A RECONCILIATION ODYSSEY: NEGOTIATING TOWARDS 2001

by

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Abstract

Relations between the indigenous peoples of Australia and non-Aboriginal Australians have been marked by racial tension, hostility and brutality: a classic case of the result of the collision of alien cultures. In the eyes of some, the differences in these world views are so great that they are irreconcilably incompatible. The acceptance by, or the imposition on a minority, of fundamental values antithetical to its own culture may spell its demise. Cultural survival is not synonomous with cultural preservation. Through the interstices created by legislation, common law and education and therefore ultimately through the will of the nation it *may* be possible to create an environment in which vastly different cultures may come to some improved position of reconciliation. The necessary political, legal, social and economic adjustments will need to be addressed and effected if the currently most disadvantaged group in Australia is to be in the necessary position of an equal at the concatenate negotiations which separate today from reconciliation.

Introduction

(a) Historical Context

Historians like Henry Reynolds[1] show that Australian colonial practices were far removed from the espousal of British principles intended to protect Aboriginal life and property and to encompass compensation. From the First Fleet's arrival until recent times non-Aboriginal Australians have demonstrated no great desire or need to negotiate with the indigenous population.

(b) The Significance of the Challenge

As modern day Australia approaches its first century of national existence, recent events and current perceptions have resulted in a focus on the possible processes of reconciliation between Aboriginal and non-Aboriginal Australia.[2]

To date the media's coverage has done little to clarify the perceived implications of the 1992 High Court of Australia *Mabo* decision;[3] rather public perceptions appear generally to have been swayed (or inflamed) against the reconciliation process.[4]

Negotiation does not take place within a vacuum. There is a vast educative effort required before mainstream Australia is prepared to acknowledge that the 1.5% minority of Aboriginal and Torres Strait Islander (ATSI) people[5] represent the descendants of the original stock which

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1 H Reynolds *Law of the Land* 2nd edn Penguin Ringwood Vic 1992; see also Von Martens *The Law of Nations* William Cobbett London 1829; J Brown (ed) *The Classics of International Law* Transmedia New York 19-; M Lindley *The Acquisition and Government of Backward Territory in International Law* Longmans Green London 1926; K McNeil *Common Law Aboriginal Title* Clarendon Press Oxford 1989; and R Bartlett 'The Source, Content and Proof of Native Title' *Resource Development and Aboriginal Land Rights* Centre for Commercial and Resources Law University of Western Australia 1993 at 35-60.

2 See *Council for Aboriginal Reconciliation Act* 1991 (Cth).

3 *Mabo v. Queensland* (1992) 175 CLR 1; (1992) 107 ALR 1; (1992) 66 ALJR 408.

4 See, eg, G Milne 'Community Divided on Native Title But Most Oppose Compensation' (17 June 1993) *The Australian* 1-2.

5 Australian Bureau of Statistics, *Aboriginal & Torres Strait Islanders. Australia, States & Territories Catalogue No.2499.* Census 1986 (1987) ABS Canberra.

provided, albeit under heinous duress, the foundation for the wealth of the Australian nation today. The Aboriginal Land Commissioner, Mr Justice Maurice, addressed this issue in his report on the Warumungu people:

> "The country as a whole has profited and continues to profit from the dispossession of these people and the use to which we put their lands. It is not simply a question of rectifying the wrongs of the past, as if the consequences of those wrongs had been worked through: the simple truth is they have not, yet we as a nation continue to enjoy benefits from them."[6]

If the reconciliation process is to be pursued so that the end result is other than token, the decade allocated for this process[7] must witness the most wide ranging consultation, debate and negotiation.[8] If the process is to be more than mere tokenism, more than mere political window-dressing for a wider international community, then this minute minority needs to bolster its base. It will require the widest political, economic, legal, constitutional and moral support. The stakes are too high to leave this support to chance. Because the stakes are so high, the consultative process needs to be open. The danger could be then however that the process degenerates into a gabfest. There is an imperative need that solid foundations are laid despite the sandcastles of rhetoric. Father Frank Brennan prior to the Bicentenary was to observe much the same sentiment in his contribution on Aboriginal aspirations to land.[9]

(c) Exploring for Common Ground[10]

The focus for Aboriginal Reconciliation needs to be directed at an exploration for common ground. An optimal negotiation approach could be one modelled on Fisher and Ury's *principled negotiation*.[11] This model identifies the four basic elements as people, interests, options and criteria. The process is co-operative and is implemented by following four cardinal rules:

1. Separate the people from the problem.
2. Focus on interests, not positions.
3. Generate a variety of possibilities before deciding what to do.
4. Insist that the result be based on some objective standard.[12]

It seems more than fortuitous that Robert Champion De Crespigny, Convenor, Mining Committee, Council for Aboriginal Reconciliation in the Preface to *Exploring for Common Ground (The Report)* should cite Edward De Bono. Two of De Bono's many books contribute centrally to the choice of title: *Exploring for Common Ground*. One of De Bono's new bestsellers, *I Am Right - You Are Wrong*[13] pursues one of his favourite alternatives to argument for dispute resolution, *exploration*: exploration of the situation; exploration of points of view, values, proposals; comparing these; perhaps combining some of these.[14] Another of De Bono's titles: *Conflicts: A Better Way to Resolve Them*[15] concentrates on the reconciliation of different perceptions by finding *common ground* and it is a combination of these two elements, *exploring for common ground*, which the Mining Committee has pursued in its present publication.

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6 M Maurice *Warumungu Land Claim* (1991), Report by the Aboriginal Land Commissioner, Mr Justice Maurice to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory. Report No. 31. AGPS, Canberra; quoted in Central Land Council *Annual Report 1990-91* (1992) AGPS, Canberra, 2.

7 *Supra* n.2, s.32.

8 See generally the last chapter, ch.38, 'The Process of Reconciliation' in Johnston, *Royal Commission into Aboriginal Deaths in Custody - Final Report* (1991) AGPS, Canberra; (*Royal Commission into Aboriginal Deaths in Custody* hereafter cited as RCIADIC).

9 F Brennan 'Aboriginal Aspirations to Land: Unfinished History and an Ongoing National Responsibility' Hocking (ed) *International Law and Aboriginal Human Rights* Law Book Company Sydney 1988 148-177 at 175.

10 Council for Aboriginal Reconciliation, *Exploring for Common Ground: Aboriginal Reconciliations and the Australian Mining Industry*, (1993) AGPS, Canberra.

11 Fisher and Ury *Getting to Yes: Negotiating an Agreement Without Giving In* 2nd ed Business Books London 1991.

12 *Ibid* at 11.

13 De Bono *I Am Right - You Are Wrong: From This To the New Renaissance: From Rock Logic to Water Logic* Penguin London 1990.

14 *Ibid* at 207-210.

15 De Bono *Conflicts: A Better Way to Resolve Them* Pelican Books London 1985.

Aboriginal Cultural Traits Pertinent to the Issue of Negotiation

(a) Kinship and Obligations

Kinship may be viewed as a central cultural factor in Aboriginality.[16] While the kinship structure has provided the foundation for Aboriginal culture, it is also at the root cause of much of the tension and disputes in evidence on the Aboriginal communities today.

Factionalism is one of the major problems of the Aboriginal communities. The *Royal Commission into Aboriginal Deaths in Custody Report* on this matter is as follows:

> "In the social world of Aboriginal people, based as it is on small kin groups, factionalism should not be considered to be either a failure by Aboriginal people to take their civic responsibilities seriously, or as merely another manifestation of cultural disintegration. Factionalism may well be, on the contrary, a sign that Aboriginal cultural processes are alive and well, and that what is missing, in the context of incorporation into a European system, is an appropriate internal system of checks and balances to the assertion of legitimate self interest."[17]

The *Royal Commission into Aboriginal Deaths in Custody* goes on to address the issue of the charge of nepotism and rightly grounds this within the framework of the kinship structure system with its intricacies of obligations central to Aboriginal culture. It is imperative that a person meet those family or kin or clan commitments and these obligations override what may be perceived as higher obligations under non-Aboriginal values. This places community councillors and other community people charged with areas of responsibility in an unenviable position. Under traditional values they are to meet their kin commitments but under the non-Aboriginal political structure they are obliged to meet their "main stream" commitments. The tensions which arise in this balancing act of trying to serve two masters take their toll and resignations are frequent. Such resulting tensions will at the least tend to a high level of community fragmentation.

Traditionally disputes were resolved through kinship structures of reciprocity based upon elaborate quid pro quo relationships.[18] The plethora of indigenous mechanisms for social control are well documented.[19] One method which requires special mention is that of consensus decision-making. Eades[20] points out some of the particular cultural ways which Aboriginal people have adopted in implementing this strategy, in particular the strategy of indirectness. Rather than contradicting initially, many Aboriginal people incline towards going along with an idea and then slowly working around to an opposing point of view.

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16 D Eades *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients -A Handbook for Legal Practitioners* Continuing Legal Education Department of the Queensland Law Society Brisbane 1992 10; Lawlor *Voices of the First Day: Awakening in the Aboriginal Dreamtime* Inner Traditions International Rochester Vermont 1991 at 166 & 168; Myers Pintubi Country, *Pintubi Self* 171, cited in RCIADIC, Vol 2, 87.

17 *RCIADIC*, Vol. 2, 83.

18 Lawlor, *supra* n.16 at 251.

19 *RCIADIC*, Vol. 2, 103, 104-108; R Berndt and C Berndt (ed) *Aboriginal Man in Australia* Angus and Robertson Sydney 1965 at 179-201; Sansom *The Camp at Wallaby Cross: Aboriginal Fringe Dwellers in Darwin* Australian Institute of Aboriginal Studies, Canberra 1980 at 89-95; H Coombs M Brandi and W Snowdon (ed) *A Certain Heritage: Programme For and by Aboriginal Families in Australia* Centre for Resource and Environmental Studies Australian National University Canberra 198 at 203.

20 Eades, *supra* n.16 at 93.

(b) Inferences for Negotiation

What may we draw from these observations of Aboriginal cultural traits?

Firstly, that it would be unrealistic to expect a unified voice from Aboriginal Australia on a number of separate grounds:

1. The small scale nature of traditional Aboriginal society[21] focused inward, not to some pan-indigenous structure.

2. The artificial construction of Aboriginal communities today is the result of non-Aboriginal Church and State policy and implementation which threw together groups and clans which had no natural affinities.[22]

3. No one expects non-Aboriginal Australia to evidence Cabinet solidarity on any issue; it is equally unrealistic to expect a unified voice from Aboriginal Australia.

4. In addition to Aboriginal communities displaying a high level of heterogeneity,[23] we need to recognise the issue of intra-heterogeneity. Rubin and Sander offer the following advice:

"Unless and until proven otherwise, it is wise to begin by assuming that differences within a culture or national group are as profound as the differences between various groups."[24]

5. Despite the existence of a legislatively created national body, the Aboriginal and Torres Strait Islander Commission[25] (ATSIC), there has been a fair degree of rejection by Aboriginal and Torres Strait Islander people of ATSIC on the grounds that the Commission is another bureaucratic organization which does not reflect grassroots aspirations.[26]

6. Traditional Aboriginal culture was not democratic in that votes were not counted. Decision-making Aboriginal style did not call for people to take sides: all the group could take part in a consensual mode; time was not critical;[27] if consensus was not reached at a particular session then the matter would be held over, and this could be repeated numerous times until eventually consensus was reached.[28]

Secondly, traditional Aboriginal culture placed a paramountcy on interpersonal relationships.[29] The participatory element was vital to a culture dependant on consensus as a chief mode of dispute resolution. These characteristics are still markedly in evidence today and Ligertwood reports "the whole community is involved in action if *right conduct* is not followed".[30] From a negotiating perspective, these features are central to that of finding a "voice". The negotiators will

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21 Coombs, *supra* n.19 at 202; Sansom 'The Aboriginal Commonality' RM Brendt (ed) *Aboriginal Sites, Rights and Resource Developments* Academy of Social Sciences in Australia Canberra 1982 at 135-137; cited in *RCIADIC* Vol. 2, 535; Ekermann 'Cultural Vacuum or Cultural Vitality?' *Australian Aboriginal Studies* 1 1988 at 35, cited in *RCIADIC* Vol. 2, 535.

22 *Supra* n.16 at 18.

23 *Ibid*: "mission and reserves have comprised people from up to twenty or more different language areas"; cf B Chatwin *The Songlines* Jonathan Cape London 1987 at 288.

24 Rubin and Sander "Culture, Negotiation and the Eye of the Beholder" (Jul 1991) *Negotiation Journal* 249 at 253.

25 Created by the *Aboriginal and Torres Strait Islander Commission Act* 1989 (Cth).

26 See F Brennan 'Seeking a National Mouthpiece for Local Voices' (1990) 2:43 *ALB* 4-6; FAIRA 'A Limited Step Forward' (1990) 2:43 *ALB* 7-9.

27 Harris *Culture and Learning: Tradition and Education in North East Arnhem Land* (1980) Northern Territory Department of Education Darwin 1980 at 33 where Harris differentiates the concept of time for European Australians as being linear whereas for traditional Aborigines it is cyclic; Bird *Process of Law in Australia, Intercultural Perspectives* Butterworths Sydney 1988 at 255.

28 This bears a very close and fascinating resemblance to Native American decision making processes. See, eg, (Summer 1993) 10:4 *Mediation Quarterly*, Special Issue. 'Native American Perspectives on Peacemaking'; R Ross *Dancing with a Ghost: Exploring Indian Reality* Octopus Markham Ontario 1992 at 8, 23, 159.

29 For example, Watson and Chambers *Singing the Land, Signing the Land: A Portfolio of Exhibits* Deakin University Geelong Victoria 1989 at 38; Maybury-Lewis *Millennium: Tribal Wisdom in the Modern World* Viking 1992 at 85.

30 Ligertwood 'Aborigines in the Criminal Courts' Hanks and Keon-Cohen (eds) *Aborigines and the Bar* Sydney 1984, cited in Bird *The 'Civilizing Mission': Race and the Construction of Crime* Contemporary Legal Issues - No.4 (1987) Faculty of Law Monash University Melbourne 35.

then need to clarify the mandate bestowed by their constituency just as the other side will seek clarification of that side's binding authority.[31]

Thirdly, despite the general advice proffered that we arm ourselves before any negotiation with the necessary information about cultural traits of the other side, Rubin and Sander[32] offer the sound advice to avoid preconceptions. Stereotyping may not only be xenophobic; it may also be commercially disastrous. The best advice in cross cultural negotiations seems to be to take cognizance of cultural differences but to focus on the specific characteristics of those individuals involved in the particular negotiation.[33]

The most graphic example of this is the break-through in the *Mabo* negotiations which culminated in the agreement amongst Aboriginal people, (some of) the States, and industry groups on the evening of Monday, 18 October 1993. The agreement forms the basis of a new land tenure system. The *Native Title Bill* 1993 was introduced 16 November 1993. The legislation was passed by the Commonwealth Parliament on 23 December 1993 and came into effect on 1 January 1994.

The Aboriginal build-up to this successful negotiation was as short a time ago as the 5 August 1993 when Aboriginal and Torres Strait Islander people held their first national meeting to formulate responses to the crucial issues of dispossession, social justice and economic development. The result was the Eva Valley Statement.[34]

Aboriginal Land Rights and *Mabo* Implications

(a) Empowerment and Self-Determination

A wide literature ranging from the anthropological to the governmental attests to the special relationships which Aboriginal people have with the land.[35] Dispossession from their land has meant separation from both their physical and metaphysical source of sustenance.[36]

The struggle for Aboriginal land rights has gone some way to galvanize Aboriginal aspirations and efforts, but the plethora of organizations representing Aboriginal and Torres Strait Islander people is itself a possible source of labyrinthine confusion.[37] The attaining of land rights is perceived to be at the very foundation of restoring the base for empowerment and self-determination, the two goals identified by the *Royal Commission into Aboriginal Deaths in Custody* as the basic solution to the current problems of the disadvantaged positions of Aboriginal people.[38]

In Queensland, the Legislation Review Committee *Final Report*[39] still awaits direct legislative response from the Queensland Government. The purpose of the Report was to examine pertinent Queensland legislation,[40] and then consistent with government policy recommend a new legislation framework for Aboriginal and Torres Strait Islander people to exercise some degree of self-determination.[41]

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31 See, eg, J Rojot *Negotiation: From Theory to Practice* Macmillan 1991 at 67.

32 *Supra* n.24 at 253.

33 The Aboriginal author Kevin Gilbert warns against the propagation of (favourable) stereotypic cultural myths about Aboriginal people: *Living Black: Blacks Talk to Kevin Gilbert* Penguin Ringwood Victoria 1978.

34 See *Aboriginal Law Bulletin* (August 1993) 3:63 *ALB* 2.

35 A good general bibliography is provided in: McRae, Nettheim and Beacroft *Aboriginal Legal Issues* Law Book Company Sydney 1991 at xxi-xxxvii.

36 Authority for such statements are legion. Classic ones include: Elkin *The Australian Aborigines* 3rd ed Angus and Robertson Sydney 1932; Stanner *White Man Got No Dreaming, Essays* 1938-73 Australian National University Press Canberra 1979; Maddock *Your Land is Our Land* Penguin Ringwood Victoria 1983. Non-Eurocentric testimony from the dispossessed themselves often finds more visceral expression.

37 See, eg, comments by Charles Perkins in: C Stewart and D Nason 'PM Calls for Pride in Blacks not Prejudice' (July 10-11 1993) *Weekend Australian* 3.

38 *RCIADIC National Report* (1991) Vol. 5 Overviews and Recommendations para 1.10.10.

39 Queensland Legislation Review Committee *Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland; Final Report.* (Nov 1991).

40 *Community Services (Aborigines) Act* 1984 (Qld): *Community Services (Torres Strait) Act* 1984 (Qld); *Local Government (Aboriginal Lands) Act* 1978 (Qld).

41 *Supra* n.39 at 1; the Queensland Government is currently pursuing an alternative government structures policy.

(b) Definitional Limitations

To date the term "Aboriginal self-determination" in its widest construction by the Australian Government would seem to be stretched to mean self-government and autonomy. Such a construction would most certainly be set within the confines of the Australian federal system.

When the Royal Commission into Aboriginal Deaths in Custody speaks of empowerment and self-determination as the basic solution to the current problems of Aboriginal people,[42] or when the former Aboriginal Affairs Minister, Mr Jerry Hand also spoke of self-determination[43] there is some doubt as to what the term might embrace. Does it extend to its international definition under Art 1(1) of the UN Charter that:

> "All peoples have the right to self-determination. By virtue of that right they fully determine their political status and freely pursue their economic, social and cultural development."[44]

Or do such people need to constitute a State as defined by the 1933 Montevideo Convention on the Rights and Duties of States before qualifying for the right to self-determination? The requirements include having a permanent population, a defined territory, an effective government and the capacity to enter into relations with other states.[45]

Anthropologist Nancy Williams records that in her experience with Aboriginal communities, their goal is not separation but rather "a reasonable degree of control over their own lives ... and the means of maintaining ... their cultural heritage."[46]

This would appear to be within the overview of the recommendations of the Queensland Legislation Review Committee which recognises that the "proposed legislation does not provide Aboriginal and Torres Strait Islander communities with the high level of political autonomy ordinarily associated with self-government."[47]

The chairperson of ATSIC, Lois O'Donoghue, while advocating Aboriginal reconciliation which means in her assessment working "towards a realistic accommodation with modern Australia"[48] cites that hundreds of Aboriginal community organizations "are powerful instruments of self-help and *self-determination*"[49] (italics added). Again the term "self-determination" in context is taken to mean something less than the meaning given in Art 1(1) of the UN Charter.[50]

(c) Attaining The Goal

Even if we proceed on the basis that self-determination in the Queensland context will mean self-determination within the confines of the Australian federal system, (and in the present turmoil of ambit claims following in the wake of *Mabo* there is no such surety), nevertheless to gain self-determination, Aboriginal people will need to use non-Aboriginal methods and structures. From the crucible of acculturation, in the process of winning power Aboriginal communities will it is suggested, inevitably (following Medcalf)[51] move towards the values of the dominant white culture. It will remain to be seen what directions negotiations will take in this movement toward empowerment and self-determination in the reconciliation process.

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42 *RCIADIC supra* n.38.

43 Hand *Foundations for the Future* AGPS Canberra 1987 at 1.

44 Cf. International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) which also have this same provision.

45 See Clinebell and Thomson 'Sovereignty and Self-Determination: The Rights of Native Americans Under International Law' (1978) 27 *Buffalo Law Review* 669, cited in McRae *supra* n.35 at 321; L McNamara 'Aboriginal Human Rights and the Australian Criminal Justice System: Self-determination as a Solution?' *Manitoba Law Journal* 544 particularly at 595-615.

46 Williams 'Local Autonomy and the Viability of Community Justice Mechanisms' Chapter 11 *Ivory Scales: Black Australia and the Law* Hazlehurst (ed) New South Wales University Press Kensington 1987 at 227.

47 *Supra* n.39.

48 O'Donoghue 'Ending the Despair' (Nov 1991) *Directions in Government* 12 at 14.

49 *Ibid* at 13.

50 *Supra* n.44.

51 Medcalf *Law and Identity: Lawyers Native Americans and the Legal Practice* Sage Beverley Hills (1978) cited in Bird *supra* n.30 at 43.

(d) *Mabo* and Its Maelstrom

At the current time of writing[52] the dust is far from settled from the historic decision handed down by the High Court on 3 June 1992. Never has any other decision in Australian legal history sparked such breadth or intensity of responses.

The central legal principal arising from *Mabo* is that the Crown's radical title did not of itself without further legislative action, extinguish native title. This while momentous in Australian legal history only brings Australia in line with New Zealand, Canada and the United States. From a negotiation perspective, *Mabo* potentially arms at least some Aboriginal and Torres Strait Islander people with new leverage. Following international law,[53] *Mabo* in the words of the recent Australian Democrats' Proposal dealing with native title, "has made it possible for all Australians to negotiate for a shared history. The recognition of indigenous land rights, cultural autonomy and self-government is the emerging world standard."[54] The *Western Sahara* case[55] with its rejection of the doctrine of *terra nullius* was the basis for negotiation for the occupation of indigenous land.[56]

At the centre of one of the current furores over the *Mabo* decision is the uncertainty it has raised concerning industry's security of land tenure. Speedy Victorian State legislation as proposed on 21 July 1993 aimed at validating title granted between 1975[57] to current date is a good example of what has been termed "capital logic"[58] which is driven by the particular project's implementation timetable. In western culture time is money.[59] In traditional Aboriginal culture there is no such imperative. Economic rationality and profitability, however, step to the beat of a faster drum.[60]

An appreciation of the differences of basic cultural perceptions may need to be noted to allow sufficient strategic planning if there is an intention for accommodation at the negotiating table.

Among the uncertainties which arose from *Mabo* was the mechanism which might best expedite native title *Mabo* claims. The Government[61] and the Democrats[62] sided for some type of specialised tribunal system including, significantly for negotiation, some conciliatory capacity within the framework of the particular statutory scheme. ATSIC had adopted a similar response with specific reference to a statutory tribunal system empowered "to determine whether native title exists over particular land and to *facilitate and certify negotiated settlements with respect to native title right to land*"[63] (italics added). The Conservative parties on the other hand opted for the courts to settle such claims on the grounds that claims would finish in the courts anyway. The Commonwealth *Native Title Act* 1993 establishes the National Native Title Tribunal (NNTT). Section 19 of the *Native Title (Queensland) Act* 1993 will establish the Queensland Native Title Tribunal.

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52 23 December 1993.

53 *Advisory opinion on the Western Sahara* ICJ Rep 1975 39.

54 C Kernot *Dealing with Native Title: The Australian Democrats' Proposal for a Native Title Tribunal and Related Mabo Issues* Australian Democrats National Secretariat Canberra 8 July 1993.

55 *Supra* n.53.

56 *Mabo, supra* n.3, (1992) 66 ALJR 408 at 422.

57 See *Racial Discrimination Act* 1975 (Cth); see *Mabo* at p.436 for Brennan J's comment on whether such legislation as the Kennett government proposes would be valid.

58 J Connell and R Howitt (eds) *Mining and Indigenous Peoples in Australasia* Sydney University Press Sydney 1991 at 37.

59 Cf *supra* n.27.

60 Cf the 19th century American transcendentalist admonition from Henry David Thoreau in *Walden* (1854): 'Pause. Avast. Why so seeming fast but deadly slow?' [(1910) Dent London 83].

61 See, eg, the Interdepartmental Committee of Officials' paper: *Mabo: The High Court Decision on Native Title Discussion Paper* AGPS Canberra June 1993 particularly 32-37.

62 *Supra* n.54 at 2: "The fulcrum of the debate should be the structure of a Tribunal to hear native title claims".

63 ATSIC, *ATSIC'S Response to the Commonwealth Government's Consultation Process covering the High Court's Decision in the Mabo Case* ATSIC Canberra June 1993: Executive Summary 3 Detailed Response 7-9.

On the domestic front, a decade ago federal land rights legislation based on certain broad principles was promised. These were:

1. Aboriginal land to be held under inalienable freehold title.
2. Protection of Aboriginal sites.
3. Aboriginal control in relation to mining on Aboriginal land.
4. Access to mining royalty equivalents.
5. Compensation for lost land to be compensated.[64]

ATSIC has supported the pursuit of these principles intermeshed with the *Mabo* decision. The successful outcome of such protracted negotiations would best be entrenched in the Constitution in light of shifts in political vision.[65]

Internationally, ATSIC is calling on the Commonwealth Government to show initiative in supporting a new convention to acknowledge indigenous rights with particular emphasis on the central importance of land rights.[66] Prime Minister Keating is on record as to his perceptions that Australia is in the international spotlight as to its forthcoming treatment of its indigenous people.[67] This is of course a vital source of power to Aboriginal and Torres Strait Islander people.[68]

The *Mabo* decision, it is suggested, will do nothing to dampen the ardour of those Aboriginal and Torres Strait Islander people (the vast majority) who have gained no promise of direct benefit falling as they do outside the narrow confines of native title requirements.

The outcome of ensuing negotiations arising from the issue of land rights and *Mabo* implications will be closely monitored. On the 8 October 1993 the mood expressed by Aboriginal leaders over the proposed *Mabo* Bill was pessimistic indeed. Lois O'Donoghue, ATSIC Commissioner, Mick Dodson, Social Justice Commissioner, and Noel Pearson, Cape York Land Council Director all expressed the gravest doubts over the successful pursuit of reconciliation.[69] However, by the 18 October 1993 negotiated outcomes over Aboriginal land tenure prompted Noel Pearson to speak of P.M. Keating's commitment to native title legislation as "exemplary" and Lois O'Donoghue to state the negotiated outcome meant all Australians now "... start off together down the long path to genuine reconciliation."[70]

Queensland Legislative Background

Aboriginal Land Act 1991 (Qld)

Whether negotiations involve cross cultural or domestic considerations, a cardinal rule is to prepare adequately.[71] As a basic pre-requisite in the case of Queensland land claims for example, a thorough knowledge of the current pertinent Queensland legislation and its background would

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64 C Holding, Minister for Aboriginal Affairs, Commonwealth House of Representatives, *Parliamentary Debates* v134 (1983) 3486.

65 Cf. *Constitution Act* 1982 (Canada) s.35: "the existing Aboriginal rights of the Aboriginal peoples of Canada are hereby recognised and affirmed".

66 *Supra* n.63 at 12.

67 Cf. "... there is no more central issue to our national identity and self esteem than the injustices brought home to all of us by the *RCIADIC*. There is nothing more central to our reputation in the world, or to the kind of democratic, just society to which we aspire:" Prime Minister Keating's response to the *RCIADIC* cited in *Social Justice for Indigenous Australians 1992-93*, 1992-93 Budget Related Paper No.7 AGPS Canberra 1992 1-2.

68 *Supra* n.31 at 47.

69 L Tingle 'PM Has Failed Us on Mabo: Aborigines' (October 9-10, 1993) *Weekend Australian* 1.

70 L Taylor 'Keating Makes Mabo History' (October 20, 1993) *The Australian* 1.

71 See, eg, *Raiffa The Art and Science of Negotiation* Harvard University Press Cambridge 1992 where in a survey of 34 elements for successful negotiation, preparation was ranked first; R March *Towards Better Management of Australia-Japan Business Negotiations*, cited in Bond University Dispute Resolution Centre, Laws 761 - Negotiation (May Semester 1993) 115 at 119,121; Faure 'Negotiating in the Orient: Encounters in the Peshawar Bazaar' (July 1991) *Negotiation Journal* 279,290 where Faure's background knowledge of the carpet trade and carpets is seen as indispensible to a successful negotiation in that particular milieu; K Wilson 'Lawyers Engaged in ADR' (August 1990) 64:8 *LIJ* which summarises steps for negotiation preparation; Karrass *The Negotiating Game* Crowell New York 1970 at 169.

be mandatory as would access to and analysis of pertinent information, particularly from Government departments. Electronic mail is also proving to be an innovative power medium.[72]

Western Australia and Queensland are the two states with the highest percentage of Aboriginal people on a percentage of total population basis.[73] They are also the two states with the most marked history of a less than liberal attitude toward Aboriginal rights.[74] The current legislative situation in Queensland is covered *inter alia* by the *Aboriginal Land Act* 1991 (Qld) (the *Act*) and the *Torres Strait Islander Land Act* 1991 (Qld). These acts themselves do not confer land rights per se. What they do is set up the processing machinery for claims, including preparatory governmental gazetting of land, the actual processing of claims, the recommendatory process and issue of titles.[75] Central to the system are the Land Tribunals.[76] Under the Act provision is made for statutory conferences between interested parties. In appropriate circumstances successfully negotiated outcomes will circumvent the necessity for a Land Claim Tribunal hearing and the Tribunal may make recommendations to the Minister.[77] Significantly, the Queensland Land Tribunals were cited as possible models for a Native Title Tribunal for Mabo type claims on a Commonwealth basis.[78] The Interdepartmental Committee of Officials (IDC) without specifically referring to the Queensland model, outlined in June 1993 a possible tribunal system which also had provision for a capacity for conciliation.[79]

The genesis of the Act precipitated acrimonious criticism from the Aboriginal community. Neither the current Goss (Labor) government nor its predecessor, pre-eminently under Bjelke Petersen, has given any serious priority to Aboriginal participation in consultation and negotiation.[80] An elementary requirement for negotiations to take place is that the parties have to communicate with each other.[81] The time allocated for discussion and consultation of the proposed Aboriginal land rights in the instance of the Act was disparagingly short, so short in fact that the Aboriginal consultation component was a travesty and Aboriginal negotiation was non-existent.[82] From the Aboriginal perspective if not from that of non-Aboriginals there is abundant need for the Queensland Government (and other State, Territory and Commonwealth levels) to participate in Aboriginal community consultations as both a sign of bona fides and as a necessary step to the preliminaries to negotiation.

For reconciliation to be effected, it is obvious the electorate must be educated to a better understanding of Aboriginal and Torres Strait Islander culture and aspirations. It is also abundantly clear that the same goals need to be applied to government, at all levels.

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72 See, eg, P D'Errico and G Trujillo 'Native Net Teaches about Indigenous Cultures' (May/June 1991) 8:3 *Link-Up* (LUP); K Jackson 'Infobase Helps Natives Process Land Claims' (22 Nov 1990) 16:24 *Computing Canada* 30.

73 *Supra* n 5: population 1986 Census: Queensland 61, 267 (2.37%); Western Australia - 37, 788 (2.69%).

74 For a brief review of land rights legislation up until 1991 for Qld and W.A. see McRae *Supra* n.35 at 154-159.

75 Queensland Lands Department *Annual Report* 1991-92 The Department Brisbane 22-26.

76 For detail see Queensland Land Tribunal *Report on the Operations of the Land Tribunal Estalished under the Aboriginal Land Act 1991 for the Year Ended 30 June 1992* (1992) Land Tribunal Brisbane; and a similar report established under the *Torres Strait Islander Act*; Part 8, *Aboriginal Land Act*.

77 *Aboriginal Land Act* 1991 (Qld) s.8, 21; cf *'Aboriginal Land Act Practice Directions*: Procedures for the Assessment by the Land Tribunal of Aboriginal Land Claims' June 1992 Annexure B to Land Tribunal Report paragraphs 25-28 *supra* n.75.

78 Kernot, *supra* n.54 [7].

79 *Supra* n.61.

80 See eg, F Brennan *Land Rights Queensland Style: The Struggle for Aboriginal Self-Management (1992)* University of Queensland Press Brisbane 1992 at 6.

81 Astor and Chinkin *Dispute Resolution in Australia* Butterworths Sydney 1992 at 80.

82 See, eg, Brennan *supra* n.80, 124-155; Brennan 'The Queensland Aboriginal Land Act 1991' (June 1991) ALB 10; J Sutherland 'Queensland Land Rights: A Derogation from Poor Standards Elsewhere?' (Oct 1991) 2:52 *ALB* 16; B Miller 'Clayton's Rand Rights: The Queensland Aboriginal Land Act - An Aboriginal Co-ordinating Council Perspective' (Oct 91) 2:52 *ALB* 10; R Tatten and Djnnbah 'Queensland Land Rights: An Illusion Floating on Rhetoric', (Oct 1991) 2:52 *ALB* 13.

Queensland Aboriginal Land Councils do not gain any statutory role in the Act unlike the situation in NSW and the NT. Such Land Councils in Queensland could serve the useful functions of consultation and negotiation on behalf of their Aboriginal people with the government on a range of pertinent issues.[83]

One of the key thrusts of the Royal Commission into Aboriginal Deaths in Custody *Final Report*[84] was towards empowerment of Aboriginal people. No doubt governments find the consultative negotiation route time consuming. Such a process allows articulation of uncomfortable criticisms. It is also indispensable to the democratic process.

It is worth noting that since the *Mabo* decision, Aboriginal people may choose, in some instances, to forego (in Queensland) the Land Tribunal process and instead elect to seek a declaratory court order, bearing in mind that a claimant to use the Queensland Land Tribunal may make such a claim only where the land has been gazetted as claimable. No such common law restriction applies to native title claims.

Aboriginal People and the Mining Industry

(a) Space for Negotiation

Aboriginal communities are marked by a high degree of heterogeneity. The negotiation relationships between Aboriginal communities and the mining industry are marked with an equal diversity. Intra-heterogeneity often manifests itself in tensions in Aboriginal communities between preferences for the *old* or *new* ways. Canadian District Attorney Ross's words directed to the situation in the North West of Northern Ontario, Canada, translate well to the Queensland situation. He writes:

> "... each of the communities familiar to me is unique. None has remained untouched by the outside world, but each has been touched in different ways and for different periods of time. Similarly, individuals within each community have had very different kinds and degrees of contact with the outside. On any one reserve you can find some who have been out to university and some who, in the words of one band councillor, are 'stone-age people, pre-agrarian, pre-industrial who think only in the Old Ways.' It is therefor absurd to pretend to describe 'Indians' for each person will occupy a unique position on the continuum of adaptation from the Old Ways to new ways which are still in the making. The same holds true for entire communities as they struggle to find a new social consensus; their evolving approaches are much more varied than many outsiders might suspect."[85]

Attempts to alleviate such tensions in Queensland Aboriginal communities have been recorded by Welsh,[86] Ackfun[87] and O'Donnell[88] while Trigger[89] highlights other tensions between mixed-descent and full-descent Aboriginal people arising over land interests. Rogers' study of the late 1960's revealed that Aboriginal people wanted economic development of their regions but they also wanted some control over the technology which would effect that change.[90]

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83 Cf. *NSW Aboriginal Land Council v The Minister Administering the Aboriginal Land Rights Act* 1983; cited in Sutherland *ibid* 16 at 17.

84 *Supra* n.42.

85 Ross, *supra* n.28 at xxiv.

86 Welsh *Aboriginal and Island Mediation Initiative Project Proposal* Queensland Department of Attorney General Brisbane 1991.

87 A Ackfun *A Profile of the Aboriginal and Torres Strait Islander Mediation Project* Alternative Dispute Resolution Division Department of Justice and Attorney General Brisbane 1993.

88 M O'Donnell *Mediation Within Aboriginal Communities: Issues and Challenges* Division of Alternative Dispute Resolution Queensland Department of Attorney General Brisbane June 1992.

89 D Trigger 'Racial Ideologies in Australia's Gulf County' (April 1989) 12:2 *Ethic and Racial Studies* 209-232 at 225-6.

90 P Rogers *The Industralists and the Aboriginal: A Study of Aboriginal Employment in the Australian Mining Industry* Angus & Roberts Sydney 1973, cited in D Cousins and J Nieuwenhuysen *Aboriginals and the Mining Industry: Case Studies of the Australian Experience* Committee for Economic Development of Australia Allen and Unwin Sydney 1984 at xv.

Some more recent perceptions do not vary from the findings of this earlier work.[91] The Reverend Jim Downing writes:

> "I have worked in community development and training with Aboriginal people in the Northern Territory for 28 years. Most Aboriginal people are not opposed to mining. Traditional people are simply frightened for the safety of sacred areas and of having no control over what happens to their land or to them."[92]

The Aboriginal Member of the Council for Aboriginal Reconciliation, Mary Graham, confirms that in her view Aboriginal people are not anti-development in general or anti-mining in particular. Negotiating successfully with the mining industry she sees as one of the few options which may alleviate extreme poverty. She stresses however the deep concern Aboriginal people have for the protection of their sacred sites.[93] Under present Queensland legislation[94] Aboriginal people have been virtually ignored in this regard as they were under the *Cultural Records (Landscapes Queensland and Queensland Estate) Act* 1987 (Qld) and its predecessor.[95] Hence the mining negotiations would need to ensure adequate protection to satisfy Aboriginal concerns.

(b) Noonkanbah, Western Australia

During the dispute period of 1978-80, the Noonkanbah people of Northwest Australia demonstrated their resistance to oil exploration over their land. Noonkanbah gave Australia and the world a graphic example of what a sacred site meant to the Aboriginal people connected to that land. Defence of sacred sites is a non-negotiable issue. The Noonkanbah people wished to negotiate on the drilling issue but not in terms of compromise of the sacred land.[96] Howitt & Douglas[97] record what they perceive as the relative success of the counter-strategies employed by the Yungugora community responsible for Noonkanbah Station rejuvenation from 1976. While the community failed to stop the drilling it did achieve national and international publicity. Howitt's list contains the following key elements for this notoriety:

1. Community retention of control of the campaign. Advisers did not exceed their capacity as advisers.
2. Community retention of cohesion in the face of sweetheart deals or intimidation.
3. A well orchestrated publicity campaign to keep the media and support groups informed.
4. Reliance on other powerful organizations willing to offer active support, eg the churches and race relations groups.[98]

Ultimately, however, the will of the West Australian State and the lack of any Commonwealth legislation or intervention saw the oil well drilled.

(c) Other Aboriginal - Mining Industry Encounters

Other infamous names in Aboriginal mining history include Gove Peninsula,[99] Groote, Eylandt,[100] and Oenpelli.[101] At base, negotiations could not really take place because negotiation demands equality between the parties.[102] *Mabo* has given leverage to Aboriginal communities as

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91 Cousins & Nieuwenhuysen, *ibid* at 34.
92 Downing 'Letters to the Editor' (June 12/13 1993) *Weekend Australian*.
93 Graham Mary: personal correspondence 9/7/93.
94 *Nature Conservation Act* 1992 (Qld).
95 Replaced *Aboriginal Relics Preservation Act* 1967-76 (Qld).
96 See, eg, S Hawke and M Gallagher *Noonkanbah: Whose Land, Whose Law* Fremantle Arts Centre Press Perth 1989 at 325.
97 R Howitt with J Douglas *Aborigines and Mining Companies in Northern Australia* Alternative Publishing Co-operative Chippendale Australia 1983 at 64-65.
98 *Ibid* at 97.
99 *Supra* n.91 chapter 4.
100 Howitt, *supra* n.97 at 68-69.
101 R Levitus 'The Boundaries of Gagudju Association Membership: Anthropology, Law and Public Policy' in J Connell and R Howitt (eds) *Mining and Indigenous Peoples in Australasia* (1991) *supra* n.58 at 153-168.
102 *Supra* n.68 at 47; *supra* n.100 at 80.

evidenced in the 1992 negotiations which took place between the Hopevale Aboriginal Community and the Cape Flattery Silica Mine. Under the 1990 Regulations of the *Mineral Resources Act* 1989 (Qld), royalties accrue to the Crown pursuant to a formula according to the particular mineral involved.[103] Under the *Aboriginal Land Act* 1991 (Qld) an unspecified percentage of royalties is payable to Aboriginal land holders who have granted permission for mining of that land.[104] In addition to this source of governmental royalties, an Aboriginal community may negotiate on a private basis for "royalties" directly from the mining company.

Earlier in 1993 John Ah Kit on behalf of the Jawoyn Association in NT also used the lever of native title to negotiate successfully with the Zapopan mining company for the Mt. Todd gold mine development. Among other benefits flowing to the Jawoyn are agreements for employment, training, scholarships and other outstanding land claims.[105]

Such successful mining negotiations (ie, those essentially acceptable to both sides) may afford good individual local examples of what is going to make Reconciliation possible. It is only through repetition of a large series of such successful outcomes that Reconciliation is going to have any real and worthwhile meaning.

(d) The Adoption of Appropriate Protocols

Anaylsis of the relationships between the Aboriginal people and the mining companies on a case by case basis might reveal emerging patterns of positive and negative effects. Myriad factors could be investigated which impinged on that particular case study varying from the mineral being mined with the concomitant type of mining and its associated environmental impacts, to the mining company's level of commitment to the education or induction of workers to the indigenous culture; fundamental factors would range over physical and cultural degradations the community might suffer as well as positive benefits, eg, provision of infrastructure and employment opportunities.[106] Generalizations (just as we noted for cross cultural characteristics for consideration in negotiating) may mislead. What emerges from one carefully and well recorded case study is the conclusion of *that* case study. Whether on a community, regional, state or national level, there is a lesson to be learnt for those who wish to exert successful power at the negotiating table. A unified power front is the result no doubt of extended discussions, consultation and negotiating amongst the constituency and its peak organizations. The historic Eva Valley Meeting in the Northern Teritory (3-5 August) represents a major advance in this regard in terms of Australian and Torrest Strait Islander people organising to strengthen their negotiating position by finding a unified voice.[107]

It has been observed that certain protocols will be required for the building of the necessary goodwill and trust which is a prerequisite to negotiations between Aboriginal communities and outside interests. It has been noted already the emphasis placed upon interpersonal relationships.[108] Would-be negotiators need to spend sufficient time to create that necessary foundation. Traditional Aboriginal culture has placed a higher value on the group than on the individual.[109] It is therefore not surprising that group participation in discussions would be considered normal.[110] Adequate attention needs to be given to demonstrating correct behaviour which would include identification of "respected" persons in the community and a display of appropriate social

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103 *Mineral Resources Regulations* 1990 (Qld) Schedule 1 Calculation of Royalties.
104 Section 7.02: Royalties in relation to mining on Aboriginal Land.
105 P Maher 'Diamonds Flawed' (9 March 1993) *The Bulletin* 70.
106 *Supra* n.99 at 159.
107 *Supra* n.34.
108 *Supra* n.29.
109 Harris *Culture and Learning: Tradition and Education in North East Arnhem Land* Northern Territory Department of Education Darwin 1980 at 33; N Williams *Two Laws* AIAS Canberra 1987 at 94 posts a caveat on this.
110 Cf. Welsh *Darnley Island Report* Community Justice Programs Department of the Attorney General Queensland at 1.

decorum.[111] Graham[112] stresses the necessary emphasis on the process, rather than the content. Demonstrating such "correct" behaviour is mandatory if what follows is to fall into place. Johnson Oyelodi[113] also stresses the necessity for outside interests wishing eventually to negotiate with Aboriginal people to invest in long liaison and consultation time. During this period of building up positive relationships as much information as is relevant to the circumstances should be provided to allow the community to think, digest, discuss and to seek advice. Oyelodi draws a distinction between local companies which have not yet built up experience in this area and the big internationals which have dealt with traditional owners around the world. The process is neither fast nor cheap and it would be usual for Aboriginal communities to call on the would-be negotiator to cover investigatory and advice costs incurred by the particular community. The Australian Petroleum Exploration Association Ltd has drafted recommendations to member companies.[114]

Work has been underway for the past two years through the Queensland Minerals and Energy Department to conduct consultations with Aboriginal communities and also with the mining industry.[115] The consultations with the Aboriginal communities have been directed at a grass roots level. It is the intention that an Aboriginal body will be elected to voice its concerns and aspirations in regard to mining on Aboriginal land. The mining industry will then through consultation with this elected Aboriginal body reach conclusions which will be embodied in a code of conduct. This would be a reference for future negotiations which could serve the purpose of advancing a Fisher and Ury type "principled" negotiation with the emphasis on using this document as providing the objective criterion.[116]

Section 17(1) of the *Council for Aboriginal Reconciliation Act* 1991 (Cth) empowers the Council to establish committees. Subsequently the Mining Committee was formed and it is to this and its recently published *Exploring for Common Ground*[117] to which we now turn.

Aboriginal Reconciliation

(a) Exploring For Common Ground

For relationships to endure they need to be symbiotic. De Crespigny, as Chairman of Normandy Poseidon, views the reconciliation process as good business:

"We've said quite openly that whatever we do is based on a commercial decision. The sooner we come to grips with Aboriginal reconciliation the more competitive we will be in our work, and in that core issue we are no different to any other mining company."[118]

Aboriginal people are singled out as the most disadvantaged group in Australian society.[119] Many Aboriginal people including those who are highly educated want to gain benefits from mining.[120] Many are sick of living on hand-outs and want some means of regaining their independence.[121] Here are some of the pre-conditions to set the potential negotiating scene.

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111 Ackfun Alternative Dispute Resolution Division Department of Justice and Attorney General, Brisbane personal correspondence.

112 *Supra* n.93: Her percentage breakdown is 98% process, 2% content.

113 Queensland Minerals and Energy Department, Assessing Branch, personal correspondence 14/7/93.

114 Australian Petroleum Exploration Association Recommendation to Member Companies, cited in Cousins & Nieuwenhuysen *Aboriginals and the Mining Industry: Case Studies of the Australian Experience Committee for Economic Development of Australis* George Allen & Unwin Sydney 1984 at 170-173.

115 Queensland Minerals and Energy Department, Assessing Branch, personal correspondence 14/7/93.

116 Fisher & Ury *Getting to Yes: Negotiating an Agreement Without Giving In* Business Books London 1984 at 84-98.

117 *Supra* n.10.

118 Haig Gideon 'Miner Champions Battle for Aboriginal Reconciliation' (July 3-4 1993) *Weekend Australian*, 7.

119 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *Access and Equity – Rhetoric or Reality? Report of the Inquiry into the Implementation of the Access and Equity Strategy* AGPS Canberra November 1993.

120 *Supra* n.112.

121 *Ibid.*

The report *Exploring for Common Ground* does not trivialize past difficulties. It cites specific examples of conflict which made national and international news: Gove, Noonkanbah, Coronation Hill, Yackabindie, McArthur River, Rudall River.[122] But it goes on to identify important shared characteristics by the mining companies and Aboriginal communities. These are:

1. their involvement in contemporary Australian society and economy;
2. their corporate responsibilities - miners to their shareholders and Aboriginal people to their communities;
3. their requirement of access to land for cultural or economic purposes;
4. their desire to maximise economic advantages of resource development for gaining income or relieving poverty.[123]

Astor and Chinkin identify certain basic prerequisites which must be met before negotiations may take place.[124] The first of these is communication between the parties. The *Report* likewise gives priority to this element,[125] with summarized detailed recommended strategies, which hinge on the establishment of a Joint Council on Aboriginal Land and Mining (J-CALM).[126] The other key issues which are identified and to which practical recommended strategies are addressed are Aboriginal education, non-Aboriginal heritage legislation and resource development.[127]

By and large *The Report* is presented from the vantage point that with communication between the involved parties the parties will want to negotiate. This of course must be based on the issues being negotiable.

Getting the opposing teams to sit on one side of the table and view the problem as a shared problem is a major advancement on a more argumentative, confrontationist approach. The output of options using both teams' creativity is greatly magnified.[128] By calling on third parties the possible alternatives are further increased.[129]

The Aboriginal reconciliation process is designed in Phase One to accommodate this very point.[130] Reconciliation will be achieved not in one fell swoop but gradually. The time honoured strategy adopted by pressure groups is to keep on keeping on. By way of analogy, we could point to the environmental movement which over the last three decades has created a global awareness and response. One of the strands of that environmentally educative process has been to preach the need to cherish and nurture biological diversity. Perhaps cultural diversity may receive some similar global acceptance in the next decade or three.[131] Further we need to keep reminding ourselves that negotiations do not take place within a vacuum. The negotiating parties will be Aboriginal people on one side and some other interest group, or the government on the other. Public opinion and the power of the electoral majority may act as forces of inhibition against single-minded goals of attainment of the otherwise more powerful party. In addition, beyond the national scene, international conventions[132] provide broad rules and breach of these would carry the burden of moral if not more tangible sanctions.

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122 *The Report*, *supra* n.117 at 3.

123 *Ibid* at 5.

124 *Supra* n.81 at 80.

125 *The Report*, Key Issue 1: Communication, 7; and Chapter Three: Conclusion, 35.

126 *Ibid* at 37-38 (It is interesting to note that De Bono is notorious for acronyms on the grounds that they command attention - De Crespigny shows himself an astute disciple).

127 *Ibid* at 38-41.

128 Fisher & Ury *supra* n.116, Chapter 4: 'Invent Options for Mutual Gain' 59-83; E De Bono *I Am Right - You Are Wrong. From this to the New Renaissance: From Rock Logic to Water Logic* Penguin London 1991, 207.

129 E De Bono *Conflict: A Better Way to Resolve Them* Pelican London 1985 at 190.

130 Council for Aboriginal Reconciliation *Making Things Right: Reconciliation after the High Court's Decision on Native Title* Council for Aboriginal Reconciliation Canberra 1993 at 14.

131 Cf. K Coates 'Indigenous Battles for Land and Cultural Rights in Australia and Canada' in H Reynolds and R Nile (ed) *Indigenous Rights in the Pacific and North America: Race and Nation in the Late Twentieth Century* University of London 1992 at 136.

132 For example, International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR); cf Speech by the Hon P.M. PJ Keating MP, Australian Launch of the IYWIP, Redfern, 10 December 1992: "There should be no mistake about this - our success in resolving these issues will have a significant bearing on our standing in the world"; cited in (April 1993) 3:61 *ALB* 4.

As might be expected Reconciliation even at this its incipient stage has already come to mean different things to different people. A Brennan and Crawford[133] interpretation could base reconciliation on the need and goal of recognition of indigenous people's rights, values and culture; O'Donoghue, ATSIC Commissioner, takes a placatory stance and advocates a "realistic accommodation within modern Australia"[134]; Howard[135] is on record as saying: "The progress which has been achieved in reconciling the moral imperative of delivering greater social justice and fairness to Aborigines while preserving the integrity of our common nationality will be an important indicator of how as a nation we have resolved a broader debate"; Kelly[136] interprets this also as the general response by non-Aboriginal Australia to mean a desire for social improvements for Aboriginal and Torres Strait Islander people but without any substantive accompanying economic or political empowerment; Mansell,[137] Secretary of the Aboriginal Provisional Government (APG), views reconciliation as a meaningless exercise and opts for absolute indigenous sovereignty. Pearson[138] raises the question whether the Mansell approach is an ambit one. He sides with Brennan[139] in arguing that it is unlikely that the issue of Aboriginal Sovereignty would be given a hearing by the International Court of Justice, there being no chance before an Australian court[140] on the authority of *Mabo*. Pearson, noting Robert Williams'[141] views on the futility of pursuing absolute indigenous sovereignty adopts what he considers a pragmatic approach.[142] Pearson's view is presented as a challenge to Mansell to set aside the APG's agenda for the while and instead accept leadership in the forthcoming negotiations with the Commonwealth concentrating on land rights, self-determination and self-government. No face need be lost by Mansell's APG, simply by making the issue of Aboriginal sovereignty at this stage non-negotiable.[143]

If Pearson's suggested agenda were adopted he identifies the necessity of a "singularly unified Aboriginal leadership".[144] That leadership would need the sanction of its constituency not only to pursue the agenda itself but of a mandate as to how best negotiated achievements could be safeguarded. Brennan[145] raises three possibilities:

1. By treaty
2. By constitutional entrenchment
3. By Commonwealth and State legislation

He briefly dismisses by treaty on the grounds of their being no single "Aboriginal nation" and the hundreds of "Aboriginal nations" being "so diverse and disparate that consultation, negotiation and treaty arrangements would simply be unworkable". Pearson adds a further complicating factor of the difficulty of sustaining the supposition that there ever was *an* Aboriginal nation.[146]

As to safeguard by constitutional entrenchment this is not an impossibility but in the present climate of hostility stirred by counter-claims against *Mabo* native title, it may be premature to pursue.

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133 F Brennan and J Crawford 'Aboriginality, Recognition and Australian Law: Where to from Here?' (1990) *Public Law Review*, cited in McRae *supra* n.48 at 299.
134 *Supra* n.48.
135 L Kelly 'Reconciliation and the Implications for a Sovereign Aboriginal Nation' (April 1993) 3:61 *ALB* 10 at 12.
136 *Ibid.*
137 *APG Papers* (July 1992) 1, Deep South Sovereign Publications, 20; cited *ibid.*
138 N Pearsopn 'Reconciliation - to be or not to be - separate Aboriginal nationhood or Aboriginal self-determination and self-government within the Australian nation?' (April 1993) 3:61 *ALB* 14.
139 F Brennan 'Mabo and its Implications for Aborigines and Islanders in Ratnapala' S and M Stephenson (eds) *Mabo: A Judicial Revolution* University of Queensland Press Brisbane 1993 at 25-27.
140 *Mabo*, *supra* n.56 at 418 and 445-447.
141 Pearson, *supra* n.138 at 15.
142 Note De Bono's approval of pragmatism in his methodology of "water" logic, *Supra* n.128 at 196.
143 Pearson *Supra* n.141 at 17.
144 *Ibid.*
145 F Brennan 'Reconciliation in the Post Mabo Era' (April 1993) 3:61 *ALB* 18 at 19.
146 Pearson, *supra* n.144 at 14-15.

The most likely route to be taken is via Commonwealth and State legislation although this is also of course the least secure of the three possibilities due to political vicissitude.

The above comments are offered on the premise that governments (at the various levels in Australia) wish to enter negotiation with Aboriginal people either as being represented by one negotiating team or at some more regionalized or local level. Past dealings that Australian and Torres Strait Islander people have had with government have given no assurance that this is the case. Governments, State and Commonwealth, commonly have exhibited an expedient approach to legislation where even communication (which is a basic preliminary to negotiation) has been minimal or non-existent. No political party or level of government has been exempt from this practice.[147]

The Royal Commission into Aboriginal Deaths in Custody reports that prior to the landslide referendum of 1967 it was rare for Aboriginal people or communities to be consulted by government agencies of any type.[148] Since that time, the 1970s and onwards have witnessed the deluge of Aboriginal communities by government officials determined to document that the Aboriginal communities have been consulted to the nth degree.[149]

Patrick Dodson, Aboriginal Commissioner, has perceived the inadequacies of the consultative approach by government in this light: "Gradually government instrumentalities have made attempts to allow 'advisory' roles for Aboriginal representation. This has taken place through consultative mechanisms, and all suffer from an obvious lack of power to effect and implement advices. There was little or no control over the procedure and practices that accompanied implementation of what-ever government made of the advice or consultation. In my view, process of consultation should become processes of negotiation[150] ... Negotiation needs to replace consultation and advisory postures ...".[151]

Prime Minister Keating has demonstrated a commitment to acknowledge Aboriginal and Torres Strait Islander people as equals at the negotiating table when the recent land rights agreement was reached between the government and Aboriginal and Torres Strait Islander representatives.[152]

Reconciliation may now proceed by directing attention to the very wide range of issues documented in the voluminous *Royal Commission into Aboriginal Deaths in Custody Report.*[153]

When the issue of reconciliation is raised the question may be posed: "Is it possible to negotiate any agreement that truly recognises the reality that the Aboriginal people did not cede sovereignty over their land, and that there is no legitimate basis to assume that white law is superior to Aboriginal law? Can the two systems be accommodated? Will white Australia allow such an accommodation at anything more than a superficial level"?[154]

If reconciliation is to have any firm foundation Aboriginal and Torres Strait Islander people must continue now to be treated as equals at negotiations. A serious past defiency has been merely to solicit Aboriginal and Torres Strait Islander response to government or industry policy and initiatives. Negotiation is also concerned with agenda setting and policy formulation. It is not merely about responses to imposed decisions.[155]

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147 See, eg, Brennan *supra* n.80; Victorian Premier Kennett's *Land Titles Validation Bill* 22/7/93; the Commonwealth's September 93 timetable for a "Mabo" legislative response was extended to October.

148 *RCIADIC* vol 2, 518.

149 *Ibid* at 528.

150 P Dodson *Regional Report of Inquiry into Underlying Issues in Western Australia RCIADIC* vol 2 AGPS Canberra 1991 at 767.

151 *Ibid* at 781.

152 *Supra* n.70; F Brennan 'Sticking Points' (Oct 23-24, 1993) *Weekend Australian* 22.

153 *RCIADIC Final Report* Chapter 38 'The Process of Reconciliation' 38.27.

154 S Hawke *supra* n.96 at 326; cf *Johnson v. McIntosh* (1823) 8 Wheat 543 per Marshall CJ at 588 where the basis of recognition of native title was grounded in pragmatism, not justice or fairness.

155 Cf. T Rowse *Remote Possibilities - The Aboriginal Domain and the Administrative Imagination* ANU, Canberra 1992.

(b) The Canadian Experience

A recent example from Canada may give some insights into what can be achieved and the process which was adopted. In April 1990, tri-partite negotiations were entered on behalf of the Canadian federal government, the territorial Canadian Yukon government and the indigenous people through the Council of Yukon Indians. The agreement settled indigenous rights to a substantial area of traditional land (16,000 square miles) and substantial compensation ($230 million). A special feature of the negotiated agreement was the setting up of special committees and boards incorporating Indian participation in the management of wildlife programmes, non-renewable resource development and heritage preservation. A particularly appropriate innovative feature of the process was that while the above elements were agreed to in principle, band by band negotiations were to follow to complete the land claims process.[156] While the Canadian example may be hailed as a substantial success, the reservation is raised that the mere negotiation and settlement of native land rights does not automatically flower into the beginning of a harmonious indigenous/white relationship.[157] In Coates' view such negotiations have:

> "... provided indigenous peoples with stark evidence of the unaltered hostility of many non-indigenous residents to the settlement of indigenous rights, hardly a foundation for favourable relations in the post-settlement era ... There is no consensus between indigenous and non-indigenous peoples of the goals of the land claims process: does it represent the beginning of a new era of cultural understanding and co-operation ... Legal rights, however gained and clarified, are no assurance of cultural control and independence ... The indigenous peoples ... remain in generally hostile territory, among non-indigenous majorities that do not seek to understand or celebrate their cultures and aspirations."[158]

The requirements of the legislation to rearrange a land tenure system which has been in existence in the last 200 years are abundantly complex and thorny. Questions of land ownership and land management nevertheless are capable of legislation. Positive changes in attitudes towards cultural diversity and racial harmony however require other stragegies.

(c) A Pragmatic Approach

An examination of the key issues as identified by the Council for Aboriginal Reconciliation[159] reveals a predominant aim is the education of non-Aboriginal Australians to an awareness, understanding and appreciation of Aboriginal views, beliefs and culture.

As to the aspirations of Aboriginal people, a general dividing line could be drawn between those seeking self-determination, a key recommendation of the Royal Commission into Aboriginal Deaths in Custody, within the framework of the modern Australian State and those seeking it on the grounds of absolute indigenous sovereignty.[160] The more modest aim of self-determination within the Commonwealth of Australia appears more realistic.[161] The question of power however remains central no matter how muted or attenuated the negotiable issue is framed.[162] Coe acknowledges the limitations of Aboriginal might to pursue its objectives[163] but bargaining power is subjective: "it actually only really exists to the extent that it is perceived as existing".[164] What Coe is pronouncing is the basis of moral power:

> "... we have never surrendered our rights to our land; we have never surrendered our rights to our territories; we have never surrendered our rights to our laws; and we have never

156 Coates, *supra* n.131 at 132.
157 *Ibid* at 138.
158 *Ibid* at 139-140.
159 Council for Aboriginal Reconciliation, *supra* n.130 at 2.
160 For a recent debate on this issue see (April 1993) 3:61 *ALB* 3-22.
161 Brennan, *supra* n.139; Pearson, *supra* n.138.
162 *Supra* n.31.
163 P Coe 'We are People' in J Ferguson (ed) *Aboriginal Peoples and Treaties* Seminar Report Conventions Coverage International, Hunters Hill, NSW March 1989 at 113.
164 *Supra* n.162.

surrendered our rights to bring up our children and to live with our families and people in accordance with our beliefs and our customs."[165]

The Council for Aboriginal Reconciliation may have as its educative task the most challenging one in Australia.

As part of this educative programme, the Australian population could be exposed to a concept which Smith has neologized as "consociation".[166] Essentially this entails the idea of independence and self-determination within the particular nation state. The split comes between national interests, for example defence and foreign relations, and "ethnonational" (here read indigenous) interests, for example education and some aspects of language, civil law and culture. Such systems work in countries like Belgium and Switzerland and in Canada it has been applied to the "French-fact" in Quebec.[167] It is only when majority public opinion favours such accommodations that governments will entertain negotiations along such lines. Without a sufficient groundswell of support no popularly elected government will voluntarily and aggressively pursue such policies.

History provides sufficient examples of peoples dispossessed of their land. The reclaiming of that heritage may be a painfully protracted mission. For the best part of 2000 years the cry of hope in the Diaspora was, "Next year in Jerusalem". The Saami of Fennoscandia have fought for the last eight centuries for national security and human rights.[168]

The North American indigenous peoples are still after 500 years yet to regain what they lost with the "discovery" of the New World.[169] Until Australians are sufficiently exposed to such world wide examples and start to feel some degree of empathy with them they shall remain obdurate to the problem of dispossession. Governments will not sit down to negotiate with indigenous people over matters like self-determination until the electoral barometer shows a substantial drop in cultural intolerance. Aboriginal and Torres Strait Islander people may be well advised to follow Pearson's pragmatism and aim negotiations at realistic agenda.[170]

To draw the tensions, the different aspirations and the cultural collisions to their genesis into one sentence we borrow from Steve Hawke who saw it as the "brutal conflict over land that is the essence of Australian history."[171] While recognising this basic historical fact, the parties in negotiation might be better off to explore common ground. Pragmatic flexibility may be the only mode of eventually gaining the day.

Aboriginal and Torres Strait Islander people may jockey themselves into a favourable position for successful negotiation by adopting a cultural analogue approach,[172] the kind of approach which chief Dan George, elected Chief of the Salish, West Coast, British Columbia, Canada, promised his people in these words:

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165 *Supra* n.163.

166 M Asch 'To Negotiate into Confederation: Canadian Aboriginal Views on Their Political Rights' in E. Wilmsen (ed) *We are Here: Politics of Aboriginal Land Tenure* University of California Press Berkeley 1989: Asch and Smith, both prefer the "consociation" model for cogent reasons: M Smith 'Some Developments in the Analytic Framework of Pluralism' in L Kuper and M Smith, *Pluralis* University of California Press Berkeley 34; quoted in Asch at 131-134.

167 Lijphart (1977); quoted in Asch, *supra* n.166 at 132.

168 F Korsmo 'Nordic Security and the Saami minority: territorial rights in Northern Fenno-Scandia' (Nov 1988) 10 *Human Rights Quarterly* 509-524; *Summary of the First Report from the Norwegian Saami Rights Committee* Royal Norwegian Embassy Canberra 1984 17 & 19, quoted in P Poynton 'Into the Deep Black Yonder: EARC does Cape York' (April 1992) 2:55 *ALB* 11; T Brantenburg 'Norway: Constructing Indigenous Self-Government in a Nation State' in P Jull and S Roberts *The Challenge of Northern Regions* NARU Darwin 1991 at 66-128, quoted in P Poynton.

169 Lavery 'The Council of Aboriginal Reconciliations: When the CAR Stops on Reconciliation Day will Indigenous Australians have gone anywhere?' (Oct 1992) 2:58 *ALB* at 8.

170 Pearson, *supra* n.161.

171 S Hawke, *supra* n.154 at 327.

172 Defined as "a construct which meets the fundamental cultural and traditional needs of the tribal community but in a new form or manifestation which is appropriate to the present time and situation" by Tafoya in Tribal Community Boards Project *Program Planning for Tribal Conciliation Systems* A report from the 1985 Tribal Peacemaking Conference presented by the Tribal Community Boards Project of Northwest Intertribal Court System (1986) Washington and the Community Board Centre for Policy and Training San Francisco 3.

> "O God! Like the Thunderbird of old I shall rise again out of the sea; I shall grab the instruments of the white man's success - his education, his skills, and with these new tools I shall build my race into the proudest segment of your society. Before I follow the great Chiefs who have gone before us, oh Canada I shall see these things come to pass."[173]

No culture is static. The future of Aboriginal and Torres Strait Islander people is not going to be the same as their past. This does not mean that the essence of Aboriginality is in question. As Maybury-Lewis pointed out in *Millennium*, North American Indians don't cease to be North American Indians just because they don't use bows and arrows today;[174] Australians or Americans don't cease to be Australians or Americans just because they no longer "bounce to town on barrel mares".[175]

This may help some Australians to clarify their thinking when they classify only certain restricted groups as being *real* Aboriginal people.

There are probably no Aboriginal people leading totally traditional lives today which have not undergone substantial modification even in the last couple of decades.[176] Aboriginal people might reply that while lifestyles have changed, the cultural values have been maintained.

Whatever the moral case may be the reality is non-Aboriginal Australia is not going to pack up and leave. Hopefully the interests of both groups will ultimately centre on the creation of a new design for sharing the land.[177] A "win" in the long term which will involve numerous negotiations is dependent on the necessary preparation[178] and promotion, including getting people (in this instance the nation) on side, creating positive images, and showing the relationship and the negotiated outcome will be mutually beneficial. Aboriginal and Torres Strait Islander people may need to seek help beyond the national limit by invoking international support.

Mainstream Australia may be more receptive to the reconciliation movement when cultural diversity is translated into terms of economic returns. Aboriginal communities are already engaged in artifact enterprises, mining operations and ecotourism ventures. Aboriginal art and culture currently generate $50 million per annum.[179]

Conclusions

Negotiation literature is not short on strategies, tactics or manoeuvres.[180] Negotiation is still an art not a science. Probably the most valuable general guidance is offered by Fisher and Ury when they advise the participants to make the process their own.[181]

Because of the immense complexities involved in negotiating toward an Australian reconciliation, no one negotiation can hope to put the matter to rest once and for all. Rather achievement may come through a protracted series resulting in incremental gains. Pragmatism dictates that the negotiating parties take benefits as they accrue but at the same time reserving positions making

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173 D George 'A Lament for Confederation' recited at Vancouver's Empire Stadium July 1 1967.

174 *Supra* n.29 at 279.

175 Adapted from K Slessor 'Country Towns' *Poems* Angus & Robertson Sydney 1944.

176 Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws - Report No. 31* AGPS Canberra 1986 at 27.

177 Cf. F Brennan *Sharing the Country* Penguin Ringwood Victoria 1991, in particular the words of Mr Winton Rubuntja, Chairman Central Land Council, Barunga 12 June 1988, 82-83: "We have to work out a way of sharing this country"; R Tickner *Council for Aboriginal Reconciliation Bill: Second Reading Speech* (1991) at 9 citing Wompoo Kepple: "... what all Australians must do, is to think about how we are going to co-operate and to live together in harmony."

178 Cf. Astor and Chinkin *supra* n.124 at 87-89.

179 Spring J 'International Visitors and Aboriginal Arts, 1993: Report of a Survey of International Visitors to Australia, Feburary – March 1993' Research Paper No. 10 July 1993 Arts *Research* Australia Council for the Arts.

180 See, eg, J Wall *Negotiation: Theory and Practice* Scot Foresman Glenview Illinois 1985 at 117.

181 *Supra* n.128 at 198.

it quite clear that at some future time the more fundamental objective(s) will still be pursued.[182]

Negotiations resulting in relatively small wins, frequently enough, are the base for bigger things. If one takes stock of the disadvantaged position of Aboriginal people generally in Australia today, then if Aboriginal culture is to survive that racial survival is "as much dependent on an economic, structural base as on the ideational base that is culture."[183] This in turn is dependent on political will. And this in turn is dependent on the electoral majority. And the temper of the electoral majority will be forged in the crucible of its own cultural indoctrination.

Reconciliation will remain odyssean until Aboriginal and Torres Strait Islander people have gained recognition from mainstream Australia of their contribution to the richness of this nation.[184] Until Aboriginal and Torres Strait Islander people have negotiated themselves into a position where they have a choice to pursue self-determination or otherwise, it is premature to talk of reconciliation. An odyssey however by both denotation and connotation is not something that is achieved overnight.

The impending legislative resolution of the High Court's *Mabo* decision has become inextricably bound to the issue of Reconciliation. No legislative resolution, however, is ever going to satisfy all the competing and conflicting interests. No legislative resolution will be able to avoid disputes. Negotiation will always be a preferable form of resolution for those disputes to litigation.

The possibility of an actual formal "Reconciliation" document has been left for exploration under the *Council for Aboriginal Reconciliation Act* 1991 (Cth). When *Mabo* with its implications for the mining and pastoral and tourist industries and for Australia as a whole has attained certainty; when *Mabo* has been expanded to accommodate land rights *and* compensation for Aboriginal and Torres Strait Islander people; when the education of non-Aboriginal Australia has fulfilled the goals of the Council for Aboriginal Reconciliation, then will be the time for Reconciliation, in whatever its formal guise.

The foundation necessary for the rhetoric to ring true is summarised by the Council for Aboriginal Reconciliation in these words:

> "It is important to remember that no document will effect a significant improvement in the relationship between indigenous and other Australians until attitudes are changed through education and community interaction. The national and local dimensions are equally important."[185]

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182 P Boyne 'Adapting Techniques' in Ferguson *supra* n.165 at 117.

183 Bullivant *Pluralism: Cultural Maintenance and Evolution* Multilingual Matters Avon England 1984 at x.

184 Note the 'Redfern' Speech, *supra* n.132, 5; eg, J Poulter 'Koori Football' *Aboriginal Newsletter* AGPS Canberra June 1985 at 12; and 'Marn-Grook- Original Aussie Rules' unpublished paper: Historian Jim Poulter is still researching the topic but evidence to date is very clear of the Aboriginal origins of Australian Rules Football. The suggestion of having a curtain raiser of two Aboriginal teams before an AFL grand final playing a traditional game of Marn-grook could be a tourism and international sport TV bonanza.

185 *Supra* n.159 at 13.