy Yunupingu and Wenten Rubuntja took the opportunity to present the Prime Minister with two

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154 Ibid, Section 3.12.
155 Ibid, Section 3.46.
paintings and a text written on bark which became known as the Barunga Statement\(^{160}\).

The text began: "We, the Indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights..." Amongst other concerns, it called on the Australian Government and people to recognise Indigenous rights to self-determination and self-management and to control and enjoyment of ancestral lands. Ultimately the Statement required "...the Commonwealth Parliament to negotiate with us a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedom".

In his acceptance speech, Prime Minister Hawke said there would be a treaty between Indigenous people and the Government of Australia within the life of the current Parliament. The use of the term “treaty” provoked public debate. Prime Minister Hawke is quoted as commenting: "It's not the word that's important, it's the attitudes of the peoples, attitudes of the non-Aboriginal Australians and of the Aboriginal Australians if there is a sense of reconciliation...whether you say there's a treaty or a compact is not important, but it is important that we do it".\(^{161}\)

Mr Hawke could not secure unanimous support for a treaty, but his last act as Prime Minister on 20 December 1991 was to hang the Barunga Statement in Parliament House in Canberra and to call for following Prime Ministers to "...continue efforts to find solutions to the problems, the abundant problems which still face the Aboriginal people of this country".\(^{162}\)

Prime Minister Paul Keating succeeded Mr Hawke and was in office between 1991 to 1996, years which saw Mr. Keating's own Redfern address, the establishment of the Council for Reconciliation and the growth of the Reconciliation movement, the Mabo decision and commissioning of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, but no significant developments in the treaty debate.

The issue was revisited during the Great Debate\(^{163}\) hosted by Ray Martin of Channel 9 on 13 September 1998 between then Prime Minister John Howard and Kim Beazley MP, leader of the Labor Party. On being questioned by Martin as to whether there would be a treaty negotiated with Indigenous Australians by 2001, Mr Howard rejected the idea of a treaty because it implied Australia was divided into 2 different nations. In the alternative, he was"...in favour of a document that recognises the prior occupation of this country by the indigenous people... But within the notion of one undivided united Australian community where our first and foremost allegiance is to Australia and nothing else."\(^{164}\)


Following Howard’s successor, Prime Minister Kevin Rudd’s Apology to the Stolen Generations, constitutional recognition moved to the forefront of national discussion apropos Indigenous affairs. Though overshadowed, the treaty debate still endured. When Federal Parliament passed the *Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012* on the fifth anniversary of the Apology, protesters in front of Parliament House said the Act of Recognition was meaningless and called for a sovereign treaty recognising all Indigenous ethnic groups in Australia.

It is generally accepted as an important tenet of Indigenous identity that current generations are descended from what were approximately 600 different kinship groups or ‘nations’ in existence at the time of European colonisation, each with different languages, laws, ceremonies, teachings and art and with a distinct attachment to their ancestral home territory. These groups are as culturally diverse and have experienced the same kind of cultural distinctions, allegiances and tensions that any European nations have encountered. As such, while proud to share the title of Australia’s First Peoples, it is important to the Indigenous nations that their diversity is respected.

The concept that a treaty must be negotiated with individual Indigenous nations was recently endorsed by Warren Mundine, head of the Indigenous Advisory Council and current Prime Minister Tony Abbott’s chief advisor on Indigenous affairs. A report in *The Australian* suggested that rather than making a case for treaties with individual nations based on recognition of their diversity, Mr Mundine called for individual treaties as it would have the practical effect of enabling such agreements to go hand in hand with recognition of each nation’s Native Title claims to avoid drawn-out cases.

The Opposition’s spokesperson on Indigenous affairs, Labour MP Shayne Neumann, noted that in southeast Queensland alone there are currently 3 groups contesting 3 overlapping claims. He described the Native Title process as “a legal quagmire” as it is and that Mr Mundine’s approach would result in a “lawyers’ picnic”. He suggested that politicians’ efforts and funds would be better spent for Indigenous people on ‘closing the gap’ [in quality of life between Indigenous and non-Indigenous Australians] and achieving Constitutional recognition.

Maurie Japarta Ryan is the current chair of the Central Land Council (a council of 90 representatives from Indigenous communities made up of 15 different language groups, based in the south of the Northern Territory) which promotes Indigenous land rights. He has rejected Mr Mundine’s suggestion, saying that “Any treaty should

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164 *Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012* (Cth).
be done with the Queen of England. Not with Australia, with England because we never acquiesce our sovereignty for 1788 to present day."^{168}

Mr Ryan’s assertion raises some fundamental questions: if a treaty were to be agreed, is the Australian Government an appropriate signatory in light of the contention that Indigenous Australia has never ceded sovereignty to the British Crown? In the alternative, can Australia legally make what is in essence a treaty with itself? Will a treaty have the support of the majority of Australians?

### 4.2 A Treaty with the Crown

While Indigenous Australians and the British Crown are logically the most appropriate parties to engage in a treaty, such an approach is certain to be firmly rejected by the UK authorities.

In 2007 the UN General Assembly voted to adopt the UN Declaration on the Rights of Indigenous Peoples which asserted the rights of Indigenous people to freedoms such as self-determination, preservation of culture and land rights.\(^{169}\) If it were adopted into a nation's law, Indigenous people could sue that nation's government based on breaches of that law.

Whilst voting to adopt the Declaration, the UK delegate Karen Pierce stressed that it “...was non-legally binding and did not propose to have any retroactive application on historical episodes. National minority groups and other ethnic groups within the territory of the United Kingdom and its overseas territories did not fall within the scope of the indigenous peoples to which the Declaration applied.”\(^{170}\)

Due to the doctrine of parliamentary sovereignty,\(^{171}\) UK courts cannot overrule parliamentary policy. Accordingly, the fact that the British delegate stated publically that the Declaration was non-binding and had no retrospective effect is an indicator that the UK government was attempting to distance itself from the historical grievances of its former colonies, including Australia.

The Scottish referendum on independence held in September 2014 prompted conversations about the future of the UK’s Acts of Union and demonstrated that the UK is not willing to become embroiled in a constitutional argument with Australia. Such an argument would inevitably have implications for its relations with other former colonies and possibly the countries within its own union.

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A treaty with the British Crown is not completely outside the realms of possibility: in this age of internet activism the support of the UK public could be engaged to encourage their leaders to sign a treaty to acknowledge past wrongs. However, following the failure of the Scottish referendum, it is hard to envisage how Australia could compel the UK to engage in such a treaty process.

Accordingly, the most likely scenario for a treaty to be struck within the current generation is that it will be between Indigenous Australians and the Australian Government as the heir to the legacy of British colonisation: such a ‘realpolitik’ approach may not satisfy historical purists, but until such negotiations become a reality it remains to be seen whether this would be acceptable to the wider Indigenous community.

4.3 A treaty with the Australian Government

In a radio interview with John Laws on 29 May 2000, then Prime Minister John Howard made the following statement: "…a nation, an undivided united nation does not make a treaty with itself. I mean to talk about one part of Australia making a treaty with another part is to accept that we are in effect two nations."

This raises the issue of Indigenous sovereignty, a concept very important to Indigenous identity in terms of reconciliation, as to acknowledge Indigenous sovereignty is to acknowledge an assertion of Indigenous ownership of the Australian continent and its waters as a pre-existing, perpetual right.

However, this concept does not sit comfortably against the popular view of many non-Indigenous Australians that reconciliation can be achieved merely by closing the gap and outlawing racial discrimination. This is illustrated by the following discussion which is extracted from the abovementioned interview between Laws and Prime Minister Howard (emphasis added):

LAWS: … do you understand what it is that the Aboriginal people want?

HOWARD: Well I think many of them want a treaty.

LAWS: But a treaty’s something you have after a war isn’t it?

HOWARD: Well it depends who you talk to. If you talk to the public spokesmen they increasingly talk about a treaty. If you talk to people in remoter parts of Australia they’re interested in better health, better education, more jobs, improved living conditions… I find often a disconnect between what the spokesmen are saying and what the people on the ground are saying but that’s not necessarily a strange thing. But the notion of a treaty is very divisive because demands about land ownership

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and so forth will be made if there were ever any negotiation for a treaty and that would open up a divide rather than heal a rift.

HOWARD: ...I’ve said that frequently that I am very sympathetic to the goals of reconciliation I just can’t agree with the leadership of the Aboriginal movement on a formal national apology or on a treaty. The great bulk of the declaration [presented to Howard the day previously, which was the date of the first Sydney Harbour Bridge Walk for reconciliation] that they presented I agree with but in three important respects, that’s the formal apology, the question of self-determination and the role of customary law, I couldn’t agree to those things. See as the Prime Minister you don’t have the luxury of giving general assent to something. If you say you agree to something then that is a statement given on behalf of the entire government of the nation and the idea of separate self-determination implies that you have separate development. I mean one of the clauses that I wanted to put in was that all Australians should have equal rights.

LAWS: Well isn’t that correct?

PRIME MINISTER: Well of course it’s correct but that was not acceptable to the people who wrote the declaration.

LAWS: So what do they require? Preferential treatment?

PRIME MINISTER: Well, well I’m not sure but it troubles me that that kind of phrase was not acceptable because everybody believes that. I mean I want Aboriginal Australians to have equal rights."

The above exchange demonstrates that equality and outlawing racism can be viewed as concessions toward reconciliation rather than as basic human rights. It also demonstrates that a failure to educate the wider public about the historical reasons and present need for closing the gap can lead to skewed views about preferential treatment.

Dr William Jonas AM, then Aboriginal and Torres Strait Islander Social Justice Commissioner for the Human Rights and Equal Opportunity Commission in his 2002 paper Reflections on the history of Indigenous people’s struggle for human rights in Australia – What role could a treaty play? has expressed the view that: "Formal equality on its own is not enough. As a tool of social change it is inadequate and, indeed, entrenches the inequality that already exists. The problem is not that Aboriginal people were given equal rights and treated like everyone else. The problem is that these are the only rights that Aboriginal people were given. This type of equality, formal equality, is not enough to restore Aboriginal people to their rightful

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place as the first peoples of this country. We need to go further with rights. We need to adopt a rights approach that does have the capacity to transform social, economic and political relations in Australia."

Indigenous leader Professor Mick Dodson has commented that negotiating a treaty is a matter of concern for all Australians. Referring to recently arrived New Australians, he expressed the view that it is important they understand that although they are not responsible for the original dispossession, those who have come here voluntarily should acknowledge the history of the country and that they have benefited from Indigenous people being dispossessed of the land.

Constitutional recognition can be viewed as a 'soft' act of reconciliation. If the national inclusionary clause follows the States' formula, its practical effect will mainly be as a symbolic constitutional enshrinement of an accepted fact and an expression of sympathy: recognition of Indigenous people as the First Peoples and an expression of sorrow for the pain they have been caused.

Whereas a treaty is a confronting and 'hard' act because it is, as Laws pointed out, a process that usually follows a war. It will be more difficult process for lawmakers to convince conservatives in the non-Indigenous community not to view engaging in a treaty as taking on the mantle of 'oppressor', coming as they do from a society in which Australian militarism is more often associated with valour.

As Prime Minister Howard observed, treaties also involve settlement of land disputes. Any treaty negotiations will inevitably lead to the re-opening of the Native Title/land rights question which could in turn ignite the alarmists who predicted mass evictions of non-Indigenous Australians when Native Title was first introduced.

### 4.4 Legal implications for a treaty with the Australian Government

#### 4.4.1 International Law


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In it he opined that: "In international law a treaty is normally understood to be "an international agreement concluded between States in written form and governed by international law". The Vienna Convention on the Law of Treaties, concluded in 1969, and to which Australia and most other states are parties, so defines the term in article 2 (1) (a). The Vienna Convention is also regarded as an authoritative statement of customary international law. That Convention, however, expressly recognises that there can be other forms of agreement, such as between states and "other subjects of international law", the legal force of which is to be determined by applicable rules of international law independent of the Convention."

There can also be forms of agreement that are not governed by international law such as a "Memorandum of Understanding" which produces an agreement of less than treaty status and is binding at the political level but not enforceable in international law. In an advisory opinion of the International Court of Justice in 1949, the United Nations was recognised as having the capacity to enter into treaty relations with states. Subsequently, this capacity has been ascribed to some international organisations such as the United Nation's Specialised Agencies. Professor Shearer notes that save for these examples, there is no generally recognised capacity of non-state entities to enter into treaty relations.

Professor Shearer went on to say: "There is a profound reluctance, indeed aversion, of states to concede any measure of international personality to the various peoples constituting their own populations." These agreements concluded to obtain the relinquishment of title to territory were generally held to be valid acts in international law but, once title had passed, relations between the parties came to be regarded as subject to domestic law only. Professor Shearer uses New Zealand's Treaty of Waitangi as an example of a treaty now regarded as only having status under national law.

So how do these circumstances affect the possibility of an Indigenous treaty being negotiated in Australia?

* A treaty that fits with the Australian paradigm

Professor Shearer suggests the word "treaty" implies:
  o an intention to create legal relations between the parties governed by international law; and

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177 The Treaty of Waitangi was signed on 6 February 1840. It was drafted in Māori and English and made between the British Crown and 540 'rangatira' (chiefs), representing some of the leaders of the indigenous Māori people of New Zealand. The Māori agreed to cede the sovereignty of the country to the Crown and to give the Crown an exclusive right to buy lands they wanted to sell. In return, they were guaranteed full rights of ownership of their lands, forests, fisheries and other possessions and given the rights and privileges of British subjects. Some chiefs refused to sign and others did not get the opportunity to. The Colonial Office in England later declared that the Treaty applied to tribes whose chiefs had not signed. British sovereignty over the country was proclaimed on 21 May 1840.
that the parties each possess a separate international personality.

Accordingly, he could not conceive of any government of Australia being willing to negotiate any agreement of that kind, rather a form of agreement that has political, preferably constitutional, status in Australia.

Professor Shearer suggests such an instrument should avoid associations with the controversial areas of sovereignty and international law; he proposes a term that had previously been put forward for such an agreement: 'Makaratta'. He opines that too much should not be proposed for inclusion in a treaty: attempting to draft a lengthy and comprehensive text that would settle all questions would lead to inevitable frustration.

He suggests a kind of treaty which already exists in the international sphere. They are often called "framework conventions" These agreements usually start with a preamble identifying the problems and objectives of the parties and a commitment to work towards resolution. They commit the parties to co-operate to achieve the objectives of the convention and rely on creating programmes rather than setting definitive and binding courses of action. It is an ongoing process, not a settlement. According to Professor Shearer, the legal obligations therein may only consist of the obligation to act in good faith in the forms of co-operation set out in the convention. But good faith is in itself "an important principle of both international law and national law in its own right."

He points to the Helsinki Final Act on Security and Co-operation in Europe 1975 and the United Nations Framework Convention on Climate Change 1992 respectively as examples of such agreements in operation.

According to Professor Shearer: "Some commentators decry such instruments as "soft law". They cannot conceive of law as anything other than "hard" and enforceable by inflexible legal processes backed up by sanctions. Such an attitude ignores the realities of international relations and - by extension - the realities of sensitive national political issues, such as the situation of Aboriginal Australians. In fact, so-called soft law has produced outstandingly successful results in the first example, and moderately successful results in the second. Even in the second example, the great force of the dynamics of the process set in train is evident in the defensive postures of those states that are reluctant to commit themselves to specific emission targets. They may


28. THE PROCESS OF RECONCILIATION (RECOMMENDATION 339)
shy away from specific targets but they dare not disengage themselves from the process. In the end an accommodation will be reached."

4.4.2 The form of treaty Indigenous Australians require

The question is; would such an agreement be acceptable to Indigenous Australia? After all, the main advantage for Indigenous people in negotiating a treaty is that it would give legal, international recognition to their prior and enduring sovereignty as owners of the country. How would another largely symbolic, aspirational document with no legally enforceable rights and which does not legally recognise pre-existing Indigenous sovereignty be any different from constitutional recognition?

By rejecting the concept of terra nullius legally and on a world stage, a treaty could serve to restore the international profile of Indigenous sovereignty. If the treaty were to be drafted to recognise non-Indigenous Australians as a collateral, functioning, sovereign entity with a right to co-exist, there should be nothing to fear for non-Indigenous Australia from such an agreement.

The aforementioned Dr William Jonas AM also gave a speech at the same seminar on 10 September 2002 entitled Native Title and the Treaty Dialogue. In it he posited that, up to that date, Indigenous sovereignty had been treated as indistinguishable from State or government sovereignty in international law: "The effect of this is to establish a framework in which Aboriginal sovereignty is pitted against the existing system. Aboriginal sovereignty immediately becomes an oppositional force; a threat to territorial integrity; to our system of government; to our way of life. And as a consequence, it irresistibly leads the broader community to the conclusion that Aboriginal sovereignty cannot be recognised and must be resisted."

Dr Jonas argues that the Australian Government has made an "illegitimate and quite wrongful assumption" that it is responsible for defining Indigenous sovereignty: this results in the non-Indigenous viewpoint taking precedence, an approach which will undoubtedly fail.

He concluded that recognition of Native Title arose from an acknowledgement of, and a need to reconcile "important truths about our past … with contemporary notions of justice." But it also highlighted the inconsistency between the notion that the Federal Government, heir to the colonial power who took possession of the country illegally, assumes exclusive territorial jurisdiction to Australia without having ever negotiated a legal agreement about it with those who were dispossessed.

Dr Jonas argues that it must be resolved "through a treaty process which emphasises co-existence and mutual benefit." He suggests that negotiation based on consent could resolve conflicting claims of both communities to the

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jurisdiction of traditional lands and create a coexisting sovereignty over the country.

4.5 The Intelligence Squared Debate of 12 November 2013: "True Reconciliation requires a Treaty"

IQ² or 'Intelligence Squared' is a forum for public debate based in the St. James Ethics Centre in Sydney. The Intelligence Squared Debate of 12 November 2013: "True Reconciliation requires a Treaty" was held at the Wheeler Centre in Melbourne. It was a very insightful view into the opinions of six informed, modern Australians of varied backgrounds and disciplines regarding the issues of reconciliation, treaty and the question of republic, as well as those of the audience who also offered their contributions to the debate.

4.5.1 Arguments for a treaty

George Williams, Professor of Law at the University of New South Wales and one of Australia's leading constitutional lawyers, gave a speech in support of his argument for the affirmative.

Professor Williams noted that the 1967 referendum removed the Section 51(xxvi) prohibition on the Federal Parliament making laws for Indigenous people and deleted section 127 regarding imposed omission of Indigenous people from the national census. However, it did not change the Preamble (which recites the history of the Australian States uniting as a nation but makes no mention of prior occupation by Indigenous people) or section 25 which allows states to disqualify people from voting based on their race.

Current discussions involve only consultation with Indigenous people: in Professor Williams' opinion this does not go far enough. He suggested such an agreement could involve:

- acknowledgment of the history and prior occupation of Indigenous people, as well as their long-standing grievances;
- a process of negotiation and redress for those grievances and helping to establish a path forward based upon mutual goals, rather than ones imposed on Indigenous people; and
- outcomes in the form of rights, obligations and opportunities discussed and negotiated through a process based on mutual respect that recognises the sovereignty of Indigenous people.

Professor Williams cites the Harvard Project on American Indian Economic Development which has run hundreds of research studies over more than two decades on what is and is not effective in Native American communities.


Its most important finding is that "sovereignty matters": "When Native nations make their own decisions about what development approaches to take, they consistently out-perform external decision makers on matters as diverse as governmental form, natural resource management, economic development, health care, and social service provision."182

The evidence demonstrated that redressing Indigenous disadvantage in the long term required Indigenous people having the power to make decisions on issues that affected them. Professor Williams noted, however, that Australia lacks the laws and institutions to institute such programs.

Professor Williams contends that a negotiated treaty would mark a deviation from a system that reinforced Indigenous feelings of powerlessness and result in the genesis of stronger, more capable institutions of Indigenous governance.

Professor Williams asserted that while a treaty is not a panacea for all the problems between the Indigenous and non-Indigenous communities, it is one of the elements required to achieve reconciliation and to underpin enduring Indigenous prosperity.

Supporting Professor William's argument for a treaty were Mark Yettica-Paulson and Professor Mick Dodson.

Mark Yettica-Paulson is an Indigenous leader, intercultural facilitator and a founding member of the National Indigenous Youth Movement of Australia (NIYMA). He argued that a treaty was not an act of magnanimity by the majority to be grudgingly accepted by the minority, nor was it an act of concession, but an act of reconciliation that can set out standards, responsibilities and entitlements which can inform relations going forward into a shared future. A treaty is important for Australian identity as it would help repair Australia's story of origin, because that story was not honourable. Yettica-Paulson also suggested that treaty has been associated with extreme ends of the debate regarding Indigenous rights and positioned away from reconciliation. He warned that progress cannot be made if Australians allow themselves to become polarised about the treaty issue.

Professor Mick Dodson, Australia's first Indigenous law graduate, is director of the National Centre for Indigenous Studies at the Australian National University and professor of law at the ANU College of Law and a member of the Yaruwu people. He pointed out that a blueprint for a treaty already exists, drafted by the Council for Aboriginal Reconciliation, which has not been put into practice.183 The Council for Aboriginal Reconciliation had previously recommended that:

"5. Each government and parliament:

182 Ibid.
- recognise that this land and its waters were settled as colonies without treaty or consent and that to advance reconciliation it would be most desirable if there were agreements or treaties; and

- negotiate a process through which this might be achieved that protects the political, legal, cultural and economic position of Aboriginal and Torres Strait Islander peoples.

6. That the Commonwealth Parliament enact legislation (for which the Council has provided a draft in this report)\(^{184}\) to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved."

Mick Dodson further asserted that the political status of Indigenous Australians and the resolution of tensions and divisions in society could be resolved by a treaty. It could also address the legacy of prejudicial policymaking and the removal of resource wealth from Indigenous ownership and control.

4.5.2 Arguments against a treaty

Professor Peter Sutton, Dr. Tony Birch and Gregory Phillips argued against the proposition.

Professor Peter Sutton is an anthropologist, linguist and author. He observed that the US and Canada did not have a single treaty but numerous treaties with different Indigenous groups (which is an ongoing process) and that New Zealand's Treaty of Waitangi,\(^ {185}\) cited by Professor George Williams as an example to Australia, only covered some Māori clans of the North Island.

He noted Professor Williams' assertion that a treaty is nothing more than a political agreement reached between groups. It could be called an agreement, a Makarrata or a compact, but the effect is the same. He maintained that reconciliation is a matter for one's own conscience. The best option for those without direct exposure to Indigenous culture who want to become involved in reconciliation is to seek out such contact, learn about Indigenous culture and resolve the matter within their own minds as "the State cannot do your morals for you".

Dr. Tony Birch is an author and historian from the Wurundjeri people. He was of the opinion that a treaty which has only symbolic value could become meaningless, similar to other hollow gestures Federal and State government


\(^{185}\) The Treaty of Waitangi is not considered part of New Zealand domestic law, except where its principles are referred to in Acts of Parliament. There were subtle differences in translation between the Māori and English text which has led to subsequent disputes, but the exclusive right to interpret the meaning of the Treaty lies with the Waitangi Tribunal, a commission of inquiry created in 1975 to investigate alleged breaches of the Treaty by the Crown. According to New Zealand History Online, more than 2000 claims have been lodged with the tribunal, and a number of major settlements have been reached.

sometimes enact as token efforts toward safeguarding Indigenous rights. He expressed the view that the word 'reconciliation' has become "commodified". This kind of reconciliation is momentary and based on products and a feel-good sense of oneself that does not challenge people to look at long term changes in their thinking.

Any treaty must come only after a notion of settlement between Indigenous and non-Indigenous Australians as nations, which is not legal but cultural. It involves non-Indigenous Australians coming to Indigenous Australians as hosts and owners of that country. Accordingly, Indigenous people should not need to have their sovereignty recognised. If reconciliation is not first based on a common sense of community and humanity, all other efforts to achieve it will not be able to occur.

Gregory Phillips from the Waanyi and Jaru peoples is a medical anthropologist with twenty years work experience in health, youth empowerment, medical education and health workforce. He argued that a treaty is a token act unless dual sovereignty is enacted. A treaty is effective when negotiated by two equal parties, otherwise one party will become subsumed into the apparatus of the other which reinforces the power imbalance, as was the case, Phillips contended in Canada, the USA and New Zealand.

Phillips maintained that two important opportunities were missed to redress the power imbalance and implement dual sovereignty. In the lead up to the 1967 Referendum, Indigenous leader Uncle Joe McGinness proposed an Indigenous Parliament so that Indigenous people could negotiate on equal terms but instead they were 'included' and expected to be grateful to be counted in the Census and "not as flora and fauna anymore."

Secondly, following the Mabo decision, instead of the Keating Government and the Indigenous negotiators addressing dual sovereignty, Indigenous people were expected to be satisfied with Native Title being recognised under the common law. However, the practical effect of Native Title was Indigenous people being required to prove their entitlements on the establishment's terms and creating conflict within families and communities trying to prove who is 'more Indigenous' under those terms. As a solution, Phillips proposes a new republic with a new founding document and the implementation of a peacemaking process, not reconciliation, to deal with the 'stain' on the national character.

Phillips argued that any treaty should not be negotiated until Australia becomes a republic as otherwise the Crown would have more power than any Indigenous group which would reinforce the power imbalance. He concluded that if there are not two equally sovereign parties negotiating a treaty all that can be achieved is "benevolence, charity and power imbalance dressed up as inclusion".

4.6 Reconciliation and a Republic

May 2015
Gregory Phillip's proposal for a new Australian republic has been raised before by Indigenous commentators as a change which could serve to ‘reset’ the relationship between Indigenous and non-Indigenous Australians.

Larissa Behrendt is from the Eualeyai and Kamilaroi people and the Professor of Law and Director of Research at the Jumbunna Indigenous House of Learning at the University of Technology, Sydney and a member of the Indigenous community. In her 2005 National Republican Lecture The Australian Dream: Indigenous Peoples in an Australian Republic,186 Professor Behrendt said "[w]hile the extent to which Aboriginal sovereignty exists today may be contentious to Australian governments and Australian law still struggles to identify and protect the rights of Aboriginal and Torres Strait Islander people, the exclusion of Indigenous people from the drafting process is representative of the fate of Aboriginal people under the first century of its operation. And this exclusion from the Constitution confronts us with the questions of: who does our founding document speak to and who is talking?"

Professor Behrendt refers to Kruger v Commonwealth187 (also known as the “Stolen Generations case”) which concerned a claim by Indigenous people affected by a Northern Territory Ordinance under which Indigenous children could be removed from their families. The plaintiffs were children who had been removed from their families under the Ordinance. They claimed their rights to due process before the law, equality before the law, freedom of movement and freedom of religion had been breached, but were unsuccessful on each count.

According to Professor Behrendt "[t]his was not a case that was run on what we would consider Indigenous rights; it was a case that was run on rights that would assume to be held by all Australians. This result highlights how the rights many might assume to be protected by Australian law are not and it also shows that where our Constitution is silent about the protection of rights, it is the disadvantaged within our community who are the most vulnerable to their violation."

She also referred to the case of Kartinyeri v Commonwealth188 (the Hindmarsh Island Bridge case) where the plaintiff sought to enforce heritage protection laws to prevent the Hindmarsh Island Bridge being built over sacred land. The High Court of Australia held that the Federal Parliament had the power to grant and to repeal heritage protection, if and when it so chooses. Professor Behrendt used this case to illustrate how reliant Indigenous people are on the goodwill of governments which will not always have their best interests at heart.

Professor Behrendt notes that of the many types of nationalism, "the worst" are those based on an ethnic identity and ethnic history as these can create conflict, exclusion and misery, such as in Nazi Germany. Other civic forms of nationalism created around a shared political principle which envisions a community of equal citizens with the same rights regardless of race, gender or religion are more positive.

and inclusive. Creating a republic would be an opportunity to refocus on developing this form of civic nationalism.

Professor Behrendt notes that "Aboriginal people have always contested the British claim to Australia and we have continually sought recognition of and reparation and compensation for the atrocities that have occurred in the process of colonisation... Aboriginal people have understood that the British Crown bears responsibility for these atrocities... The fear that the Republic will be used as an excuse to wipe the slate clean is understandable since the 1967 referendum has similarly been erroneously promoted as a moment in which Aboriginal people were granted equality." However, Behrendt sees this as an opportunity to create a national dialogue in which true reconciliation and acknowledgement of past wrongs can begin.

Professor Behrendt posits that a practical effect is that it will be easier to inspire non-Indigenous Australians to engage in this new civil society when they see the benefits for themselves and their families rather than to focus on the improvement of the socio-economic position of Indigenous people through a renewed reconciliation process as "[t]he general population is, according to social researchers and commentators, too inward looking and fearful to look beyond their own immediate interests."

In concluding his speech at the Intelligence Squared Debate, Gregory Phillips suggested that a new system could incorporate western democracy and incorporate the traditions of newer Australians. The citizenry should participate in pre-selection of candidates for all parties, parliamentary budgets and expenditure reviews, and the President should always be an Indigenous person, which would represent power sharing and confidence in Australia's new identity.

In Phillips' suggested model, a republic would not require a radical change to the current system of government. Parliament could be constituted as it is now with Indigenous people able to run for election if they wish, but there should be a form of Indigenous Parliament to allow for engagement in sensible policy debates. New Australians should get their citizenship from an Indigenous elder as well as their local MP. As Australia is shared between Indigenous and non-Indigenous people - these two equal sovereign parties should welcome them.

While negotiating of a treaty and the establishment of a republic are not necessarily mutually exclusive, the issue as to whether the treaty should be negotiated with the Australian Government or with the British Crown would likely become moot if the country were to become a republic. In fact, having a legal agreement containing an acknowledgement of Indigenous dispossession by the Australian government could support efforts toward negotiating a future treaty with and/or compensation from the British government.

A move toward a republic would divest the country from the remnants of colonialism, which holds such negative associations for many in the Indigenous community. It would open the way for constitutional change if the required amendments such as the removal of Section 25 are not addressed during the anticipated constitutional
reform referendum. Section 25 could then be replaced with sections enshrining fundamental freedoms for all Australian citizens.

However, unlike the issue of a treaty which is predominantly concerned with Indigenous issues, the republican debate is likely to attract other interest groups with their own agendas. Accordingly, whether or not a republic would advance the reconciliation process would be a factor, but not necessarily the main factor influencing the outcome of the debate. The extent to which it would be a factor would be the litmus test of the importance of the reconciliation process to the Australian public at large.

5. The Future of Reconciliation in Australia

From its beginnings in the wake of the 1967 Referendum, the process of reconciliation has grown from agitation mainly from the Indigenous community to a national political and social imperative.

It has taken many forms; from powerful and emotive expressions of remorse and solidarity such as the Redfern speech or the Apology, to practical efforts such as the Closing the Gap strategy and successful examples of two communities with competing interests working together in the spirit of mutual respect for mutual benefit, including the Cape York Heads of Agreement.

There have also been some steps backward, such as the enactment of the Northern Territory Intervention which is still in effect. In addition, the Federal Government planned in 2014 to repeal sections of the Racial Discrimination Act 1975, including Section 18C, which makes it unlawful for someone to act in a manner likely to "offend, insult, humiliate or intimidate" someone because of their race or ethnicity. The current Attorney General expressed the view that "People have the right to be bigots". However, the current Prime Minister announced on 5 August 2014 that the proposed changes had been abandoned. The changes were opposed by the Labor party, had been criticised by ethnic leaders and were unpopular with the wider public.

Where to now for the reconciliation process? Will there ever be a time when Indigenous and non-Indigenous Australians can say that the process has achieved what it set out to do: that after almost two hundred and fifty years of a history that...
has often been characterised by bitter enmity, can both communities say that they have been reconciled?

5.1 Has the reconciliation process had any effect?

The Australian Reconciliation Barometer\(^{193}\) is a national research study conducted every two years to measure the progress of reconciliation between Indigenous and non-Indigenous Australians. The 2012 Australian Reconciliation Barometer is the third study in the series, the initial study having been undertaken in 2008. It is run by Auspoll and consists of a 15 minute survey which asks both Indigenous and non-Indigenous Australians what they think about the relationship between the two groups and what barriers still exist.

In the first poll taken in May 2008, 50% of Indigenous people and 51% of the general community surveyed believed the relationship between the two communities was fairly or very good. In May 2010, the same question produced a result of 46% of Indigenous people to 43% of the general community and by 2012 the result had improved to 47% of Indigenous people and 46% of the general community who believed the relationship between the two communities was fairly or very good.

The Auspoll Overview attributed the positive result in 2008 to the fact that it had been conducted shortly after the Apology to Australia’s Indigenous Peoples and captured the positive mood of the nation towards reconciliation. After a slight decline in 2010, results are now trending in a positive direction; there is likely be a rise in the 2014 poll towards constitutional recognition. At the time of writing, the results of the 2014 study were not yet published.

Auspoll ’s key findings for 2012 are as follows:\(^{194}\)

<table>
<thead>
<tr>
<th>Question</th>
<th>Aboriginal and Torres Strait Islanders</th>
<th>All Australians</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree the relationship between us is important</td>
<td>98%</td>
<td>87%</td>
</tr>
<tr>
<td>Know a lot about Aboriginal and Torres Strait Islander cultures</td>
<td>84%</td>
<td>31%</td>
</tr>
<tr>
<td>Agree the relationship is good</td>
<td>47%</td>
<td>46%</td>
</tr>
<tr>
<td>Agree that it is important to know about Aboriginal and Torres Strait Islander cultures</td>
<td>96%</td>
<td>82%</td>
</tr>
<tr>
<td>Agree the relationship is improving</td>
<td>50%</td>
<td>50%</td>
</tr>
<tr>
<td>Agree Aboriginal and Torres Strait Islander cultures are important to Australia’s identity as a nation</td>
<td>94%</td>
<td>71%</td>
</tr>
</tbody>
</table>


Overall, the findings of the combined surveys indicate that Australians believe that the relationship between the two communities is important but that this relationship is not in a good state. On a positive note, Australians from outside the Indigenous community want to learn more about Indigenous people, their history and culture.

The extent to which non-Indigenous Australians are uneducated (yet curious) about Indigenous history is illustrated in a review written by Ellie Rennie on the award-winning documentary "First Australians: The Untold Story of Australia" which tells stories from Bennelong and his interactions with the First Fleet, to the success of Coranderrk before it was eventually dismantled by the Aboriginal Protection Board, the tragedy of the Stolen Generations and up to the Mabo decision.

Rennie writes: "After questioning why I hadn't been taught all this at school, a second, more unnerving thought started to surface: "What if I was?" Had I simply put this history to the back of my mind and forgotten it? We forget things we never use (like algebra). The important stories of Indigenous Australia are simply not present, not in circulation, for many of us. In her statement on the SBS website, Perkins [Rachel Perkins, one of the directors of First Australians] writes that First Australians is "a taste of the story that remains to be understood. Hopefully it will spark national interest in the people on whose lands we have made our homes." Both through this documentary and as a key figure in the establishment of the National Indigenous Television service, Perkins is using television to address that other “gap” – the gap in understanding."

There has been conflict among historians as to the extent to which European colonisation impacted Indigenous civilisation. At its worst, some of the argument

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196 At the date of the article a research fellow at Swinburne University of Technology’s Institute for Social Research, now described as an Associate Professor at the same institution <http://www.swinburne.edu.au/health-arts-design/staff-profiles/view.php?who=erennie&unit=isr> accessed 29 March 2015.


199 From the late 1960s to the present day, a number of Australian historians have been engaged in a dispute as to the nature of Indigenous dispossession, some arguing that reports of genocide are an exaggeration while others accused them of being apologists for said genocide.

has adopted a denialist approach to the past, condemning the damage to Australia’s image and/or national psyche by continually focusing on the ills of the past. Gregory Phillips has described this as "... a white, polite version of history where the truth never gets discussed and we all get to move on."\(^{200}\)

The Australian national school curriculum is currently undergoing a review, to be welcomed as presenting an opportunity to review whether Indigenous history has been given its place in the story of the nation rather than being sanitised or stereotyped to ‘Dreamtime and didgeridoos’. However, the Education Minister’s publically expressed desire\(^{201}\) for a curriculum with "a greater focus on the benefits of Western civilisation" seemed to suggest a brief was being put to the committee to downgrade a history which was, as Rennie noted, already largely absent from non-Indigenous Australian society in favour of Western civilisation which has never had anything but the greater focus in Australian education.

The Government released its Review of the Australian Curriculum on 12 October 2014. The review suggests that Aboriginal and Torres Strait Islander history could be a subject of its own within the history curriculum.\(^{202}\) This is a step in the right direction for reconciliation. However, whether it will be its own subject remains to be seen. The Review and its recommendations are now being considered by all Australian education ministers.\(^{203}\) The final outcome and implementation of the review has the potential to cause a backward step in the reconciliation process.

5.2 Can Australians ever be truly reconciled?

John Laws’ question, "What do Aboriginal people want?" is succinctly addressed in the following extracts from a letter to the Koori Mail in January 2011 by a reader who published her ideal Prime Ministerial response to the needs of Indigenous Australians, under the title "If Only":\(^{204}\)

"In my Government’s new paradigm, we hereby make this solemn oath: We will stop telling you what to do and we will start asking you what you want and need to address your social problems and restore peace, health and harmony in your communities...

\(^{200}\) Intelligence Squared Debates, True Reconciliation requires a Treaty (12 November 2013)
We will listen carefully, and then we will facilitate whatever you say is required to achieve this, be it supplying remote communities with the latest renewable energy technologies, practical earth-building programs or anything else at all to help with the reconstruction effort.

There will be no more demeaning ‘welfare’ payments to Aboriginal people who wish to reclaim their inheritance and restore their cultures, contemporaneously or traditionally.

There will now be unconditional funding of each and every person (including non-Indigenous) in any way involved in cultural restoration in recognition that this would involve a comparatively minuscule amount of government funds.

If you wish to re-establish your inter-connected grid of Songlines and migration trails (mostly still existing within the stock route system which usurped them) that can easily be arranged by according them the same legal status as the stock routes, that is, free access to walkers and riders...

If you want to prioritise teaching your children their own languages over English, that too can be arranged through school curricula.

In fact, as long as you don’t break any laws, you do whatever you need to do to keep the priceless legacy of humanity’s longest continual scientific and metaphysical knowledge streams safe and enduring into the future.

Needless to say, all your most precious and sacred cultural places will immediately come under legal protection from harm...

Keep in touch… and let me know if you would like me to sign a treaty to legitimise our pledge.”

The practical and politically driven “Closing the Gap” strategies being enacted by Federal, State and Territory governments for bringing Indigenous Australian’s life expectancy, quality of life and equality of opportunity level with those of other Australians within a generation are absolutely essential to the process of reconciliation. One community's development in the economic, social and psychological spheres has been significantly hindered by the other. It would only engender continuing resentment if such a situation was allowed to continue and it is vital to ensuring that when both communities engage in dialogue, they are doing so from equal bargaining positions.

However the national, popular movement appears at this present time to be less focused and effective. Gregory Phillips has said that the reconciliation movement at the moment seems only to be concerned with corporate ‘do-gooding’ than looking at the causes of terrible statistics or about discussing the truth, which Professor Peter Sutton has described as “reconciliation with a capital ‘R’”. According to Phillips "It's
based on the false notion that if Aboriginal people all just get good jobs then everything will be OK.”

Therefore ‘closing the gap in understanding’ appears to be the main challenge for both communities in developing the reconciliation process going into the future. Rennie notes of Australian children that research has shown that “…the narrative presented to them is safe and repetitive, consisting of superficial lessons on Dreamtime and didgeridoos. Teachers are unsure of their ability to present Indigenous perspectives, while students feel guilt-tripped by the term ‘invasion’.”

The way to reconciliation can only be brought about through better understanding, as humans fear and resile from what they do not know or understand. If a serious attempt was made at formulating a program informed by Indigenous perspectives and history and adopted into the national curriculum as a compulsory subject, even those children without direct exposure to Indigenous classmates would learn such history as a shared history, instead of such history being viewed as that of the ‘other’ and they could take a shared pride in it.

Education outside the classroom for the adult public is also essential to the process. There are those in society who perceive ‘closing the gap’ initiatives as ‘preferential treatment’ and view them with resentment, which is contrary to the healing climate the reconciliation process is attempting to create. These individuals would benefit from a better understanding of the obstacles in the path of Indigenous development and how government strategies are working to reverse this injustice within the life of one generation.

Recognising the humanity in the other community is just as important as celebrating the differences; accordingly the important work of Reconciliation Australia and similar organisations in introducing non-Indigenous Australians to their Indigenous neighbours should be encouraged and supported.

According to the authors of the Auspoll overview "It will take a generation to see significant change in the perceptions and attitudes of Aboriginal and Torres Strait Islander and non-Indigenous Australians towards one another. Improving levels of trust and reducing levels of prejudice will happen slowly as we understand each other better and communicate more.”

It must also be recognised that reconciliation is a two-way process. While the onus has been on non-Indigenous Australia to extend the hand of friendship, Indigenous Australia must be prepared to grasp it. Warren Mundine has been quoted as saying "It seems to me when we talk about reconciliation in the context of Aboriginal affairs, we talk a lot about the sorry part but we don’t talk much about the forgiveness.


part...For real reconciliation, it is not enough that the country says sorry, feels remorse, rejects racism and seeks to make amends: for real reconciliation, indigenous people also need to forgive...I’m not suggesting that indigenous people should forgive wrongdoers as individuals...However, I do believe the time must come when indigenous people forgive Australia as a nation.  

To forget history creates a danger that it may repeat itself. It is also understandable that those alive today who have suffered and who remember the suffering of their loved ones and ancestors would have great trouble forgiving past wrongs. A failure to accept the efforts at reconciliation which are being extended, however, will condemn future generations to bitterness. As the future proprietors of their people’s knowledge and culture, it is very important that insofar as possible Indigenous youth be given the best possible opportunity by their own community to embrace their future.

Perhaps the future of the reconciliation process is summed up best in the words of Professor Mick Dodson: "...I think it’s not a thing that is going to have an end point. I think it’s a process that will be taken up generation by generation; generations who set their own terms and conditions of the relationship."  

Australia can be reconciled, but this can only take place as part of an ongoing, living process where all Australians' commitment to sharing this land in harmony is continuously being reaffirmed.

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