From Dispossession to Reconciliation
From Dispossession to Reconciliation

John Gardiner-Garden
Social Policy Group
29 June 1999
Acknowledgments

The author would like to acknowledge the generous research and editorial assistance he has received from his colleagues in the Department of the Parliamentary Library in Canberra.

Inquiries

Further copies of this publication may be purchased from the:

Publications Distribution Officer
Telephone: (02) 6277 2711

A full list of current Information and Research Services publications is available on the ISR database. On the Internet the Information and Research Services can be found at http://www.aph.gov.au/library/

A list of IRS publications may be obtained from the:

IRS Publications Office
Telephone: (02) 6277 2760
Contents

Major Issues ........................................................................................................... i
Introduction ............................................................................................................... 1
PART I: The First 200 Years ...................................................................................... 2
   The 19th Century and the Period of Dispossession ............................................. 2
   The Mid 20th Century and the Period of Assimilation ....................................... 2
   1967 Referendum and a New Beginning ......................................................... 4
   The Early 1970s and the Concept of 'Self-determination' and 'Self management'  6
   The Late 1970s and Early 1980s—the Concept of a Treaty or 'Makarrata' .......... 7
   The Mid 1980s and the Return of the Concept of 'Self-determination' ............... 8
PART II: The Next 10 years ..................................................................................... 11
   The Late 1980s and the Concept of a 'Compact' .............................................. 11
   1989/1990 and the Concept of 'Self-government' .............................................. 15
   The Late 1980s/Early 1990s and the Concept of Reconciliation ....................... 16
   The Response to Mabo and Debate on a 'Social Justice Package' ................... 18
   The Mid 1990s and the Inquiry into the Separation of Indigenous Children ...... 21
   The Late 1990's and a New Language ............................................................... 22
PART III: The Last Year .......................................................................................... 25
   The 1998 Election and a New Commitment ..................................................... 25
   The End of 1998/Beginning of 1999 and a Plethora of Problems ..................... 30
   Early 1999 and a Draft Pre-amble ..................................................................... 32
   Mid 1999 and a Draft Declaration of Reconciliation ......................................... 34
PART IV: The Road Ahead ...................................................................................... 36
   The Apology Obstacle ......................................................................................... 36
Conclusion .............................................................................................................. 41
Appendix 1. Council for Aboriginal Reconciliation, Addressing the Key Issues for Reconciliation, Canberra, 1993, pp.51–52 ......................................................... 43
Appendix 2: Parliamentary Motions of Apology—Stolen Children ....................... 47
Appendix 3: Overseas Use of the Term Reconciliation ......................................... 51
Endnotes ................................................................................................................. 53
Major Issues

This paper attempts to trace the rhetorical road which has led from the period of dispossession and the policy of assimilation to the later policy of self-determination and the present process of reconciliation.

The notional citizenship ascribed to Aboriginal people at the end of the 18th century was eroded during the nineteenth century—with dispossession from land being followed by dispossession from family. In the mid-twentieth century a rhetorically more benign period of assimilation was ushered in, but laws, including Commonwealth laws—intended to 'protect' or advance people's 'welfare' quickly became laws which further oppressed and alienated indigenous people. Indeed, during this period the removal of children from indigenous parents shifted from being an ad hoc State practice to a systematised strategy agreed on by all governments, State and Federal.

In the early 1960s, as more voices drew attention to the meagre achievements of the assimilation policy, the Commonwealth began to reform the system within its own jurisdiction, removing various legal liabilities it had imposed, or let be placed, upon indigenous Australians. The States soon began to follow suit, repealing most of their discriminatory legislation. The 1967 referendum, although simply clearing a broader way for the Commonwealth to make special laws in relation to Aboriginal people, was subsequently linked in the popular imagination with a wide range of developments which took place between the early 1960s and early 1970s—a decade which ended with the emergence of the new policy of 'self-determination'.

With the Fraser Government dropping 'self-determination' from Commonwealth rhetoric and showing no sign of following up its support for land rights in the Northern Territory with support for a national system of land rights, a campaign got under way for a more basic immutable recognition of indigenous rights in the form of a 'treaty', 'compact' or 'makaratta'.

When the Labor party returned to office in 1983, 'self-determination' returned to the Commonwealth vocabulary, the issue of national land rights was again on the agenda and work began on moving away from the Departmental model of service delivery towards that which became the Aboriginal and Torres Strait Islander Commission. However, when the Hawke Government subsequently limited that which it meant by self-determination and backed away from the pursuit of national land rights, calls for a treaty became even stronger. In 1988 Prime Minister Hawke committed his government to concluding a
'compact' by 1990. Failing, however, to achieve bi-partisan support for a treaty or even a resolution backing the right of indigenous people to self-determination, the Hawke Government started to see some merit in the concept of 'reconciliation' being advanced by the Christian Church leaders.

In 1991 bi-partisan support was achieved for the passage of a bill setting up the Council for Aboriginal Reconciliation and setting in motion a formal ten-year 'process of reconciliation'. Prime Minister Keating, in his Redfern speech of December 1992 and his Government's decision to set up a national inquiry into the separation of indigenous children, sought to advance this process by encouraging some recognition of past injustices. In his government's native title and land fund legislation and proposed 'Social Justice Package' he sought to advance the process of making amends for the disregard of indigenous common law rights which the 1992 Mabo judgement had found to have occurred.

The new Howard Government dropped the terms 'social justice' and 'self-determination' and withdrew support from many of the initiatives and institutions for which these terms were the raison-d'etre and declared its new priorities to be 'accountability', 'improving outcomes in key areas' and 'promoting economic independence'. Many of the Government's subsequent administrative actions, together with the Prime Minister's perceived lack of action over responding to the rhetoric of One Nation, ended up, however, placing an enormous strain on its relationship with the indigenous community.

Upon his re-election in October 1998, Prime Minister Howard acknowledged at least one instance in which his words could have been better chosen and declared reconciliation would be a priority for his Government's second term. It soon became clear, however, that the reconciliation to which the Prime Minister had committed himself appeared to be a much narrower concept than that to which many others in the community were working. The Prime Minister did eventually express support for some form of constitutional recognition of indigenous people and declaration of reconciliation, but his own proposed constitutional preamble fell well short of recognising prior indigenous custodianship of the land or any past injustices, his impression of the Council for Aboriginal Reconciliation's Draft Declaration was that it would need amendment and he has continued to resist calls to making a formal Government apology for past injustices.

On 4 June 1998 the Council for Aboriginal Reconciliation formally opened a six month process of public consultation leading up to a National Reconciliation Convention on 27 May 2000 at which a final plan will be presented.

On 1 January 2001, the anniversary of the Centenary of Federation, the Reconciliation Council will cease to exist. What may be in place when it does so, in terms of documents, preambles, new bodies etc, is still far from clear.
Introduction

In the early years of colonisation indigenous Australians occupied an important place in the lives and writings of Australian settlers, but as indigenous dispossession became complete there descended that which the anthropologist W.E.H. Stanner dubbed 'the great Australian silence', an inattention, he argued, resulting not from an accidental oversight but from viewing Australian history and society through a window carefully placed to exclude a whole section of the landscape. Over the last 30 years writers of histories, reports, commentaries and judgements have offered more and more windows onto once hidden parts of the landscape and this has resulted in a broadening of the public debate on indigenous affairs. This debate, which had been centred for most of this century on how best to implement 'assimilation', moved on to explore concepts of 'self-management', 'self-determination', 'self-government', and 'sovereignty', and to grapple with the possibility of a 'treaty', 'compact' or 'makarrata'. In more recent years the debate has progressed onto the issues surrounding a possible 'social justice package', 'preamble to the constitution' and 'an apology for past policies'. In June 1999 the debate received a new focus with the Council for Aboriginal Reconciliation releasing its draft 'Declaration for Reconciliation' and formally opening a final process of public consultation leading up to a National Reconciliation convention in May 2000.

No matter how far debate progresses, however, the past is never far behind. It is no surprise, therefore that protagonists in the debate sometimes label each other according to their purported attitude to the past, that is as being adherents to a 'black arm band' or 'white blind fold' view of history.

This paper attempts to trace the rhetorical path which has led from the 'policy of assimilation' to the present 'process of reconciliation' and to identify some of the main obstacles still to be negotiated if the goal of reconciliation is to be attained in any meaningful sense by the centenary of Federation in 2001. In so doing many issues will be touched upon, but in an attempt to keep the chronology moving and the main themes in focus, discussion of some of these issues (for example land rights legislation and service delivery mechanisms) may be episodic and limited.
PART I: The First 200 Years

The 19th Century and the Period of Dispossession

The first century and a half of European—Aboriginal relations in Australia can be characterised as a period of dispossession, physical ill-treatment, social disruption, population decline, economic exploitation, codified discrimination, and cultural devastation. The notional citizenship ascribed to the Aboriginal people at the beginning of this period was all but gone by the end of it, and as if to illustrate this point, in every State the law specifically sanctioned the removal of Aboriginal children from their parents. The aim of such removals was to separate 'full-bloods' from the 'half-castes', curb indigenous reproduction (girls being especially targeted for removal), provide a cheap source of labour and facilitate the Christianising of the indigenous population. In NSW, from 1909, the Aborigines Protection Board consciously strove to remove children of Aboriginal people from the influences of the camps and in 1915 the NSW's Aborigines Protection Act was amended to allow the Board 'to assume full custody and control of the child of any aborigine'-underwriting what was already the practice. Similarly, according to the Northern Territory Aboriginals Act 1910, passed by the South Australian Parliament in preparation for Commonwealth administration, the Chief Protector, represented by a protector in each Protector's District, was to be the legal guardian of 'every Aboriginal and half-caste child' up to the age of 18, irrespective of whether that child had a parent or other relative alive, and in due course it became usual for a protector to remove the children with light skins from their mothers. In Victoria too, as early as 1919, the inspector from the Aborigines Protection Board with police assistance forcibly removed children with lighter skins from their parents.

The Mid 20th Century and the Period of Assimilation

In the mid-20th century the State's control over Aborigines started to be regarded as analogous to that which the common law permitted a father to exercise over his children. Although the legislation in this 'period of assimilation' varied between states, in every jurisdiction it tended to touch on similar areas (where an Aboriginal person could live, their access to alcohol, their wage rate, their access to their own wages, and whom they could marry) and laws intended for the 'protection' or 'welfare' of Aboriginals became laws which oppressed and alienated indigenous people. Commonwealth legislation was no exception. Throughout the period of assimilation Commonwealth legislation supported discrimination against Aboriginal people in such areas as voting rights, wage entitlements and social security eligibility. Indeed, it was not until 1966 that the Commonwealth extended social security eligibility to all indigenous Australians.
The above regulations and restrictions all illustrate that which Jeremy Beckett refers to as the 'contradictory nature of the Assimilation Policy', a policy which:

used the goal of eventual entry into the community as a justification for segregating Aborigines on settlements, and the goal of eventual citizenship as justification for curtailing their civil rights. 6

Nowhere, however, does the destructive and contradictory nature of the assimilation policy become so apparent as in the area of the removal of indigenous children from their parents. The haphazard State legislation in this area in the late 19th and early 20th century gave way in the mid-20th century to systematised removal. In 1937 the Commonwealth State Native Welfare Conference declared that 'the destiny of the natives of aboriginal origin, but not the full blood, lies in their ultimate absorption by the people of the Commonwealth' and the conference recommended 'that all efforts be directed to that end'. 7 There followed more rigorous surveillance and enforcement regimes, underpinned by the notion that there was nothing of value in indigenous culture. Some jurisdictions, such as Western Australia, Northern Territory, South Australia and Queensland, continued with their special laws into the later 1950s and early 1960s, before transferring indigenous children to the mainstream system. Others, such as Victoria, Tasmania and New South Wales, started applying the same laws to indigenous and non-indigenous families much earlier but application of general child welfare laws did nothing to slow the rate of forced removal and in some places increased it, with courts prepared to equate 'poverty' with 'neglect' and an indigenous life-style with 'uncontrollable'.

The third Native Welfare Conference in 1951, at which the newly appointed Federal Minister for Territories, Paul Hasluck, advanced assimilation as the remedy to the inconsistent policies which made a mockery of Australia's attempt to promote human rights internationally, did nothing to stem the removals. Indeed, States began to widen the scope of their removal policies and in the 1950s and 1960s children were being removed not just for alleged neglect, but to attend school in distant places, receive medical treatment and to be adopted out at birth. To alleviate the pressure on State institutions and to facilitate a more rapid assimilation, many children were placed with white foster parents. In 1989 Coral Edwards and Peter Read estimated that at the time of writing there were 100 000 people who were either themselves removed, or are descendants of people removed, from their Aboriginal families. 8

As more voices drew attention to the meagre achievements of the assimilation policy, the denial of civil rights that it entailed and the poor international image it gave Australia, the Commonwealth Government began to reform the system within its own jurisdiction. In the early 1960s it lifted restrictions on eligibility for benefits, extending the federal franchise, and removing various legal disabilities. The States found themselves under pressure to follow suit and most discriminatory State legislation was soon repealed.
1967 Referendum and a New Beginning

Throughout the period of assimilation the administration of Aboriginal Affairs was regarded primarily as a State responsibility. Although the Commonwealth had been empowered to legislate for the protection of Aborigines in the Northern Territory after South Australia handed over the Territory to the Commonwealth Government in 1911, it was only after the 1967 Constitutional referendum and the amendments to sections 51 and 127 of the Constitution, that the Commonwealth was free to accept wider responsibility for the Aboriginal people. The constitutional amendments removed the barrier to the Commonwealth Parliament making special laws in relation to the Aboriginal 'race' and offered successive governments the head of power to enact a vast body of legislation intended to benefit indigenous people. The amendments did not, however, as has since been widely believed, guarantee Aboriginal voting rights (this right had been clarified in 1962), confer citizenship rights on Aboriginal people (in theory they had never lost these) or grant award wages to Aboriginal people in the pastoral industry (this did not happen until 1968 and was the result of an unrelated process linked to a successful action in the Conciliation and Arbitration Commission by the North Australia Workers Union in 1965). It did not offer Aboriginal people and Aboriginal rights any constitutional recognition. Nor did it give the Commonwealth Government exclusive responsibility for Aboriginal Affairs, or even any explicit responsibility in the area (had such responsibility been sought, the State Governments would almost certainly have opposed the proposal). It is also arguable that the Government could have set up an Office or Department of Aboriginal Affairs and to initiated programs to address Aboriginal needs without the constitutional amendment, just as the Commonwealth has set up Departments of Education and Health, when primary constitutional responsibility in these areas rests with the States.

Indeed, for the first five years following the referendum, there was a degree of Aboriginal frustration at the lack of Federal Government action. Prime Minister Holt established a Commonwealth Council for Aboriginal Affairs, under the chairmanship of Dr. H.C. Coombs, and set up an Office of Aboriginal Affairs within his own Department. Mr Holt's successor, Mr Gorton, appointed Mr Wentworth Minister-in-Charge of Aboriginal Affairs, but did not appear interested in stimulating Commonwealth activity in the area of Aboriginal Affairs. According to Dr. H.C. Coombs:

Gorton's genuine interest in social reform did not extend to Aborigines. Indeed it could be said that he was frankly not interested and could see no good reason for special privileges for Aborigines or for programs directed specifically at their needs. ... He quickly made it clear that he did not, even when Wentworth wished it, want to deal with the council. It would not be a great exaggeration to say that having agreed to Wentworth's request for a $10m budget allocation he believed he had done all that was necessary.

In his address at the Conference of Commonwealth and State Ministers responsible for Aboriginal Affairs at Parliament House in Melbourne on 12 July 1968, Mr Gorton said:
I believe that the Minister and the Council, in their relations with the States, should seek to discharge three main functions:

1. To allocate funds from the Commonwealth to the State for Aboriginal advancement; using State machinery to use these funds for an agreed purpose to the greatest possible extent.

2. To gather information regarding Aboriginal matters (especially welfare) and to act as a clearing house for such information both as between the various States and as between States and Commonwealth.

3. Where appropriate to assist the States in coordination of their policy and in setting the general direction of the Australian approach to Aboriginal advancement.

We propose to give the fullest cooperation to the States, and I am sure we will get the fullest cooperation in return.

The lives of Aboriginal people remained primarily in State hands. In 1972 the McMahon Government announced a policy which recognised the rights of individual Aboriginals to effective choice about the degrees to which, and the pace at which, they might come to identify themselves with the wider society and which aimed to encourage Aboriginals 'increasingly to manage their own affairs—as individuals, as groups, and as communities at the local level'. There were, however, few actions to match the rhetoric. Prime Minister McMahon's Aboriginal Affairs Minister, Peter Howson, proposed a new general purpose lease for Aborigines, but these leases would be very different from an acknowledgment of land rights, would be conditional upon Aboriginal peoples' 'intention and ability to make reasonable economic and social use of the land' and would 'exclude all mineral and forest rights'.

Aboriginal frustration at the general lack of federal government action in the five years following the referendum and the McMahon Government's attitude to land rights culminated in the raising, on 26 January 1972, of a 'Tent Embassy' on the lawns in front of Parliament House in Canberra. The tents were re-erected after being torn down by police on 20 July 1972 and, after a violent clash with police, on 23 July 1972 and on 30 July a demonstration of approximately 1500 people prevented the tents being removed again on that day. A flag designed the year before by Aboriginal artist Harold Thomas (and flown on 12 July 1971, National Aborigines' Day, in Adelaide's Victoria Square) was flown at the Tent Embassy and this flag soon became the focus for Aboriginal land rights aspirations for which it had been intended.

Although the short term political significance of the 1967 referendum may be questioned, its long term symbolic significance cannot be, and although the event may have become distorted by myths, it has proved to be a very useful marker of change, and as Andrew Markus observes, 'markers are so difficult to find on the field of desolation that is the history of Aboriginal—white relations'. Indeed, the referendum has come to act as a form
From Dispossession to Reconciliation

of historical shorthand for a decade of change in the area of Aboriginal Affairs, a decade which began in the early 1960s and ended in the early 1970s.

The Early 1970s and the Concept of ‘Self-determination’ and ‘Self-management’.

It was not till Labor won office in December 1972 that the term ‘self-determination’ was introduced and the Federal Government was able to successfully project itself as totally reversing the previous ‘assimilation’ policy. Mr Whitlam declared that his government’s policy would ‘restore to the Aboriginal people of Australia their lost power of self-determination in economic, social and political affairs’. The four main developments which came to be associated with this commitment were legislation to enable Aboriginal communities to incorporate for the conduct of their own affairs, the establishment of the National Aboriginal Consultative Committee consisting of 41 elected representatives, the establishment of the Aboriginal Land Rights Commission and an increased level of spending on programs specifically directed to Aboriginals through the newly created Department of Aboriginal Affairs. The first two of the above developments were seen to evidence an intention to involve Aboriginal people in the running of Aboriginal affairs at all levels. The third and fourth developments were seen as evidence of commitment to overcome Aboriginal economic deprivation. Both the Aboriginal involvement and the ‘equality of opportunity’ sides to the concept of ‘self-determination’ are evident in a statement made by the then Minister for Aboriginal Affairs, Senator Cavanagh, in 1974:

Our aim is, quite simply, both to remove the disadvantages generally faced by Aboriginal Australians in the fields of housing, health, education, job training and employment opportunities, and to make it possible for Aboriginal communities and individuals to develop as they wish within the overall Australian Society. In all these fields, the importance of Aboriginal involvement and identity is paramount.

When the Liberal–National Country Party coalition came to office in 1975, ‘self-determination’ was dropped from the Government’s vocabulary. The policies which the Australian Labor Party (ALP) had grouped within the concept of ‘self-determination’ were given different labels. Aboriginal involvement in their own affairs was now called ‘self-management’ and the economic means by which Aboriginal people would have the opportunity to make decisions about their lives was called ‘self-sufficiency’. Land rights and additional funds were presented not as part of the greater issue of ‘self-determination’ but as separate issues. The change in terminology reflected not so much a change in policy as a change in underlying philosophy. The L–NCP policy stressed the responsibility for successful and efficient administration that was to go with Aboriginal involvement, while seeing a limit to the Commonwealth’s own responsibility in areas such as land rights. Although the new Coalition government passed the Aboriginal Land Rights (Northern Territory) Act 1976, essentially in the form which the previous Labor Government had prepared the legislation, it did not see it as a manifestation of the principle of self-
determination and did not see it, as the previous Labor Government had, as a stepping stone
to nation-wide legislation.

The Late 1970s and Early 1980s—the Concept of a Treaty or 'Makarrata'.

The realisation that the meaning of self-determination could vary with governments and
that the spirit of the Aboriginal Land Rights (Northern Territory) Act 1976 was not going
to be translated into nation-wide legislation led to a campaign for a more basic recognition
of Aboriginal rights. The campaign first captured public attention in April 1979 following
a call by the National Aboriginal Conference for the Federal Government to negotiate a
'treaty of commitment' between representatives of Aboriginal Australians and the
Commonwealth. The Conference began speaking of a 'Makarrata', a term taken from a
north-eastern Arnhem Land language, where it means the end of a conflict and the
resumption of normal relations between communities. The Federal Government was
prepared to discuss the concept of an agreement, but ruled out a treaty because of its
connotations of separate nations within Australia. There may have also been concern that
a treaty implied massive group compensation. Indeed, the Victorian Parliament's Social
Development Committee in Recommendation 4 of its 1982 Report upon Inquiry into
Compensation for Dispossession and Dispersal of the Aboriginal People accepted 'that
Aboriginal people as a whole have suffered or been disadvantaged as the result of
dispossession and dispersal' and recommended 'that all Aboriginal people be eligible for
compensation'.

As most Aboriginal activists were focused on immediate political goals such as land rights,
much of the work of publicising and promoting the concept of a treaty was taken on by the
Aboriginal Treaty Committee, a non-Aboriginal organisation of prominent citizens including
Dr H.C. Coombs and the poet Judith Wright. This committee was convinced that without a
treaty or similar instrument, Acts of Parliament would be too subject to the winds of political
change. It proposed that the treaty, covenant or convention include provisions relating to:

(i) the protection of Aboriginal identity, languages, law and culture;

(ii) the recognition and restoration of rights to land by applying, throughout Australia,
the recommendations of the Woodward Commission;

(iii) the conditions governing mining and exploitation of other natural resources on
Aboriginal land;

(iv) compensation to Aboriginal Australians for the loss of and damage to traditional
lands and to their traditional way of life;

(v) the right of Aboriginal Australians to control their own affairs and to establish their
own associations for this purpose.
The Aboriginal Treaty Committee succeeded in having the treaty question referred to the Senate Standing Committee on Constitutional and Legal Affairs which reported in 1983. In its report, *Two Hundred Years Later*, the Senate Committee argued that past treaties made with indigenous populations in former British colonies were not very useful 'as precedents for a compact between Aborigines and the Commonwealth' as they were 'concluded at a time when the term treaty did not possess so fixed a meaning in international law as it does today', that is as 'an internationally recognised agreement between two nations'. The Committee further argued that the rights which indigenous people now had in countries such as New Zealand, the US and Canada, had come not from the treaties but from the domestic law applying to everyone within the nation's territorial boundaries. The Committee considered using the Aboriginal word 'Makarrata', but as it was a word peculiar to one Aboriginal linguistic group preferred to use the word 'compact'. It concluded that although at the time of settlement sovereignty may have resided in the Aboriginal people:

> as a legal proposition, sovereignty is not now vested in the Aboriginal peoples except in so far as they share in 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. Nevertheless, the Committee is of the view that if it is recognised that sovereignty did inhere in the Aboriginal people in a way not comprehended by those who applied the *terra nullius* doctrine at the time of occupation and settlement, then certain consequences flow which are proper to be dealt with in a compact between the descendants of those Aboriginal peoples and other Australians.

The Committee advised that its 'preferred method of legal implementation of a compact' between the Aboriginal population and the Commonwealth would be a referendum to amend the Constitution. There would first have to be an education program to familiarise the Aboriginal and non-Aboriginal community alike with the idea of, and proposed substance of, the compact. The 1988 bicentennial year was 'consistently suggested by many groups as a target date', but the Committee gained the impression that if a compact were to be decided upon, the education process might take somewhat longer.

The Senate Committee's report did not immediately lead to any new treaty initiatives and the Aboriginal Treaty Committee, finding a lack of political will to implement a treaty, ceased its activities in February 1984.

The Mid 1980s and the Return of the Concept of 'Self-determination'

Progress towards a 'treaty' may have reached an impasse in 1983, but with the ALP winning office that year, 'self-determination' returned to the Commonwealth Government's vocabulary and 'self-sufficiency' was dropped. In his major speech to the House of Representatives the then Minister for Aboriginal Affairs, Mr Holding, declared:
This Government...looks to achieve further progress for the Aboriginal and Torres Strait Islander people through the two principles of consultation and self-determination, that is, with the involvement of the Aboriginal people in the whole process.  

Similarly, in the ALP's 1982, 1984 and 1986 platforms, support is pledged to 'the policy of self-determination' and in its April 1987 paper entitled *Achievements in Aboriginal Affairs 1983-84 to 1986-87*, the Government cited the establishment of incorporated Aboriginal controlled organisations as a measure of success of the policy of 'self-determination'.

The Hawke Government's concept of self-determination, however, did not differ greatly from the previous Government's concept of 'self-management' and did not carry any of the connotations carried by the term 'self-determination' as used in International Law. As Mr Richard Chisholm, a Senior Lecturer in law at the University of NSW suggested:

> While changes in Departmental policy represent a notable advance and a significant break with the past, it is still unclear whether they embody a real commitment to Aboriginal self-determination as distinct from a policy of multiculturalism that could equally apply to other racial or ethnic groups.

Self-determination, which would enable Aboriginal people to control their destiny and adapt their laws, culture and traditions, is essential to their continuation as a viable and identifiable race. Multiculturalism which acknowledges differences between different communities is not enough.

Many indigenous activists, disappointed among other things by the Government's retreat in March 1996 from their pursuit of a system of national land rights, sought to link the domestic use and international meaning of the term. For example, Paul Coe, the then Chair of the National Aboriginal and Islander Legal Service Secretariat, argued in a United Nations Week Speech, October 1986, that international law recognises the Aboriginal people's statehood and that the Commonwealth of Australia must recognise 'the right to self-determination of the nation of the Aboriginal people'. Shane Houston, the Coordinator of the National Aboriginal and Islander Health organisations in a speech given at the 'Self-Determination Indigenous People Speak Regional Forum', 29 June 1986, insisted that:

> Despite oppression and attempts at indoctrination in colonialists' schools, our inherent belief that the members of our communities collectively have the right to rule, that an individual's responsibility and right is to protect himself by guarding this collective right, remains.

Professor Erica Irene A. Daes, Chair of the United Nations Working Group on Indigenous Populations, made it clear that she believed there was a general Aboriginal aspiration for self-determination and that by this they meant having control over their land, their laws and all aspects of their lives. Consequentially she recommended that:

> the Aboriginal and Islander people be given self-government over their local and internal affairs. While the exact powers and functions of such self-governments should be the subject of negotiations between the parties, the minimum goal should be powers
sufficient for the protection of the group's collective right to existence and for the preservation of their identities. To this end, a secure financial basis must be created for the self-governments, preferably through the establishment of rights to land and resources, taxation powers and, when and if these are insufficient, the granting of lump sums for their free use.\textsuperscript{30}

The term 'self-determination', however, ended up being the main stumbling block to bipartisan support for a resolution which church leaders had proposed parliamentarians pass as their first act in the new Federal Parliament House. The resolution in its final form read:

That the House of Representatives/Senate:

1. acknowledge that:

(a) Australia was occupied by Aborigines and Torres Strait Islanders who had settled for thousands of years before British settlement at Sydney Cove on 26 January 1788.

(b) Aborigines and Torres Strait Islanders suffered dispossession and dispersal upon acquisition of their traditional lands by the British Crown; and

(c) Aborigines and Torres Strait Islanders were denied full citizenship rights of the Commonwealth of Australia prior to the 1967 Referendum;

2. affirms:

(a) the importance of Aboriginal and Torres Strait Islander culture and heritage; and

(b) the entitlement of Aborigines and Torres Strait Islanders to self-management and self-determination subject to the Constitution and the Laws of the Commonwealth of Australia; and

3. considers it desirable that the Commonwealth further promote reconciliation with Aboriginal and Torres Strait Islander citizens providing recognition of their special place in the Commonwealth of Australia.\textsuperscript{31}

Although this resolution had already been modified to accommodate Opposition concerns (e.g. references to the legal recognition of land rights and to the desirability of a compact were dropped) the joint party meeting of the Opposition on the morning of the debate endorsed supporting the resolution only if the entitlement of self-determination already qualified by the words 'subject to the Constitution and the laws of the Commonwealth' were further qualified by the words 'in common with all other Australians'. The Social activist Father Frank Brennan suggested:

At best, the proposed amendment was ambiguous suggesting that the entitlement to self-determination was universal but exercisable discretely by separate groups. At worst, it was ruthlessly assimilationist suggesting that self-determination could be exercised only collectively by all Australians...\textsuperscript{32}
The amendment was not accepted and the Opposition did not support the resolution. The Government continued to use the term but avoided using it in international fora and domestically always appeared to try to link it with 'self-management'. Thus the preamble to the 1989 Bill which established the Aboriginal and Torres Strait Islander Commission (ATSIC), a body which was to combine the representative and consultative functions of the earlier NACC and NAC, with the budget and program responsibilities of the Department of Aboriginal Affairs, declared the new body's objectives to be 'self-determination and self-management for the Aboriginal and Torres Strait Islander peoples within the Australian nation...' and the Commonwealth Government's 1991 Budget Related Paper No.7 stated:

The Aboriginal and Torres Strait Islander Commission (ATSIC) is the centre-piece of the Government's policy of greater self-management and self-determination for Aboriginal and Torres Strait Islander people.

The Government's attempt to appear supportive of 'self-determination' while containing it within the parameters of 'self-management', led the House of Representative Standing Committee on Aboriginal Affairs to note in 1990 that 'at times Aboriginal people and governments have talked past each other because they have used terminology loosely.'

PART II: The Next 10 years.

The Late 1980s and the Concept of a 'Compact'

In the late 1980s, while the debate over self-determination gathered pace, the prospect of a treaty, a prospect which had receded from the political scene in 1984, returned—sometimes under the alternate name of 'compact'. In September 1987 the then Prime Minister, Mr Hawke, who had been heavily lobbied by people such as the Aboriginal poet Kevin Gilbert and Mr Justice Michael Kirby, raised the possibility of a 'compact' between the Aboriginal and non-Aboriginal people. Mr Howard, the then Leader of the Opposition, rejected the idea claiming: 'There is no way the Australian people will ever accept that in some way we are two nations within one—nor should they.'

On 12 June 1988, however, Mr Hawke effectively committed his government to concluding a compact by 1990. At the Barunga festival in the Northern Territory Galarrwuy Yunupingu, chair of the Northern Land Council and Wenten Rubuntja, chair of the Central Land Council, presented Mr Hawke with a petition framed with paintings done by elders of the Western Desert and Arnhem Land people. 'The Barunga Statement' read as follows:

We, the indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights:
To self-determination and self-management, including the freedom to pursue our own economic, social, religious and cultural development;

To permanent control and enjoyment of our ancestral lands;

To compensation for the loss of use of our lands, there having been no extinction of original title;

To protection of and control of access to our sacred sites, sacred objects, artefacts, designs, knowledge and works of art;

To the return of the remains of our ancestors for burial in accordance with our traditions;

To respect for and promotion of our Aboriginal identity, including the cultural, linguistic, religious and historical aspects, and including the right to be educated in our own languages and in our own culture and history;

In accordance with the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of all forms of Racial Discrimination, Rights to Life, Liberty, Security of Person, Food, Clothing, Housing, Medical Care, Education and Employment Opportunities, necessary Social Services and other basic rights.

We call on the Commonwealth to pass laws providing:

A national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander affairs;

A national system of land rights;

A police and justice system which recognises our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interfere (sic) with our freedom of expression or association, or otherwise prevent (sic) our full enjoyment and exercise of universally-recognised human rights and fundamental freedoms.

The Prime Minister was quoted as agreeing to five proposals:

Firstly, that there shall be a treaty negotiated between the Aboriginal people and the Government on behalf of all the people of Australia.

Secondly, that many Aboriginal people should decide what it is you want to see in that treaty.

The third step is that I have agreed that we should provide you with assistance to establish those consultation processes. In particular, that there should be a committee of seven of your traditional owners who will have the responsibility for organising those
consultations with a view to organising an Australia-wide convention, which will represent the culmination of your own negotiations.

Fourthly, that when you have conducted these processes of consultations that we as a Government should then be prepared to receive and to consider the results of your thinking and your consultation.

And fifthly, we agree that these processes should start before the end of this year, and that we would expect and hope and work for the conclusion of such a treaty before the end of the life of this Parliament.37

There ensued much debate over how the process should go forward. Shirley McPherson, chair of the Aboriginal Development Commission, called for a treaty to be embodied in the Constitution.38 Professor James Crawford of the University of Sydney said he believed the treaty would be nothing more than a public relations exercise unless the issue of Aboriginal public law was addressed and the question of who represents the Aborigines settled.39 In his Boyer Lecture on ABC radio in 1988 Dr Coombs suggested that in the absence of a recognised Aboriginal organisation with the authority to negotiate on behalf of the Aboriginal people, the National Coalition of Aboriginal Organisations (NCAO) could organise an Australia-wide convention to which all Aboriginals and their organisations could be invited, and argued that to be effective a treaty would have to require that:

- the validity of Aboriginal title to their traditional lands be recognised by the Australian legal system;

- exclusive legislative and financial responsibility for Aboriginal matters be in the power of the Commonwealth Parliament;

- the property rights of non-Aboriginal citizens at the time of the negotiation of the treaty be protected against Aboriginal claim;

- a tribunal constituted on a basis agreed by the Commonwealth and a representative Aboriginal Convention be established to supervise and to act as arbitrator in negotiations leading to a treaty, to act as interpreter of the principles of the treaty and to advise on its implementation.40

In February 1989 the Aboriginal Law Centre at the University of New South Wales in consultation with the International Law Association, the NCAO and the National Aboriginal and Islander Legal Services Secretariat (NAILSS) hosted a seminar on 'Aboriginal People and Treaties' at the Law Centre. One contributor, the NCAO chair Geoff Clark, saw land rights as being crucial to the treaty issue, considered the working out of a consultation process a prerequisite to treaty negotiations and believed that there should be international monitoring—'A UN umpire if you like'.41 Another contributor, Michael Mansell of the Tasmanian Aboriginal Centre was reported as posing five options for a treaty.42 Four of these had been outlined in the Senate Committee's report Two Hundred Years Later... and could be
negotiated within the Australian political context. The fifth option and the one favoured by Mr Mansell would recognise Aboriginal people as a separate nation:

Aboriginal people ought not to sell ourselves short by perceiving ourselves in terms of a unit of Australian society—an ethnic group or a minority—who are just getting a hard time.

We are in fact a nation of people and we ought to stand up and acknowledge it. If this is the case, then any agreement reached between Aborigines and Australia takes on a different status. And, it is not a status capable of being unilaterally enforced or not enforced by a white government as has been the case in New Zealand and the United States. It means it comes under the purview of international law.

At meetings in late 1988 and early 1989 the Prime Minister and the Minister for Aboriginal Affairs met with representatives of the NCAa to discuss how the compact consultations might be organised. The consultations, however, failed to get off the ground; the reasons included the lack of a representative Aboriginal organisation, the failure of the Government to allocate NCAa the funds budgeted for the consultations, the opposition of the Coalition parties and the preoccupation of the Minister with setting up the Aboriginal and Torres Strait Islander Commission.

Talk of a treaty, however, persisted. On 2 December 1989 a full page advertisement signed by prominent Australians, including Dr Coombs, appeared in the metropolitan press. It was headed: 'Support the Barunga Statement and the Prime Minister's reply to it: A treaty with Aborigines in 1990'. The signatories called for political and financial support:

Only if popular support is strong and lasting in the months ahead will the Government keep its promise and the Aborigines win the recognition for which they have fought for 200 years.

The advertisement claimed the funding which the Government promised for consultations would not be adequate and directed donations to the Aboriginal Law Centre at the University of New South Wales for distribution to NCAa and NAILSS. Mr Hawke himself revived the 'treaty' possibility in February 1990 during a visit to New Zealand for the 150th anniversary of the signing of the Waitangi treaty. He pledged his government would accelerate its efforts to make a treaty with Australia's Aboriginal population:

The simple position is that we will proceed with the concept of a treaty within Australia. I believe that the total Australian community, Aboriginal and non-Aboriginal, is going to be well-served by the achievement of that treaty.

It's not something that's imposed, it's something that emerges from, as far as possible, a coalescence of the wishes and aspirations of the Aboriginal people and a recognition by the non-Aboriginal community of the appropriateness of such an outcome.

Warwick Smith, then Opposition Spokesperson on Aboriginal Affairs, argued, however, that it is impossible for a nation to have a treaty with itself:
A treaty will create hostility within the Australian community where it currently does not exist and will not advance the material well-being of the Aboriginal people.45

1989/1990 and the Concept of 'Self-government'.

At the end of the 1980s a new term, widely used in North America, enjoyed a brief period of use in Australia. 'Self-government' was employed to describe one of the mid-way options between complete assimilation or complete separation. Models ranged from the creation of an Aboriginal State with the powers of other Australian States (it could be made up either of the various Aboriginal lands around Australia and have its parliament located in some central place such as Alice Springs or of one or two large continuous territories in Central and Northern Australia), to the recognition of traditional law, to constitutional guarantees of land rights, site protection and service delivery.46

In November 1991 a five member Legislation Review Committee established by the Queensland Government produced a discussion paper Towards Self-Government and reported that:

Aboriginal and Torres Strait Islander communities consulted by the committee had no doubt about the survival of their rights. The committee was often asked why the Queensland and commonwealth parliaments, and the Australian High Court, must be the ultimate adjudicators of Aboriginal and Torres Strait Islanders rights. The question is important because it highlights a fundamental issue relevant to Aboriginal and Torres Strait Islander self-government. Whatever the legal situation, Aboriginal and Torres Strait Island people do not regard any powers to govern which they exercise as being 'derivative', or originating from any mainstream government.47

The committee proposed legislation which would recognise the pre-existing rights of indigenous people to self-government and which would enable Aboriginal and Islander communities to opt, by referendum, to progressively assume responsibility for a wide range of service till many have all the powers of existing local authorities, many of the powers of state administrations and some of the powers of the federal government.

Professor Henry Reynolds presented the Fraser Government's 1979 Norfolk Island Act as a possible model for regional Aboriginal self-government. Although the Pitcairn descendants on Norfolk Island had their claims to special rights dismissed by the High Court of Australia in 1976, Parliament recognised the 'special relationship of the [Pitcairn] descendants with Norfolk Island and their desire to preserve their traditions and culture'.48 The move was supported by the Liberal minister of territories, Robert Ellicott who argued that although the island was 'part of Australia and will remain so, this does not require [it] to be regulated by the same laws as regulate other parts of Australia', by the National Party member Clarrie Miller who claimed 'it is generally accepted that Norfolk Island is quite unique in most respects' and by the Labor Party's John Dawkins who believed:
We cannot avoid the question of Norfolk Island being part of Australia; yet at the same time we cannot be seen to be preventing the people who have lived there for so long from continuing to live in the way they have for so long. We are determined to ensure that they are allowed to exercise a real sense of self-government. 49

If the small Norfolk Island community of about 1500 permanent residents could exercise the right to elect a government with many of the powers of both federal and state governments (education, health, taxation, immigration, law-and-order and social welfare) so too, the argument went, could numerous Aboriginal communities.

The Late 1980s/Early 1990s and the Concept of Reconciliation

The word 'Reconciliation' had been introduced into the debate in 1988 when 14 heads of Australian Christian Churches issued a statement entitled 'Towards Reconciliation in Australian Society'. That statement focused on the history of Aboriginal-European contact and conflict, the place of Aborigines in Australian society and the need for committed acts of reconciliation. Although the Church leaders failed to get Commonwealth parliamentarians to pass a motion in the first session in the new Parliament House embracing 'reconciliation', the term lived on. In August 1989 Father Frank Brennan and Professor James Crawford delivered a joint paper to the Australian Legal Convention in Sydney, calling for a 'charter of recognition' backed up by an independent commission rather than a treaty. The Aboriginal Recognition Commission would be modelled on the Australian Law Reform Commission in that it would be chaired by a prominent Australian, invite submissions, hold public hearings and publish interim reports. It would hold a series of twelve annual meetings before 1 January 2001, the anniversary of the first centenary of Federation. The long-term aim of the Commission would be to present a draft Charter for Aboriginal Recognition to Commonwealth and State governments at a conference of Prime Minister and Premiers in 1999, allowing 18 months for debate leading up to a referendum to approve the wording. 50

By 1990 the Government appeared prepared to embrace the concept, not necessarily as a first choice for the way forward, but as the only choice left. The failure to achieve bi-partisan support for either a 'treaty', a 'compact' or a resolution backing the right of indigenous people to self-determination, and an ambivalence in the general community about what if anything should be included in a treaty, 51 had led the Government to see some merit in a change of rhetorical tack.

In January 1991 Robert Tickner, Minister for Aboriginal Affairs, issued a discussion paper entitled Aboriginal Reconciliation which proposed the establishment by legislation of a Council for Aboriginal Reconciliation to facilitate a process of reconciliation between Australia's indigenous and wider communities. The Government's initiative was supported by the Opposition and seemed to be endorsed in the report of the Royal Commission into Aboriginal Deaths in Custody. The Council for Aboriginal Reconciliation Bill 1991 was passed in June 1991. On 25 December prominent Aboriginal and non-Aboriginal people
were appointed to a Council chaired by Mr Patrick Dodson. The process of reconciliation was to be formally concluded by 1 January 2001. The council was to consult widely to determine whether the process would be advanced by a formal 'document of reconciliation' and, if so, make recommendations on the nature of such a document.

Expectations of the process of reconciliation varied enormously among advocates of Aboriginal rights. A former head of the Department of Aboriginal Affairs and later chair of the Arrernte Council of Central Australia, Charles Perkins, was reported as calling the process a big lie and a sell out. Bob Weatherall, the chair of the self-titled 'Provisional Aboriginal Government', called for a boycott of the Council's meeting. The council chair, Pat Dodson, said he would not have accepted the position if he thought a treaty or 'instrument of reconciliation' was not a possible outcome. Lois O'Donoghue, chair of ATSIC and a member of the Council for Aboriginal Reconciliation, in a speech to mark the 25th Anniversary of the 1967 Constitutional referendum, expressed the hope that the reconciliation process would produce something more valuable than a treaty—a constitution which specifically recognised indigenous Australians and their rights.

On the 10th December 1992 the then Prime Minister, Mr Keating, in his so-called 'Redfern Speech', publicly linked progress down the path to reconciliation with Australian society coming to terms with the past:

And, as I say, the starting point might be to recognise that the problem starts with us non-Aboriginal Australians. It begins, I think, with that act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the diseases. 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.

The Council for Aboriginal Reconciliation sought to further stimulate public discussion with the publication in 1993 of eight 'key issue' papers. Paper no. 4 suggested:

It is important to fully understand the recency of the official exclusion and control of indigenous Australians. Many now in their twenties went to separate schools, were not counted in a census until 1971, and had their lives directed by managers or welfare officials; many now in their thirties were also kidnapped from their families and their links with their families were destroyed for many years; and those now in their fifties lived under harsh regimes—they were adults but had less rights than non-indigenous children of the time.

Paper no. 7 canvassed options for a document of reconciliation. The non-statutory options included area-specific protocols between various bodies, new inter-governmental agreements, and a 'treaty'. Statutory options included legislative recognition of indigenous rights (in areas
From Dispossession to Reconciliation

from self-government to customary law) and a statutory Bill of Rights. Constitutional options included the insertion of a preamble acknowledging prior indigenous ownership of the land, constitutional recognition of a Bill of Rights, of specific indigenous rights and bodies, and or of federal, state and territory government obligations to indigenous people, the creation of reserved seats in Parliament, and replacing s. 51(xxvi) of the Constitution (the 'race power' provision) with a more positively worded provision which mentions 'Aboriginals and Torres Strait Islanders'.

The Response to Mabo and Debate on a 'Social Justice Package'.

In the two decades following the failure of the applicants in the 1971 Northern Territory Supreme Court Case Milirrpum v Nabalco to have the concept of terra nullius overturned, most supporters of indigenous rights turned from pursuing common law rights to struggling for statutory land rights and/or a treaty. Most, but not all. In the 1980s some Torres Strait Islanders, led by Eddie Mabo, pursued their common law rights through the courts. On 3 June 1992, after 10 years of litigation, the High Court decided that the common law recognises that native title may survive the acquisition of sovereignty by a colonising power. The Court found that native title did not arise out of a grant from a government but was a pre-existing customary ownership of land which has survived since pre-colonial times. Indeed, the court implied that native title continued to exist elsewhere in Australia, wherever it has not been extinguished by governments and provided that the local Aboriginal and Torres Strait Islander groups had maintained a relationship with their traditional country based on customary law. The judgement offered the recently established process of reconciliation a challenge and an opportunity, and the Government's response ended up coming in three phases.

The first phase of the Government's response was the Native Title Act 1993, creating an opportunity for at least some Aboriginal and Torres Strait Islander groups to receive formal, legal recognition of their customary ownership of their country. 58

The second phase of the Government's response to the decision followed indigenous people lobbying for establishment of a land fund to help satisfy the land need of the dispossessed indigenous people, who, because of dispossession, would rarely be able to demonstrate the continuous connections to land required under Native Title legislative guidelines. This led initially to expansion of the land acquisition programs within ATSIC to include the sub-component of native title, and then to the Federal Government establishing a new land fund and Indigenous Land Corporation to manage monies drawn down each year from the fund.

The third phase in the Government's response was to be a Social Justice Package. This package had been promised by Prime Minister Keating in his second reading speech on the Native Title Bill and in 1994 the Minister for Aboriginal and Torres Strait Islander Affairs, Mr Tickner, told the 12th Session of the UN Working Group on Indigenous Populations:
The social justice package presents Australia with what is likely to be the last chance this decade to put a policy framework in place to effectively address the human rights of Aboriginal and Torres Strait Islander people as a necessary commitment to the reconciliation process leading to the centenary of Federation in 2001.\textsuperscript{59}

ATSIC, the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner coordinated a consultation process which reported community calls for:\textsuperscript{60}

- measures for recognition, protection, revival, maintenance and development of Aboriginal and Torres Strait Islander cultural heritage
- protection for 'intellectual property' such as creative designs for artworks, designs, traditional songs and stories or traditional medicines
- reviewing and strengthening existing laws for the protection of sacred and significant sites and objects
- making a new effort to see what elements of customary laws could be recognised within the general laws of Australia
- programs for increasing awareness, in the education system and in the community generally, of indigenous cultures and spirituality
- examining the possibility of recognising, in Australian law, a form of communal title that better reflects Aboriginal and Torres Strait Islander traditional attitudes to property
- measures to increase the participation of Aboriginal and Torres Strait Islander peoples in Australian economic life
- recognition, including in the Australian Constitution, of the special place and rights of indigenous peoples in Australian society
- greater measures of self government for Aboriginal and Torres Strait Islander communities
- regional agreements between indigenous peoples and governments which seek to set out rights and benefits
- seeking stronger commitments to improving Aboriginal and Torres Strait Islander access to, and equitable treatment in, all levels of government program and service delivery
- making greater effort to seek formal agreements with States and Territories, under the \textit{National Commitment to Improved Outcomes in Program and Service Delivery for Aboriginal Peoples and Torres Strait Islanders}, in areas such as health, housing, infrastructure, employment, business funding and land management
requesting the Commonwealth to impose specific requirements on States and Territories that funds provided are used in ways that adequately address the needs of indigenous peoples

• new measures to improve educational outcomes for indigenous peoples

• implementing major recommendations arising from the recent review of the Aboriginal Employment Development Policy, including the expansion and enhancement of the CDEP, Community Economic Initiatives and Business Funding Schemes

• ensuring that public health resources are equitably distributed to meet the health needs of indigenous peoples

• measures to ensure that funds under the Commonwealth State Housing Agreement are distributed equitably to meet housing needs of indigenous peoples, and

• measures to ensure culturally appropriate law and justice services.

In addition to this joint report, each body prepared its own report. While all took a 'rights-based' approach to social justice and canvassed possibilities for ensuring greater indigenous political representation, each highlighted different issues. The Social Justice Commissioner's report called for the creation of an indigenous parliament. The ATSIC report Recognition, Rights and Reform recommended a greater role for the ATSIC chairperson in the existing federal parliamentary system. The Reconciliation Council's report urged considering dedicated indigenous seats in parliament. Five other Reconciliation Council recommendations concerned 'displaced persons', with the Commission recommending that the Commonwealth, State and Territory governments:

formally recognise that the past practices of forced removal of indigenous people from their families, their land, their communities and their birthright connections to their land were unacceptable and in breach of the human rights of the people, their families and their communities.

provide funding to enable a program of detailed research for such displaced people to seek to identify and link up with their families and their origins.

identify the best means of delivering services to displaced people to address the specific difficulties arising from past government policies of removal.

seek to negotiate a possible settlement of claims for perceived breaches of duties to people who were removed from their families, their land, their communities and their birthright connections to their land.

[If] unable to resolve these matters by negotiation, the Commonwealth should fund a test case or cases.
The Mid 1990s and the Inquiry into the Separation of Indigenous Children.

In the early 1990s policy makers became increasingly aware that public ignorance concerning the removal of Aboriginal children was hindering both the provision of help to the victims of such removals and the reconciliation process in general. Helping to raise awareness of the problem had been several developments, including the Council for Aboriginal Reconciliation's submission to the Social Justice Package inquiry, a campaign by the Secretariat of National Aboriginal and Islander Child Care and the NSW organisation Link-up, the revelation in the Royal Commission into Aboriginal Deaths in Custody that nearly half of those who so died had been separated in childhood from their natural families, and a large 'Going Home Conference' in Darwin.

In 1995 the Federal Labor Government established the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families and in April 1997 the Human Rights and Equal Opportunity Commission presented its completed report, *Bringing them home*, to the Coalition Government, which had come to office in March 1996.

The Inquiry estimated that between 1910 and 1970 the number of indigenous children forcibly separated ranged from about one in ten children to one in three, depending on time and place, and that most indigenous families have been affected, in one or more generations, by the forced removal of one or more children. The majority of children removed were entirely separated from their indigenous community, were taught that indigenous culture was without value, were not allowed to use their language, suffered physically harsh living conditions and experienced multiple institutional and/or foster placements. Many were told they were unwanted, rejected or that their parents were dead. Almost one in ten boys and just over one in ten girls allege they were sexually abused in children's institutions—and more allege such abuse in foster placements. Extensive physical punishments were common. Education in the institutions was directed at preparing the children only for menial work. The Inquiry's report documents the effects not only on the children at the time (more than half of whom were removed during infancy) but also on those children later in life, on their children, on the families from which they were taken and on the foster carers when reunion is sought.

The Inquiry concluded that the forcible removal of indigenous children was an act of genocide contrary to the Convention on Genocide, ratified by Australia in 1949. This Convention included within its definition of genocide 'forcibly transferring children of [a] group to another group' with the intention of destroying the group (regardless of the extent to which that intention was achieved). It also concluded that even before international human rights law developed in the 1940s, the practice infringed the legal principles derived from the common law that children should not be removed from their parents and parents are the legal guardian of their children—unless a court, on evidence proving removal is in the best interests of the child, decides otherwise. Removal was taking place in WA (1905–1954), NT (1911–1964), NSW (1915–1940), SA (1911–1923) and
Queensland (1897–1965) without a court order and in WA, NT, SA and Queensland laws made the Protector or Protection Board the legal guardian of Aboriginal children.

The Inquiry found that Australian Governments have a responsibility to respond with:

- acknowledgment of the truth and an apology
- guarantees that these human rights won't be breached again
- returning what has been lost as much as possible (known as restitution)
- rehabilitation, and
- compensation.

It was recommended that the wording of official apologies be worked out with the assistance of ATSIC and communicated with culturally appropriate publicity. To assist people affected by forcible removal the Inquiry recommended that the process of accessing personal and family records should be easier, that there should be a Family Information Service in every state and territory for indigenous people, that counselling and support should be available through a comprehensive network of indigenous family tracing and reunion services.

The Inquiry also recommended ways in which the Australian Governments could effect compensation in line with 'The Basic Principles and Guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law' (the van Boven Principles) and in the light of different overseas practices (e.g. the US Government offered monetary compensation to Americans of Japanese ancestry who had been interned during the Second World War and the Chilean Government is preparing to offer monetary compensation to the victims of the violations of human rights by the military dictatorship). The Inquiry recommended that the Australian Government set up a National Compensation Fund, with a board made up of indigenous and non-indigenous people, that anyone who can prove unjustifiable removal receive a basic lump sum, and that further compensation be awarded upon proof of particular effects of the removal.

The Late 1990's and a New Language

Following the election of the Howard Government in 1996 and the appointment of Senator John Herron as Minister for Aboriginal and Torres Strait Islander Affairs, Commonwealth Government rhetoric changed in several respects. The Government consciously dropped two terms which had been in use for most of the previous decade.

The first term dropped was 'social justice'. The Social Justice Package consultation process which the Keating Government had embarked on to help structure the Government's third tier
response to the Mabo decision (after the *Native Title Act* and the establishment of the Land Fund), was discontinued and the previous Government's annual publication *Social Justice for Indigenous Australians* became *Commonwealth Programs for Aboriginal and Torres Strait Islander Peoples* and, in 1998, *Addressing Priorities in Indigenous Affairs*.

The second term dropped was 'self-determination'. On 25 August 1998 the Foreign Minister Mr Downer was reported as declaring the Government objected to the use of the term 'self-determination' in the Draft declaration on the Rights of Indigenous People, and, would urge the United Nations to replace the term with the words 'self-management' or 'self-empowerment'.61 The reason given by Mr Downer was that the Government did not want 'to see a separate country created for indigenous Australians', but others argue the concept of self-determination with which Australia has worked for decades and which many other countries have supported for inclusion in the UN declaration does not threaten territorial integrity.62

The Government's declared priorities now included 'accountability', 'improving outcomes in key areas' and 'promoting economic independence'. Many of the Government's actions during its first term in office, as well-intentioned as they may have been, placed a strain on the relationship between the Government and the indigenous community. Most notably:

- in April 1996 the Minister issued General Directions to ATSIC requiring the appointment of a Special Auditor to make a determination on whether a prospective grantee was 'not fit and proper' to receive public money, but on 4 September 1996 the Federal Court judged that the Minister's General Directions were invalid. In that same month the Government also commissioned an audit of the Aboriginal Legal Services, an action construed by some as an attempt to compound public perception of mismanagement than to facilitate greater accountability,63 and reversed its election position of favouring the election rather than appointment of the ATSIC chairperson

- in the August 1996 Budget ATSIC's projected budget over the next four years fell by $470 million from that which had been projected by the previous government. Less was allocated in that year than had been spent on indigenous programs in 1994–95. ATSIC expenditure fell from $968.5 million in 1995–96 to $894.1 million in 1996–97 and this was not a result of the transfer of any significant function to another portfolio area (indeed overall indigenous specific expenditure fell dramatically in the 1996–97 financial year).64 As the Minister also directed that expenditure in some areas be quarantined, expenditure in some other areas fell dramatically and some programs (e.g. The Community and Youth Support Programme) had to be terminated altogether

- in the May 1997 Budget the Federal Government announced a review of Abstudy raising concerns that the Government may seek to replace it with Youth Allowance and that this may have an impact on indigenous participation in education

- in October 1997 the Minister appointed barrister John Reeves to review The Aboriginal Land Rights Act (Northern Territory) 1976—raising fears that the Act which most
Aboriginal people view as offering the benchmark in the area of land rights might be watered down or handed to the Territory Government to administer

• in November 1997 the Government did not reappoint Pat Dodson as Chair of the Council of Reconciliation

• in April 1998 the Minister released a discussion paper entitled *Removing the Welfare Shackles*, recommending establishing Indigenous Business Australia ('the IBA') to take over the current operations of the Commercial Development Corporation ('the CDC'), amalgamating ATSIC's business programs with those of the current CDC, transferring the ATSIC Housing Fund to the prosed IBA, transferring the funds management activities of the Indigenous Land Fund and the Aboriginal Benefit Reserve into the proposed IBA and establishing what could loosely be called an 'indigenous bank'

• in January 1998 the Government abolished the position of Aboriginal and Torres Strait Islander Social Justice Commissioner

• in May 1998 the Government's budget provided for a reduction in ATSIC's budget from $973.6 million—in 1997–98 to an estimated $960.3 million—in 1998–99. Overall indigenous specific expenditure would increase slightly from $1852.3 million—in 1997–98 to an estimated $1878.0 million—in 1998–99, but after adjusting for CPI, this actually represented a slight fall

• in July 1998 the Minister sought a special audit from ATSIC's Office of Evaluation and Audit into ATSIC conferences, and

• finally, and perhaps most significantly of all, in July 1998 the Government passed, after much debate inside and outside Parliament, its Native Title Amendment Bill, introduced in November 1997.65

The impact of all of the above on the process of reconciliation was magnified by perceptions that the Howard Government, in its first term in office, was not matching its declared support of the concept of reconciliation with the language required at crucial moments, for example, by not rising to the rhetorical challenge posed by Pauline Hanson and her One Nation Party, not finding the appropriate tone for a speech at the Australian Reconciliation Convention in Melbourne (26 to 28 May 1997) marking the 30th anniversary of the 1967 referendum and by not committing itself, as the Human Rights Commission had recommend, to working with indigenous people on the appropriate words for an official apology for past actions.

Nevertheless the Government's December 1997 official response to the *Bringing them home* Report was accompanied by a $63 million package which included $2 million for Australian Archives to index, copy and preserve thousands of files so they are more readily accessible, nearly $6 million for further development of indigenous family support and parenting programmes, $16 million to the National Library for an oral history project, $9 million for culture and language maintenance programmes, more than $11 million to establish a national
network of family link-up services, $16 million for 50 new counsellors to assist those affected by past policies and for those going through the reunion process and $17 million to expand the network of regional centres for emotional and social wellbeing, giving counsellors professional support and assistance. The absence from this Government response of a commitment to an apology represented, however, in the opinion of the ATSIC Chair Gatjil Djerrkura:

a sorely missed opportunity to make a substantial gesture of reconciliation. Its is also wrong to respond to this matter as if it were a health problem rather than a social, and highly symbolic, issue. The report contained 54 principal recommendations. Some contained several parts, making 83 proposals in all. There are 62 specific issues for which the Commonwealth could take a lead responsibility. It chose to act directly on a mere handful. ... In contrast, the response to the report in the broader community has been heartfelt and generous. Many people agreed with us on the importance of acknowledging the past in order to move forward.

**Part III: The Last Year**

**The 1998 Election and a New Commitment**

Perhaps appreciating a perception that his Government had failed in its first term to advance the process of reconciliation (indeed, explicitly acknowledging that he had overreacted at the 1997 Reconciliation Convention), on the evening of his re-election on the 3 October 1998, Prime Minister Howard declared reconciliation a priority for his Government's second term:

And I also want to commit myself very genuinely to the cause of true reconciliation with the Aboriginal people of Australia by the centenary of Federation. We may differ and debate about the best way of achieving reconciliation, but I think all Australians are united in a determination to achieve it.

Mr Howard elevated reconciliation's status to that of a portfolio, which he assigned to the Immigration and Ethnic Affairs Minister, Philip Ruddock, who he then brought into Cabinet. In November 1998 he gave the Council for Aboriginal Reconciliation the extra $2.4 million it had requested to assist its work and gave his personal backing to drawing up, by May 2000, a historic document 'that acknowledges the historical truths of this country, the prior occupation of it by the indigenous people; it must acknowledge injustices'.

The Prime Minister's post-election embracing of the concept of reconciliation was not, however, seen to be unqualified. He followed his re-election night commitment with a rejection of that which he termed the negative, mean-spirited, black armband view of
From Dispossession to Reconciliation

history, and he followed his subsequent declaration of support for a document of reconciliation with a declaration that he did not favour including in such a document an apology for past wrongs, nor of adding a preamble to the Constitution acknowledging indigenous rights. Since the 1998 election the Minister for Aboriginal Affairs and Torres Strait Islander Affairs, Senator Herron, has also restated his opposition to an apology, describing it as 'an attempt at blackmail'. The Deputy Prime Minister and leader of the National Party, Mr Tim Fischer, who in the course of the October election described land councils as 'blood-sucking bureaucracies', was reported in mid-December 1998 as calling for 'a properly balanced document', but not an official Government apology or a treaty. By late December Mr Howard was reported as appending a commitment to 'try to reach an understanding with Aborigines' with the suggestion that:

there are some people in the indigenous community and there are some who support them in the broader community, who will never be satisfied, no matter what is acknowledged and what is agreed. They will always keep asking for a greater repudiation of the past and a greater sort of downgrading of the quality of the unity of the entire Australian community.

A broader concept of that which reconciliation may imply does appear, however, to have been entertained by Mr Ruddock, the newly appointed Minister to assist the Prime Minister with the issue. In one interview he suggested 'an apology is often the basis upon which you are able to move forward' and in another said:

I'm going to take all of the ideas that come through the reconciliation process to my colleagues. If you're involved in a process that's designed to achieve an effective reconciliation—one in which we all move forward as a united people, all Australians, accepting our cultural differences, accepting our history, accepting our past, then the process needs to be a real process in which all of the ideas are looked at. And that's why I've said we need to be involved in this process with a willingness to involve ourselves in lateral thinking to find ways through the impasses of the past.

Many outside the Federal Government have indeed been urging the Government to entertain a broader concept of that which reconciliation involves. Thus, Evelyn Scott, Chair of the Council for Aboriginal Reconciliation, spoke of the need for a Declaration of Reconciliation which would include, among other things, acknowledgment of the history of indigenous dispossession from land and families and a commitment to work toward the fuller participation of indigenous peoples in the economic, political, cultural and social life of the nation, along with constitutional reforms, new Commonwealth and State legislation to recognise and protect the documents and renewed commitments to address Indigenous disadvantage. Similarly, Gustav Nossal, the Deputy Chair of the Council for Aboriginal Reconciliation, welcomed the Prime Minister's renewed commitment to reconciliation but suggested:

Reconciliation has two faces: a symbolic and an action-oriented one.
The symbolic side is enormously important. There must be a respect for indigenous cultural identity and spiritual beliefs; an acknowledgment of the tragic history since white settlement, including dispossession from land and family, loss of identity, heritage, culture and language, and poor treatment by a variety of institutions; and a recognition of indigenous rights stemming from the unique status of Aborigines and Torres Strait Islanders as the first Australians, the original occupants and custodians of this land.

Equally, action plans leading to greater social justice for indigenous Australians are essential. There must be a renewed effort to address the serious disadvantage of indigenous people in all key sectors, including health, education, housing, employment and community justice. There must also be a commitment to work towards the fuller participation of indigenous people in the economic, political, cultural and social life of the nation.78

David Buckingham, executive director of the Business Council of Australia, speaking at the round table for community leaders on 25 October 1998, argued that reconciliation was not just a matter of health, education and services, but ultimately about 'indigenous rights' and until the community embraced the concept of indigenous rights, there would be a clash of expectations and the reconciliation process, in which a document would be but one step, would be incomplete.79 Similarly Fred Chaney suggested that:

The task of reconciliation is more fundamental than achieving more equal social outcomes for Aborigines. There is a deeper issue that so far we have been unwilling to face. What we fail to acknowledge is that Aboriginal involvement in post-European settlement was involuntary and remains involuntary ...[but]...There is powerful resistance to any notion of inherent rights flowing from Aboriginality...That is the tough core debate we have yet to have and must have. Long-term reconciliation means coming out of that debate with a common position, a common acceptance of the legal and moral basis on which we live together and would live and work together in the future.80

Gatjil Djerkura, the Chair of ATSIC, spoke against having a document that does not address indigenous rights, existence, cultural heritage, land, customary law, and self-determination,81 and in his introduction to the 1997–98 ATSIC Annual report, he observed:

Informed members of the community recognise and appreciate the value of symbolic gestures. They have taken them to heart, embracing a National Sorry Day, signing thousands of Sorry Books, and rallying in support of native title.

Governments cannot legislate for real reconciliation, but they can foster it.

The leader of the Federal Opposition, Kim Beazley, responded to Mr Howard's new commitment by saying it would be tested by the Government's response to the native-title legislation which was before the Western Australian Parliament and would need federal parliamentary endorsement, and by Mr Howard's capacity to handle the issue of 'making atonement for the stolen generation'.82 Similarly, the former Aboriginal and Torres Strait Social Justice Commissioner, Mick Dodson, described an apology to the stolen generation as central to reconciliation, and included in the reconciliation agenda a settlement of land
questions (beyond that offered by the Government's Native Title Amendment legislation) and a narrowing of the socio-economic gap ("we can't say we have reconciliation when our life expectancy is 20 years less than other Australians and our infant mortality is four or five times higher"). The chair of the Council for Aboriginal Reconciliation Council, Evelyn Scott, also declared these same two issues as central to Reconciliation. Peter Yu, the executive director of the Kimberley Land Council, was reported as saying "You can't expect us to open our hearts on reconciliation while we're being kicked in the guts" and argued that the following principles are essential to a Document of Reconciliation:

- constitutional recognition and protection of Indigenous rights
- recognition of traditional customary law within the Australian legal system
- the development of an agreed document on Australia's history
- symbolic protocols recognising the special status of Indigenous People within the Australian nation
- the establishment of a substantial long-term capital fund that compensates Indigenous People for past dispossession and provides economic security, and
- the establishment of a national funding formula that delivers community infrastructure and services on an equitable basis.

Aboriginal activists Murrandoo Yanner and Charles Perkins, speaking at a 'World Indigenous Pathways' conference in Toowoomba on 1 December, called for a boycott of the Sydney Olympics 'unless the Howard Government addressed reconciliation' and Perkins called on the Prime Minister to make a formal apology. 'Without this apology there can be no reconciliation.'

Five Aboriginal leaders sympathetic to the Federal Government even joined in the call for the Prime Minister to 'kick start' the reconciliation process with a formal apology to the stolen generation.

Senator John Woodley, an Australian Democrat and member of the Council for Aboriginal Reconciliation, argued that the Prime Minister's expression of commitment 'will prove hollow unless backed up by meaningful action' and called for a formal apology, support for self-determination, a document of reconciliation which has legal and constitutional backing, more fully addressing of indigenous disadvantage and supporting native title and an improvement in relations between non-indigenous and indigenous leaders. Similarly, the Jesuit Social Justice Centre director Frank Brennan, has suggested the Government attempt to mend fences with moderate Aboriginal leaders and, on the question of outcomes, has advocated a new preamble to the Constitution:

A minimal starting point would be Shane Stone's proposed preamble for the Northern Territory Constitution: 'Since time immemorial the land...was occupied by various
groups of Aboriginal people who lived and defined their relationships between each other, with the land and their nature and spiritual environment under mutually recognised systems of governance and laws.\textsuperscript{91}

Indeed, although in the February 1998 Constitutional Convention delegates voted to restrict the Convention's agenda to the questions of whether Australia should become a republic and, if so, what form it should take, there was broad cross-sectoral support for including an acknowledgment of Aboriginal and Torres Strait Islander people as the original inhabitants and custodians of Australia. The ATSIC Board included the following in its broad goals for constitutional change:

- A new preamble recognising the status of Aboriginal and Torres Strait Islander peoples as the First Australians, and indication a respect for the land and Indigenous cultural heritage;
- A Bill or Rights, specifically recognising the rights of Indigenous Australians;
- Constitutional protection against adverse discrimination on the grounds of race;
- A change in wording of s. 51(26) (the 'race power') to make it an affirmative power; and
- Reserved parliamentary seats for Indigenous representatives, as in other Commonwealth countries.\textsuperscript{92}

The intended conclusion of the reconciliation process on 1 January 2001, the centenary of the Australian Constitution, made it almost inevitable that many would debate the possible relationship between the Constitution and the reconciliation process—and in particular the document which it is likely to produce. In November 1998 Professor Cheryl Saunders, Director of the Centre for Comparative Constitutional Studies, contributed to this debate with the identification of several possible scenarios. Firstly, the constitution would remain unchanged and the Commonwealth, using its 'races' power in section 51(26) might pass legislation providing for a document of reconciliation, 'treaty' or 'agreement' (in New Zealand the Treaty of Waitangi manages to have considerable import while standing completely apart from the other constitutional instruments). Secondly, the constitution might be altered to authorise the Commonwealth (and, if required, the States) to enter into a document of reconciliation with the indigenous peoples of Australia (just as section 105(A) authorises agreements between the Commonwealth and the States with respect to public borrowing)—making recourse to section 51(26) unnecessary. Thirdly, the 'republic' constitutional referendum proposed for 1999 might also propose including in the constitution a preamble which acknowledges indigenous people's original occupancy and custodianship of Australia, and perhaps enumerates these people's 'continuing rights.'\textsuperscript{93}
November 1998 ended with the members of the Council for Aboriginal Reconciliation feeling positive about their first meeting since the election with Mr Howard. Although all conceded some areas of disagreement remained, Council Chair Evelyn Scott said she was impressed by his sincerity and Council Deputy Chair Sir Gustav Nossal said 'He's moved a big distance from where he was in 1997.' Mr Howard committed an additional $2.4 million to the Council to help organise a national event on 27 May 2000 at which a document would be presented.

Over the next two months, however, ‘the road to reconciliation’ appeared to be obstructed not simply by the big rhetorical questions, but by a range of smaller issues.

- the response to the United Nations World Heritage Committee report on the impact of the Jabiluka uranium mine on Kakadu, a report which recommended against the project on both environmental and cultural grounds

- the effect of the Federal Government’s proposed changes to Abstudy, aligning it closely with Youth Allowance, on indigenous educational outcomes

- the possibility that the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998, before Parliament, represents a withdrawal of Commonwealth involvement from the area of indigenous heritage protection and fails to treat the protection of Aboriginal heritage as ‘an important national interest in itself’

- the Federal Government response to the native title legislation before the Western Australian Parliament, legislation which requires federal parliamentary endorsement, and how will it view the WA and NT joint legal challenge to the Federal Court’s recognition of the native title of the Miriurwung and Gajerrrong people Western Australia and the Northern Territory

- the Federal response to the NT Government’s decision to cut funding to the bilingual education program for Aboriginal children, given that most reports over the last decade, while noting shortcomings in the program’s success as a means for building transferable academic skills and noting difficulties in maintaining a focus on this objective while also having the program used as a means of cultural maintenance, have not advocated an end to the program. The organisation Community Aid Abroad wrote to federal Education Minister David Kemp urging him to intervene to prevent the NT government from ending the programs and suggested that as a signatory to several international covenants recognising international standards for the protection of human rights the Federal Government had an obligation to ensure adequate and appropriate education for all Australians

- the appropriateness of the many Aboriginal people killed in punitive expeditions during the colonial period being honoured within the precincts of the War Memorial—a move
resisted by the War Memorial Council and Returned Soldiers League but supported by others such as Paul Turnbull, Associate Professor of History and Politics at James Cook University.

- the Government's plan for a new ATSIC electoral system, not supported by the ATSIC Commissioners, whereby the existing nine regions would each be divided into three or five wards

- the possible removal of the Aboriginal Embassy from the lawns in front of Old Parliament House in Canberra, and

- the appropriateness of the Government's response to the call from the United Nations Committee on the Elimination of all forms of Racial Discrimination for the Australian Government to report on recent developments—in particular in the areas of native title and social justice.

In this same period a report which the Sydney legal academic Dr David Kinley had produced for the Human Rights and Equal Opportunity Commission became public. Dr Kinley had found that at least 35 of the 54 recommendations in the *Bringing Them Home* report had not been implemented 20 months later (e.g. no moves to pay compensation to affected Aboriginal families, to fund services in all regional centres to help separated indigenous people trace their kin or to make national rules about the treatment of juveniles in the justice system). Another nine recommendations were reported to have been implemented only partially or 'patchily'. It was noted that the Federal Government had refused to legislate to make the international Genocide Convention part of Australian law and was out of step with State Governments by refusing to apologise for past child removal policies.

Although up-beat after the Council for Aboriginal Reconciliation's November 1998 meeting with Mr Howard, by 5 January 1999, Council Chair Evelyn Scott was declaring she had serious concerns about the Aboriginal Affairs Minister Senator John Herron and that she 'didn't expect reconciliation to be anywhere near achievable by 2001...'. By 26 January 1999, as has been seen earlier in this paper to have happened several times over the last 20 years, indigenous frustration with progress on other fronts lead to renewed calls for a formal treaty. While on that day the Prime Minister was referring to the debt owed to the original Australians 'for the contribution they have made to our current identity' and to the need 'to work ever closer with them to achieve greater cooperation, greater harmony and greater common understanding', 57 Aboriginal leaders and organisations put their names to a national newspaper advertisement calling for a 'treaty of reconciliation', negotiated with formally selected treaty delegates, by 26 January 2001. Signatories included indigenous leaders Geoff Clark, Michael Mansell, George Mye and Terry O'Shane and the advertisement was accompanied by a statement by ATSIC Chair Gajtil Djerrkura, calling for a vast improvement in the Federal Government's recognition of indigenous people's aspirations.
From Dispossession to Reconciliation

In February 1999 ATSIC’s submission to the UN Committee considering developments in Australia since 1994 summarised many of the complaints which had been made over the preceding months, arguing that the Federal Government had:

- abandoned the social justice package process and the policy of self-determination
- failed to demonstrate meaningful commitment to the reconciliation process
- failed to show leadership in shifting to the states and territories responsibilities in the areas of native title, customary law, heritage protection and responding to the 'stolen generation' issue
- consistently undermined ATSIC
- threatened to dismantle the Land Council structures in the Northern Territory
- made no appointment to the Office of Aboriginal and Torres Strait Islander Social Justice Commissioner since January 1998, and
- disrupted the functions of the Human Rights and Equal Opportunity Commission

and noting that

- key recommendations of the Royal Commission into Aboriginal Deaths in Custody had not been implemented and/or had been undermined by the states and territories
- there was continuing systemic discrimination against indigenous Australians in the areas of health, housing, education, income and employment, and
- mandatory sentencing legislation in Western Australia and the Northern Territory had led to a dramatic increase in the over-representation of indigenous young people in the criminal justice system.

Early 1999 and a Draft Pre-amble

In early 1999 pressure built for all political parties to support the putting of two questions at the referendum to be held later that year—one on the question of the head of state and the other on the adoption of a 'reconciliatory' preamble to the Constitution. At a two day national republican convention, some, such as the head of the Australian Republican Movement, Malcolm Turnbull, expressed their fear that including a question on a preamble would spark a race debate and be used by some to undermine the republic vote. Others, however, supported the inclusion of such a question. ATSIC Chair Gatjil Djerrkura said he had faith in the ability of Australians to separate the republic issue from the preamble. Father Frank Brennan expressed his disappointment at the embarrassing
silences and omissions at what ought to be important moments in the national life. The Australian Labor Party's legal affairs spokesman, Robert McClelland, indicated a shift in Opposition thinking when he said the ALP would not stand in the way of a second question if the Government supported the preamble. Outside the Republican Convention, Mr Tony Abbott, the Federal Employment Services Minister and declared monarchist, supported the putting of a preamble question: 'We really need to welcome Aboriginals into the extended family of the Australian nation. This, much more than becoming a republic, is the unfinished task of Australian nationhood'. A week later the Democrats announced their unanimous party room support for the putting of a question on a preamble which might include 'recognition of the rights of Aboriginal people and Torres Strait Islanders' and 'encapsulate values including equality of all people before the law and the recognition of gender equality'.

On 23 March 1999 the Prime Minister presented a draft preamble at a press conference at Parliament House. It read:

With hope in God, the Commonwealth of Australia is constituted by the equal sovereignty of all its citizens.

The Australian nation is woven together of people from many ancestries and arrivals.

Our vast island continent has helped to shape the destiny of our Commonwealth and the spirit of its people.

Since time immemorial our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures.

In every generation immigrants have brought great enrichment to our nation's life.

Australians are free to be proud of the country and heritage, free to realise themselves as individuals, and free to pursue their hopes and ideals. We value excellence as well as fairness, independence as dearly as mateship.

Australia's democratic and federal system of government exists under law to preserve and protect all Australians in an equal dignity which may never be infringed by prejudice or fashion or ideology nor invoked against achievement. In this spirit, we, the Australian people, commit ourselves to this Constitution.

The Prime Minister said the preamble was an endeavour on the part of the government 'to express in contemporary and essentially ageless language' historical realities and contemporary values. The document was criticised, however, on many grounds (e.g. ungrammatical language, uninclusive images, trite values), not least for failing to refer to prior Aboriginal ownership or custodianship of the country. In response to the Prime Minister's subsequent defence that the word 'custodianship' was not included on the grounds that some Australians would not support a Preamble that included that word, the Shadow Attorney-General Robert McClelland asked who these Australians were pointing out that:
From Dispossession to Reconciliation

The Constitutional Convention, which was broadly representative of the Australian people, unanimously endorsed the inclusion of that word in the Preamble.108

Indeed, Convention delegate Liberal Senator Alan Ferguson stated on 11 February 1998 that:

...there has been unanimous agreement amongst the delegates here that the preamble should include 'acknowledgment of the original occupancy and custodianship of Australia by Aboriginal and Torres Strait Islanders.' I think that has been general agreement amongst all the delegates here.109

Mid 1999 and a Draft Declaration of Reconciliation

Though it was still the case that not everyone had identified the same road as being the most direct route to reconciliation, by May 1999 some people's roads appeared to be converging. With the waning of the One Nation spectre, Aboriginal spokespeople such as Noel Pearson (though damned by Aboriginal activist Pat O'Shane and others for doing so) felt free to speak about the need for Aboriginal peoples to break out of their cycle of welfare dependency and participate in the 'real economy'. Others showed a preparedness to change the 26 May from the 'Sorry Day' concept which the Prime Minister Mr Howard never embraced to the more palatable 'Journey of Healing' (although the Prime Minister's inability to attend the inaugural 'Journey' ceremony at Parliament House caused some controversy). In the same spirit the Chairs of the Reconciliation Council, the Aboriginal and Torres Strait Islander Commercial Development Corporation, and ATSIC, Evelyn Scott, Joseph Elu and Gatjil Djerrkura respectively, welcomed the Government's recent $115 million-a-year Indigenous Employment Program—part of a new Indigenous Employment Policy which also included an Indigenous Small Business Fund. In seeking private sector support for the initiatives, Peter Reith, Minister for Employment, Workplace Relations and Small Business observed that the 'mutual obligation' principle which has characterised a lot of the Government's social policy, 'is also a principle that can be extended to the private sector' and that 'the private sector has an obligation to consider the community in which it operates'.110

On 4 June 1999, a new opportunity to focus the reconciliation debate was created. On that day, at a ceremony at the Sydney Opera House, the Council for Aboriginal Reconciliation released its draft Declaration for Reconciliation. The draft declaration read:

Speaking with one voice, we the people of Australia, of many origins as we are, make a commitment to go on together, recognising the gift of one another's presence.

We value the unique status of Aboriginal and Torres Strait Islander people as the original owners and custodians of traditional lands and waters.

We respect and recognise continuing customary laws, beliefs and traditions.
And through the land and its first peoples, we may taste this spirituality and rejoice in its grandeur.

We acknowledge this land was colonised without the consent of the original inhabitants.

Our nation must have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves.

And so we take this step: as one part of the nation expresses its sorrow and profoundly regrets the injustices of the past, so the other part accepts the apology and forgives.

Our new journey then begins. We must learn our shared history, walk together and grow together to enrich our understanding.

We desire a future where all Australians enjoy equal rights and share opportunities and responsibilities according to their aspirations.

And so, we pledge ourselves to stop injustice, address disadvantage and respect the right of Aboriginal and Torres Strait Islander peoples to determine their own destinies.

Therefore, we stand proud as a united Australia that respects this land of ours, values the Aboriginal and Torres Strait Islander heritage, and provides justice and equity for all.

Upon its launch Governor-General Sir William Deane pleaded that 'the search for reconciliation be marked by generosity and goodwill by all sides and be free of mere point-scoring and personal attacks'. All the major parties declared they welcomed the document, but the Prime Minister Mr Howard said it would need changes.

The draft declaration was accompanied by an outline of four 'National Strategies to Advance Reconciliation'. A 'National Strategy for Economic Independence' would include better access to capital, business planning advice and assistance, increased networking and mentoring opportunities, better access to training and development opportunities, promotion and encouragement of Aboriginal and Torres Strait Islander small business, greater strategic and integrated regional economic development plans, fostering partnerships with the business community, and reform of current government economic and funding programs for Aboriginal and Torres Strait Islander peoples.

A 'National Strategy to Address Aboriginal and Torres Strait Islander Disadvantage' is intended to better the outcomes from government and non-government services and be based on partnerships between indigenous people, governments, the business sector and service organisations. A 'National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights' will recognise the Aboriginal and Torres Strait Islander Peoples as original custodians of Australia, recognise their continuing aspirations for greater recognition and self-determination within the framework of the Australian Constitution and propose strategies for increased representation in Australian parliaments. A 'National Strategy to Sustain the Reconciliation Process' will describe how governments at all levels, organisations and community groups can recognise and adopt appropriate
protocols and symbols of reconciliation and will propose the establishment of a reconciliation foundation to support the many groups currently contributing to the reconciliation process.

The Council has expressed its hope that 'By supporting these strategies, governments, business, organisations and individuals from both Aboriginal and Torres Strait Islander peoples and the wider community can make practical commitments to reconciliation'.

Part IV: The Road Ahead

With the launch of their Draft Declaration of Reconciliation and the outlining of four National Strategies in June 1999, the Council for Aboriginal Reconciliation formally opened a six-month process of public consultation which is due to conclude on 27 May 2000, three years after the Reconciliation Convention in Melbourne and 33 years after the 1967 constitutional referendum on Aborigines, with a National Reconciliation event at which the Council will present to the Australian people a final blueprint for a way forward.

With or without broad agreement on a preamble to the constitution or a document of reconciliation, the 'road to reconciliation' is not going to be smooth. Although innumerable community groups, local authorities, industry peak bodies, religious bodies and individuals around Australia are attempting to advance the process at the grass roots level, and although every Australian parliamentary chamber has passed motions supporting Aboriginal reconciliation, there will be no shortage of small issues to test the commitment of decision makers both inside and outside of Federal parliament and the test may not simply be how (in terms of outcome) issues are resolved but how (in terms of the way) a resolution is found. Looming above all of these challenges is one particular obstacle.

The Apology Obstacle

Although the Prime Minister Mr Howard showed a preparedness to entertain some constitutional mention of indigenous people, his continued reluctance to find wording for an official apology is proving an impediment to moving the reconciliation process forward. For several reasons it is an impediment which is unlikely to fall away simply with the passage of time. Firstly, many in the general Australian population feel more empathy for the Aboriginal people on this issue than any other in the area of indigenous affairs (witness the number of people buying the Stolen Children report and signing sorry books). Secondly, although the first claim to the High Court failed, there are other claims for compensation before Australian courts and if successful they will be sure to bring further claims. Thirdly, the issue has already drawn unfavourable international attention to
Australia and this attention is only likely to increase as the year 2000 Olympics approaches.

It is clear that the removal of indigenous children was mainly carried out by agents of the State Governments and Churches, that many at the time believed it to be in the best interest of the children (e.g. the recollections of Colin Macleod, a patrol officer now Melbourne Magistrate), and that the High Court found in the recent Kruger & Bray case that the Commonwealth legislation which underpinned the removal of indigenous children in the Northern Territory, the *Aboriginals Ordinance 1911*, was not constitutionally invalid. Such considerations have led some commentators to recommend against the Federal Government making an official apology for the practice. Dr Ron Brunton suggested the National Inquiry failed to distinguish between 'truly voluntary' and 'coerced' removals and argued that if what was happening at Auschwitz was genocide then what happened in Australia cannot be genocide. Professor Kenneth Minogue, visiting Australia from the Department of Government at the London School of Economics, even suggested:

> We are dealing with collective self-accusation, complicated by the fact that the hands that beat the breast are not the hands that committed the offence

and

> Certainly it is the case that saturating indigenous peoples in a mist of self-referential Western sympathy is merely one way in which we use them for the luxury of our own self-regard.

Douglas Meagher QC, in the defence of the Commonwealth in a 'stolen children' Federal Court Case in Darwin early in 1999, enlisted the Hasluckian comparison of Aborigines to delinquent children in an attempt to illustrate the benign commonsense behind the Commonwealth assimilationist policy. He also argued that the Commonwealth acted nobly and did not sanction the 'breeding-out' policy of Dr Cecil Cook who regarded the 'half-caste' population as a menace to the future of European settlement in the north.

More recently the Hon. Peter Howson, Minister for Aboriginal Affairs in the McMahon Government in the early 1970s, reported a story of attempted infanticide and argued that 'half-caste' children were not so much being stolen by the State as being rescued from hostile communities. He further suggested that:

> The only way forward for Australia's Aborigines is to join mainstream Australia, with other Australians, as a nation in the global community. The idea of a return to a life of hunter-gathering—with its religion and rituals designed to increase the supply of game and other food resources; its rites of passage such as teenage circumcision and sub-incision; and its close connection to the physical features of a landscape which comprised their entire universe—is a fantasy. However, the message which has been coming out of Canberra, ever since the Coombsian takeover in 1971, a message
accompanied by billions of dollars, has been that such a return is feasible and ultimately desirable.\textsuperscript{117}

Reginald Marsh, a former Assistant Secretary of the Department of Territories and Assistant Administrator of the Northern Territory, also recently argued that the children were being rescued from a community in which they had no place, suggested there was no evidence that any traditional community protested against the removal of a particular Aboriginal child, saw Hasluck's assimilation policy as about a society making 'informed choices about their personal future', and suggested:

Invoking comparisons with the Holocaust and other genocides in different circumstances and historical backgrounds serves only to divert the pursuit of reconciliation appropriate for the Australian circumstances. It is on the way to an absurdity like mounting a case for compensating the Welsh for Roman invasion and charging the Italian government, as the successors of the Romans for financial compensation.\textsuperscript{118}

On the other hand, many arguments have been advanced in favour of the present Federal Government making an official apology for past practice. They include the following:

• the 'State' is a continuum which outlives individual governments and the legal and moral obligations or debts which one government incurs, failing a revolution or dramatic break in the State's continuity, are carried over to later governments. The Prime Minister can make an apology on behalf of the Federal Government for past acts of dubious legal and moral worth for which no other government has yet apologised, without implying that anyone presently alive need feel guilty.

• the Commonwealth Government was actively involved in the practice of removing children—both through its support of such resolutions as that of the 1937 Commonwealth State Native Welfare Conference, and through its early administration of the Northern Territory. Despite Douglas Meagher QC's protestations to the contrary, there is clear evidence that the Commonwealth did embrace Cook's policy (e.g. on 22/2/1933 the Secretary of the Department of the Interior, J.A.Carrodus, wrote that 'The policy of mating half-castes with whites for the purpose of breeding out the colour is that adopted by the Commonwealth Government on the recommendation of Dr Cook.'\textsuperscript{119}) Under Paul Hasluck's administration policy was regularised so that removals had to be approved by the Director of Native Affairs and in the best interest of the child, but when administrator F.J.Wised recommended that no child under the age of four be removed, except where the question of danger arose, Hasluck is recorded as insisting 'No age limit need be stated. The younger the child is as the time of removal the better for the child'.\textsuperscript{120} The Commonwealth's much later opposition to special laws for indigenous children did not constitute opposition to the practice of removal of children as it was clear the courts were prepared to equate indigenous poverty with 'neglect' and an indigenous life-style with 'uncontrollable'. It was not until the mid 1970s when indigenous legal services (not initially funded by the Commonwealth) started to represent children and families involved in separation orders and indigenous child care groups started to offer alternatives to the
removal of children from their families that the number of forced separations started to drop dramatically

- even in the time in which it occurred, it can be argued that the practice was not indisputably in the best interest of the children. There is abundant evidence that many officials believed Aboriginal people to be inferior and 'half-castes' needed to be absorbed irrespective of their individual circumstances. The argument that 'half-caste' children were at great risk of infanticide or alienation with their community, is not supported by the evidence. There are many accounts of communities trying to prevent the removal of the children and the evidence, moreover, that many children subsequent to their removal suffered physically harsh living conditions, physically abuse and multiple institutional and/or foster placements, is overwhelming. As Robert Manne despaired:

I do not know how far the Howard Government can legitimately separate itself from the historical arguments mounted in Darwin on its instructions and on its behalf. But if Meagher's attempt to portray child removal as noble and to rehabilitate the philosophy of assimilation has the support of his client, the Commonwealth Government, then the cause of reconciliation is dead.

- the Convention on Genocide, ratified by Australia in 1949, included within its definition of genocide 'any of the following acts committed with intent to destroy, in whole or in part, a nation, ethnic, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.' Many commentators have found this definition to embrace that which happened in Australia even if it also covers that which has also happened elsewhere. There may not this century have been acts in the (a) category, but there were certainly many in the (e) category—and the State's intention was clear. The 1937 Conference resolved that 'the destiny of the natives of aboriginal origin, but not the full blood, lies in their ultimate absorption by the people of the Commonwealth' and that 'all efforts be directed to that end'. The annual reports of the Aborigines Protection Boards in various jurisdictions were often equally explicit, a NSW Annual Report stating 'this policy of dissociating the children from [native] camp life must eventually solve the Aboriginal problem', and by placing the children in 'first-class private homes' the superior standard of life would 'pave the way for the absorption of these people into the general population'.

- in most jurisdictions removals were taking place without court orders, thus infringing the legal principle derived from the common law that children should not be removed from their parents unless a court, on evidence proving removal is in the best interest of the child, decides otherwise. Indeed, in the 1950s in the Commonwealth-administered Northern Territory thousands of children were removed without any court or legal process involved. In the early 1950s there was some debate over the possible introduction of a requirement for maternal consent, but in the end the guidelines only required the Director of Native
Affairs to be convinced that an 'attempt has been made to explain to the mother the advantages to be gained by the removal of her child'. A memorandum from a March 1959 conference of welfare officers spoke of the 'strong pressures being brought to bear on the parent to release the child'.

- in some jurisdictions laws made the Protector or Protection Board the legal guardian of Aboriginal children, infringing the legal principle derived from the common law that parents are the legal guardians of children unless a court, on evidence proving that another arrangement is in the best interests of the child, decides otherwise.

- the practice involved deceit by public officials. Many children were told they were unwanted, rejected or that their parents were dead, when this had not been the case. There were cases where mothers of newborns were told their child had died when it had been removed.

- the practice was on such a large scale, over such a long period of time and continued so close up to the present day that its effect cannot be dismissed as past. The experience of the removal has often had a continuing effect on the children removed, on their children, on the families from which they were taken and on the foster carers when reunions have been sought. Most present day indigenous families have been affected, in one or more generations, by the forcible removal of one or more children. Most of those indigenous people who have died in police custody had been removed as children.

- the practice involved breach of fiduciary duty. The Commonwealth and the States which legislated to put children into their care had a fiduciary duty of care to children who then came into their care and the hunger, fear, poor education, violent punishment, emotional trauma and sexual abuse which was commonly reported indicates that this duty of care had been repeatedly breached even by contemporary standards of the day. Indeed, there are many records of non-Aboriginal citizens objecting vigorously to the policy of removals and the maltreatment at the time.

- the characterisation of the assimilation policy as the progressive alternative to a primitive superstitious hunter-gather life-style, is to set up a false set of choices, to fail to recognise that others at the time were arguing child welfare could be advanced in other ways and to fail to consider the full consequences of the policy of child removal.

- governments overseas have seen fit to apologise for morally questionable actions of past governments. Thus, the Swiss Government apologised to the Romany victims of child removals and the Canadian Government apologised for the detention during World War II of Japanese Canadians. In 1993 the US Congress, in a joint Senate and House resolution, apologised to Native Hawaiians on behalf of the US for the overthrow of the Kingdom of Hawaii one hundred years earlier. In 1997 the Norwegian King apologised 'for the injustices committed in the past against the Sami people by the Norwegian state through harsh policies of Norwegianization'. In 1998 Canadian Minister of Indian Affairs and Northern Development declared that 'the Government of Canada wants to make a solemn
offer of reconciliation'. (For more on the process leading to this declaration and its content see Appendix 3)

- all State and Territory parliaments (except the Northern Territory parliament) have passed motions expressing regret for past actions with respect to Aboriginal families and most of the motions include an explicit apology for the forced separation of children (NSW 18 June 1997; SA 28 May 1997; Queensland 3 June 1997; WA 27 and 28 May 1997; ACT 17 June 1997; Victoria 17 September 1997; Tasmania 13 August 1997). (See Appendix I), and

- an apology need not expose the Commonwealth to judicial compensation claims (many of which have already been lodged on the grounds of breaches of fiduciary duty), and the Commonwealth may more effectively reduce its exposure to such claims by cooperating with the states in the formulation of a comprehensive compensation adjudication mechanism. In February 1999 the NSW Government was reportedly considering a proposal by the Public Interest Advocacy Centre (PIAC) to set up a Reparations Tribunal, similar to tribunals in South Africa and New Zealand, with the power to make compensation orders to members of the stolen generation. The PIAC proposal drew attention to the fact that litigation raises high expectation of financial compensation and does not provide for other reparations.127

Conclusion

This paper has attempted to trace the rhetorical road which has led from the period of dispossession and the policy of assimilation to the later policy of self-determination and the present process of reconciliation. Along this road debate has moved from how best to effect cultural and biological assimilation, to explorations of the concepts of 'self-management', 'self-determination', 'self-government', and 'sovereignty', to grappling with the possibility of a 'treaty', 'compact' or 'makarrata'. In more recent years the debate has progressed on to the issues surrounding a possible 'social justice package', 'document of reconciliation' and 'an apology for past policies'. No matter how far the debate progresses, however, the past is never far behind. Indeed, protagonists in the debate sometimes label each other according to their purported attitude to the past (eg. as being adherents to a 'black armband' or 'white blindfold' view of history) and obstacles which have their roots in the past litter the road ahead.

On 27 May 2000, three years after the Reconciliation Convention in Melbourne and 33 years after the 1967 constitutional referendum on Aborigines, the Council for Aboriginal Reconciliation plans a national event to present a way forward to the Australian people. In the six months leading up to May 2000, not only will the merits of the recently released draft Declaration for Reconciliation be much debated, but many other issues in the area of indigenous affairs will be viewed in the context of the reconciliation debate. It will be difficult, however, to participate in a meaningful way in this debate
without some understanding of the history of public policy in the area of indigenous affairs and the language used in earlier debates. This is especially so, as the debate has not moved neatly forward, with all participants progressing in unison from one set of concepts to another. Terms such as 'dispossession', 'assimilation', 'self-determination' and 'treaty', although introduced in different stages of the debate, are still used in the current debate, and the same forces which gave birth to the 'process of reconciliation' as a compromise way forward, are still at play producing very different agendas for reconciliation.

On the 1 January 2001, the anniversary of the Centenary of Federation, the Reconciliation Council will cease to exist. What will be in place by that time (an agreement, a document of reconciliation, a new preamble to the constitution, a Reconciliation Foundation?) is still far from clear. That which is clear, however, is, as the Reverend Makhenkese Stofile, representing the South African President Nelson Mandela, at the December 1998 'World Indigenous Pathways' conference advised, that 'even after indigenous Australia succeeded in its quest for reconciliation, the legacy of age-old problems would remain for generations'.

(1) Non-Statutory:

the convening of State, Territory and Federal Constitutional Conventions to oversee a constitutional reform process involving indigenous representatives;

the negotiation of issue or area-specific agreements and protocols between governments, non-government and indigenous peoples' organisations and individuals which might be enforceable in identified ways, or pursuant to statute;

the negotiation of new inter-governmental agreements regarding indigenous peoples' issues;

preliminary agreement among Federal, State, Territory and local governments, and Aboriginal and Torres Strait Islander community councils, local governments, and organisations regarding implementation of a right of self-government, including the issues of jurisdiction, lands and resources, and economic and fiscal arrangements, with the objective of concluding final agreements elaborating relationships between governments of Aboriginal and Torres Strait Islander peoples and governments;

the negotiation of a Makarrata, Treaty of Reconciliation or treaty between the Federal Government and indigenous peoples' organisations (this may also be given statutory or constitutional recognition); and

the amendment of the terms of reference of Federal, State and Territory Parliamentary legislation scrutiny committees to enable them to review Bills to ensure that they have sufficient regard to Aboriginal and Torres Strait Islander customs and traditions, and indigenous peoples' human rights;

(2) Statutory:

statutory recognition of self-governing rights for indigenous communities;

statutory recognition of self-governing rights for indigenous communities;

statutory recognition of self-governing rights for indigenous communities;

statutory recognition of self-governing rights for indigenous communities;

statutory recognition of self-governing rights for indigenous communities;

the passage of amendments to Federal, State and Territory Acts Interpretation Acts to require courts to construe legislation consistent with Aboriginal and Torres Strait Islander customs and traditions wherever practicable;

the introduction of statutory Bills of Rights which include specific recognition of indigenous peoples' rights; and

statutory recognition of Aboriginal and Torres Strait Islander customary laws; and
statutory recognition of agreements between Federal, State, Territory and local
governments, and Aboriginal and Torres Strait Islander peoples', or between any of
them, relating to indigenous peoples' issues; and

(3) Constitutional change:

(This would be subject to any relevant manner and form restrictions. For example,
amendments to the Federal Constitution will require the approval of an overall majority
of electors voting at a referendum as well as a majority of electors voting in a majority of
States under s.128):

the insertion of a preamble into Federal, State and Territory constitutions acknowledging
prior Aboriginal and Torres Strait Islander ownership of the continent and its islands, and
its subsequent, substantial extinguishment;

constitutional recognition for a Bill of Rights with specific reference to indigenous
peoples' rights;

constitutional entrenchment of a justiciable right of indigenous self-government in
relation to specified areas (possibly including lands and resources, language and culture,
education, policing and the administration of justice, health, social and economic
development);

constitutional recognition for the Aboriginal and Torres Strait Islander Commission or
similar bodies;

the creation of reserved seats in Federal, State and Territory Parliaments (lower or upper
houses, or both) for indigenous peoples. Models are available in India and New Zealand;

constitutional recognition of sovereign, domestic dependent nationhood for Aboriginal
and Torres Strait Islander 'nations';

entrenched recognition for Aboriginal and Torres Strait Islander community councils or
other local government structures in Federal, State and Territory constitutions;

constitutional recognition of Federal, State and Territory obligations to protect and
develop Aboriginal and Torres Strait Islander cultures and traditions;

the creation of separate Aboriginal and Torres Strait Islander parliaments analogous to
the Sami Parliaments in Norway;

the insertion of a broad enabling power within the Federal Constitution similar to the
current s.105A, enabling the negotiation and recognition of one or more compacts,
agreements or treaties between the Federal Government and Aboriginal and Torres Strait
Islander peoples', which could be followed by legislative recognition of negotiated
agreements;
the replacement of s.51(xxvi) of the Federal Constitution (the 'races power') with a provision enabling the Federal Parliament to make laws with respect to 'Aboriginal and Torres Strait Islanders' as recommended by the Constitutional Commission in 1988; and constitutional recognition and protection for any other preferred options.

Another option is to leave things as they are, and to concentrate on improving the climate of relations without any formal agreement. Or it may be that Aboriginal and Torres Strait Islander organisations will prefer to pursue remedies through the courts.
Appendix 2: Parliamentary Motions of Apology—Stolen Children

NSW

18 June 1997—Stolen Generations Apology

Mr Carr, Premier

I move that this House, on behalf of the people of New South Wales:

(1) apologises unreservedly to the Aboriginal people of Australia for the systematic separation of generations of Aboriginal children from their parents, families and communities.

(2) acknowledges and regrets Parliament's role in enacting laws and endorsing policies of successive governments whereby profound grief and loss have been inflicted upon Aboriginal Australians.

(3) calls upon all Australian governments to respond with compassion, understanding and justice to the report of the Human Rights and Equal Opportunity Commission entitled 'Bringing Them Home',

(4) reaffirms its commitment to the goals and process of reconciliation in New South Wales and throughout Australia.

South Australia

28 May 1997—Aboriginal Reconciliation

The Hon Dean Brown, Minister for Aboriginal Affairs

I move that 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 Australians.

Queensland

3 June 1997—Stolen Children, Aboriginal Reconciliation

The Hon K.R. Lingard, Minister for Families, Youth and Community Care

I move that 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.
Western Australia

27 May 1997—Aborigines, Family Separation

Mr Court, Premier

It is appropriate that this House show respect for Aboriginal families that have been forcibly separated as a consequence of government policy in the past, by observing a period of silence (Members stood for one minute silence)

28 May 1997—Aborigines, Family Separation

Dr Gallop, Leader of the Opposition

I move 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.

ACT

17 June 1997—Motion in Response to the 'Bringing Them Home' Report

Mrs Carnell, Chief Minister

I move that this Assembly:

(1) apologises to the Ngunawal people 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

(2) assures the Aboriginal peoples and Torres Strait Islanders of this Territory that the Assembly regards the past practices of forced separation as abhorrent and expresses our sincere determination that they will not happen in the ACT

(3) affirms its commitment to a just and proper outcome for both the grievances of Aboriginal and Torres Strait Islander people adversely affected by those policies and to the recommendations of the Bringing Them Home Report,

(4) acknowledges that the Government is negotiating a Regional Agreement with the Ngunawal people in relation to the Ngunawal Native Title claim in the ACT, and

(5) by this resolution seeks to take an important step in the healing process which is fundamental to reconciliation between Aboriginal and Torres Strait Islander peoples and the non-indigenous members of the ACT community.
Victoria

17 September 1997—Motion of Apology to Aboriginal People

Mr Kennett (Premier)—By leave, I move:

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.

Tasmania

13 August 1997—Motion of Apology to Aboriginal People (extract)

Mr Rundle (Braddon - Premier)—Mr Speaker, the motion before the House this afternoon is:

(1) 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, apologies to the Aboriginal people for those past actions and reaffirms its support for reconciliation between all Australians.
Appendix 3: Overseas Use of the Term Reconciliation

Reconciliation, by that or other names, is a process on which many countries have embarked. Below are four very different examples of the use of the word overseas.

Canada

In December 1979 Canadian governments and indigenous leaders began talking about the challenges ahead. As the opening words of Bill Jarvis, minister assisting Prime Minister Clark, make clear, the process they were entering bears remarkable resemblance to that which Australians are entering:

I have no doubt that many of the achievement from this process will be in the form of intangible benefits or 'spin-offs'. As much as we may eventually want to find new words for the Constitution, we are here as well to take account of the broad relationship of governments and native peoples and seek to improve it...Work has to be done together. Everyone knows that we are not dealing with subjects where someone can walk into a room and deliver a position and expect people to agree and go home. All of us, and I stress the word all, are going to need to explore each other's concerns and vocabularies. One of the reasons we will need to do this is that there exists no generally accepted language or experience for some of the work we must undertake. Such a process requires a commitment to meetings, however informal, to discussions, and to patience... The challenge for all of us is that here we may have to come to terms with perceptions of history, society, even law, which are new to many of us. It is clear that our past practices have not adequately permitted this, and I need hardly refer to some depressing social statistics to illustrate this point... Canadians are coming to realise that the problems of alienation are not simple, but often rooted in long periods of unresolved grievances and thwarted aspirations. All governments have experienced the costs of failing to solve these difficulties; what we must do now is show that our Canadian federalism provides opportunity for all people to fulfil themselves. Our legal and political systems have always been flexible enough to accommodate such diversity. Our only guarantees of success, however, are open minds, understanding and goodwill.129

The process begun with the above words led, many years later, to the report of the Royal Commission on Aboriginal Peoples and culminated in January 1998 with the Federal Government's formal response to that report, and the 'Statement of Reconciliation' which accompanied this response.130 The Statement included a declaration that 'it is essential that we deal with the legacies of the past affecting the Aboriginal peoples of Canada...', and that:

Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognise the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even
From Dispossession to Reconciliation

...destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the Indian Act. 131

The Statement also included an apology for the Government of Canada's role in the development and administration of special residential schools:

Particularly to those individuals who experienced the tragedy of sexual and physical abuse at residential schools, and who have carried this burden believing that in some way they must be responsible, we wish to emphasise that what you experienced was not your fault and should never have happened. To those of you who suffered this tragedy at residential schools, we are deeply sorry.132

Northern Ireland

In the United Kingdom, with respect Northern Ireland, there is a 'Special Support Programme for Peace and Reconciliation', the formal aims of which are:

To reinforce progress towards a peaceful and stable society and to promote reconciliation by increasing economic development and employment, promoting urban and rural regeneration, developing cross border co-operation and extending social inclusion.

South Africa

In South Africa the word 'reconciliation' is often linked with the word 'forgiveness'. Thus FW De Klerk declared that 'The only way to break the cycle is through forgiveness and reconciliation' and that 'Reconciliation means we must forgive and hope to be forgiven, but we must acknowledge our debts. We must examine accounts of the past and seek to find a balance. Find the balance and close the book'.133 In April 1996 'The Truth and Reconciliation Commission', led by Archbishop Desmond Tutu, started taking evidence and in May 1997 De Klerk apologised 'in full knowledge of the indignities and pain caused by apartheid', for constitutional decisions of the past, for indignities of racial discrimination, and expressed the hope that the apology would help to free those who were oppressed.134

Bosnia

International bodies such as the United Nations High Commissioner for Refugees (UNHCR) pair the word repatriation with reconciliation, knowing that 'People who have experienced ethnic cleansing cannot simply "get over it, go home and move on"'.135 For repatriation to be successful it has to be voluntary and accompanied by a process of reconciliation, and for that process to be successful there have to be 'comprehensive strategies', 'realistic time frames' but above all, 'a vision of reconciliation'.

Bougainville

Among the major undertakings of the late 1997 Lincoln Agreement on Peace, Security and Development on Bougainville was agreement for elections to a Bougainville Reconciliation
Government to be held on the island before the end of 1998. This election has not yet been held, due to the Papua New Guinea government's proroguing of parliament, but there is still an official commitment to setting up a 'Reconciliation Government'.

Endnotes


2. For examples of such labelling see Mark McKenna, 'Different Perspectives on Black Armband History', Research Paper No.5 1997-98, Department of the Parliamentary Library.


5. T.H. Kewley, Social Security in Australia 1900-72, Sydney, S.U.P., 1973: 218 and 266. In 1941 legislation introducing Child Endowment provided for the payment of the endowment only to an Aboriginal person who was not nomadic or wholly dependent upon the Commonwealth or a State for support. In 1942 the Age and Invalid Pension and Maternity Allowance legislation was amended to allow the payment to 'an aboriginal native who was living under civilised conditions and whose character and intelligence qualified him to receive a pension'. The 1942 legislation introducing the Widow's Pension allowed for a pension to be paid to an Aboriginal who possessed a certificate of exemption from State laws relating to the control of Aborigines. In the absence of such a certificate, eligibility depended on an assessment of the person's character, standard of intelligence and social development. Similarly, the 1944 legislation introducing Unemployment and Sickness Benefits provided for the payment of benefit to Aborigines 'if the Director-General was satisfied that, having regard to his character, standard of intelligence and development, it was reasonable that he should receive benefit' and the Commonwealth Social Services Consolidation Act 1947-50 provided that age, invalid and widow's pensions, maternity allowances and unemployment and sickness benefits could be paid only to Aborigines judged to meet a certain standard of 'character, intelligence and social development'. In 1959 Social Security legislation was amended to provide for eligibility for all pensions and benefits for Aboriginals who were not 'nomadic or primitive'.

53


14. ibid, pp. 1062–3.


20. See also Peter Sutton, 'Land Rights and Compensation in Settled Australia', *Social Alternatives*, v.2 (2) August 1981: 10: As Peter Sutton noted: 'the notion of compensation is deeply ingrained in the system by which Australian people use their state to take the sharp edge off the suffering of the less fortunate. Most compensation is awarded by the state. Since Aboriginal people...are indeed suffering as a group from the invasion of their lands
and lives by the British Empire, it follows that in a case of group compensation it is the state which should provide recompense.'

21. *Two Hundred Years Later...* Report by the Senate Standing Committee on Constitutional and Legal Affairs on the feasibility of a compact, or 'Makarrata', between the Commonwealth and Aboriginal people, AGPS, Canberra, 1983, pp. 50.

22. ibid. p. 115.

23. ibid. p. 162.

24. ibid. p. 159.

25. The Committee's work was documented by Judith Wright in *We Call for a Treaty*, Collins/Fontana, Sydney, 1985.


27. Richard Chisholm, *Aboriginal Law Bulletin*, no. 14, June 1985. Similarly, Professor Russel Barsh of the University of Washington in Seattle concluded in 'Aboriginal rights, human rights and international law', *Australian Aboriginal Studies*, 1984, no. 2: 4: 'The relevant legal issue is not whether Aboriginal people were, or are now "sovereign", but whether they have a right to become independent through the exercise of self-determination. It is plain that Aboriginal people never executed any treaty surrendering their political rights, nor voted to incorporate themselves with Euro-Australians. Australian citizenship was conferred on them unilaterally. They cannot exercise the electoral franchise to protect themselves from injustice because they are a numerical minority. There is no real question of the territorial integrity of Australia because Australia can show no deed or treaty of title to the continent, and occupied much of it within living memory. The principles of self-determination and decolonisation appear applicable.'


33. Senator Chaney claimed that the Department of the Prime Minister and Cabinet had decided: 'the Australian Government delegates in international fora will not use the term "self-determination" to prevent its misinterpretation or its extension beyond Australian Government policy'. Australia. Senate. *Debates*, 23 August 1988.


35. Australia. House of Representatives Standing Committee on Aboriginal Affairs. *Our Future Our Selves, Aboriginal and Torres Strait Islander Community Control Management and Resources*. August 1990, p. 4. The Committee noted that: 'The distinction between the terms
is important with "self-management" focusing on efficient administration of communities and organisations. "Self-determination", on the other hand, goes beyond this and implies control over policy and decision making, "especially the determination of structures, processes and priorities".

42. ibid. pp. 97–110.
43. The Sydney Morning Herald, 2 December 1989.
44. AAP, 2 February 1990.
45. AAP, 4 February 1990.
48. ibid. p. 12.
49. ibid.
51. For example, a Saulwick Age poll published in the Age on 24 March 1992 suggested that there was a stronger support for a treaty or compact, with 65 per cent of respondents in favour and 27 per cent against, than there had been five years earlier when 58 per cent were in favour and 37 per cent against, but suggest a slight community turn around on whether a treaty should acknowledge that the land was originally owned by the Aborigines and was taken from them and whether a treaty should provide money for Aboriginals to spend as they see fit on education, health and welfare. The electorate also seemed to continue to be adamantly opposed to the proposition that a treaty should provide cash compensation or reparations and continue to be divided on whether a treaty should grant further land ownership.
52. The Australian, 18 December 1991.
53. ibid.
From Dispossession to Reconciliation


57. p. 18.


63. See, for example, Debra Jospon, 'Why Aborigines now fear the worst, *Sydney Morning Herald*, 13 April 1996.

64. See the present author's paper, *Identifiable Commonwealth Expenditure on Aboriginal and Torres Strait Islander Affairs*, Current Issues Brief, No. 18, Department of the Parliamentary Library, Canberra, 1997–98.


- there is a reduction in the say native title holders have about exploration in their traditional country, moderated to some extent by alternative schemes for consultation
- there will be an opportunity for states and territories to replace the Right To Negotiate (RTN) on pastoral leases with an alternative scheme that has many elements of the RTN. The practical effect will depend on what schemes are actually implemented by the various state governments
the full range of primary production activities on what are now pastoral leases will be allowed without negotiating with the native title holders. While there are some limits on this, they are mostly ineffective

despite some improvement in procedural rights for native title holders, overall it makes it marginally easier for state governments to pursue the complete extinguishment of native title on pastoral leases by compulsory acquisition of coexisting native title rights and upgrading the lease to freehold, thereby extinguishing all native title rights

interim statutory access rights to pastoral leases will be available to some, but not to those indigenous people who have been locked out of their traditional country or who for some other reason did not have regular physical access at the date of the Wik decision

native title holders will have less of a say in a whole range of Government activities on their traditional country, including the management of national parks, forest reserves and other reserves, public facilities and water resources

although some of the extinguishment pre-empting the common law has been removed, the NTAA still says what kinds of leases (in the Schedule) extinguish native title before the courts have had a chance to consider them

native title holders, as in the 1993 Act, will not be able to have a meaningful say in offshore fishing and mining which impacts on native title rights

to obtain the RTN some native title holders will be required to prove traditional connections and, in addition, establish physical connection with the land. However, the NTAA does provide a significant 'locked gates/stolen generation' exception, and depending on how the Federal Court interprets the new provisions about its way of operating, it may be harder for native title holders to present their case in a claim hearing. Under the 1993 Act the court must take account of indigenous cultural concerns. Under the NTAA taking account of cultural concerns is made optional. Also the strict rules of evidence will apply unless the claimants can convince the court otherwise.


81. Michelle Grattan, op. cit.


83. Michelle Grattan, op. cit.


85. e.g. *Sydney Morning Herald*, 1 December 1998.

86. Quoted in Michelle Grattan, op. cit.


90. Senator Woodley said a formal apology to the Stolen Generation should be made not taking responsibility for what happened, or accepting blame, but collectively expressing sorrow for the hurt caused to indigenous families.

Support for self-determination is critical. The Democrats share indigenous people's alarm at the Howard Government's move to remove the words 'self-determination' from the United Nations draft declaration on indigenous rights. This represents the overturning of a 15-year policy of support for self-determination for Aboriginal Australians. We hope the Australian Government's lobbying efforts are unsuccessful but, regardless of the outcome, the message sent to Aboriginal people is not positive.

A document of reconciliation is due to be launched in May 2000, a few months before the Olympics. The importance of this document can't be understated. It must combine symbolic commitment and decisive action for reconciliation. It must frankly acknowledge the history of dispossession of indigenous people that occurred as a result
of white colonisation. It must set out an action plan for change... legal and constitutional backing for the document of reconciliation is fundamental.

The other most significant event affecting reconciliation in the Olympics' lead-up will be the referendum on the republic, due in 1999. This will also be a referendum on the insertion into the preamble of the Constitution of Australia of a clause recognising indigenous Australians as the original inhabitants of this country...

Urgent problems relating to indigenous disadvantage must be addressed. Indigenous people on remote communities where there are chronic alcohol problems are living in conditions not dissimilar to those in war zones. The Democrats are considering a Senate inquiry into the crisis in remote indigenous communities.

Native title is a cornerstone of reconciliation. If the Senate ticks off state native-title regimes which raise the high jump bar impossibly for native-title claimants, it will bear responsibility for the continuing violence and despair infesting indigenous communities as they continue to exist on fringes of their traditional land.

Finally, personal relations between white and indigenous leaders of this country must be healed. Moderate and respected indigenous leaders like 'the father of reconciliation', Pat Dodson, and former ATSIC chief Lowitja O'Donoghue have been alienated by this Government. However, Dodson and O'Donoghue still carry enormous weight in their communities and must be brought back into reconciliation. John Woodley, 'PM must pursue reconciliation', The Canberra Times, 15 December 1998.

91. Frank Brennan, 'No indigenous reform without fairness on both sides', *Australian*, 16 October 1998.


95. See, for example, the comments by ATSIC submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, No. HA11(a),15 and Dr Evatt in submission No. HA38 to the joint committee, p. 5.


99. Canberra Times, 26 January 1999


104. Canberra Times, 8 February 1999.

105. ibid.


109. ibid.


119. Robert Manne, op. cit.


121. See the quotations from many official sources presented by Robert Manne, 'Stolen Lives', *The Age*, 27 February 1999.

122. ibid. See also *Bringing Them Home*, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, Human Rights and Equal Opportunity Commission, Canberra, April, 1997.
123. ibid.


126. ibid.


132. ibid.


134. ibid.
