A Partnership of Equals?

The role of formal negotiations in Reconciliation for Australia

Submission to the

Council for Aboriginal Reconciliation

On its Discussion Paper:

"Reconciliation Implementation and Framework Agreements Legislation"

by

Australians for Native Title and Reconciliation (ANTaR)

Sea of Hands

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Questions from the Discussion Paper of the Council for Aboriginal Reconciliation, *Reconciliation Implementation and Framework Agreements Legislation,* which are addressed in this submission:

Question 1: Should the Council for Aboriginal Reconciliation recommend legislation along the lines proposed?

Question 2: Are there any other items that the Council should include in its proposed legislation?

Question 9: Should there be further processes to identify areas of unfinished business? If yes, what should these processes look like?

Question 10: Should the identified list of unfinished Reconciliation business limit the range of framework agreements that can be negotiated or entered into?

Question 11: If you agree with the idea of a convention to identify the unfinished Reconciliation business:

(a) how should its members be elected or appointed?

(b) what functions and roles should be given to this convention?

Disclaimer!

This submission has been prepared by ANTaR and is offered as a contribution to the discussion of complex issues. It has been written in response to an invitation from the Council for Aboriginal Reconciliation to respond to matters raised in its Discussion Paper. The contents of this submission have not been directed by indigenous people. They reflect the views of ANTaR only.

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Summary

There could be no stronger boost to Reconciliation than to see, after 212 years, Australia finally joining other Commonwealth countries in negotiating a treaty with our indigenous peoples.

In this submission, ANTaR argues that the process of Reconciliation is necessarily directed towards a resolution - a resolution which involves not only a change of sentiment at the grass roots level but, importantly, a new formal relationship between indigenous and non-indigenous peoples in Australia.

The two key mechanisms which, under the broad umbrella of the Reconciliation process, will take us to a new relationship are direct negotiation and binding agreement. These are also the mechanisms for safeguarding against a return to the old order. And they are the means through which fundamental change at the personal and neighbourhood level can be dynamically stimulated and supported.

The recent Bridge Walks demonstrate that Australia will not be satisfied with a Reconciliation process which asks only for voluntary, informal change, change which is confined to people's hearts or the neighbourhood level. Reconciliation must also involve structural change. The nature of that change must be the subject of high level negotiations, at which the two peoples are able to find lasting agreement about major issues and to implement a new relationship at the formal level.

The status of indigenous Australians under the new relationship needs to be entrenched in a form that cannot be wiped out by the next hostile government with a temporary majority. Making that status safe may take the form of a treaty, involving constitutional and legislative change. It may take the form of a network or series of regional and sectoral agreements within a constitutional pathway.

Whatever form the final outcomes may take, new formal and informal relationships must derive from direct negotiation and binding agreement. As Mick Dodson said at Corroboree 2000, "the only agreement that's going to work is one that's got consensus".

Without a profound relationship change at the formal level, to follow and build upon the changes at the informal or personal level, the Reconciliation process will damage its own cause. Those in favour of Reconciliation will become frustrated with the lack of change and turn to other avenues for change. Those against Reconciliation will become more opposed, as the Reconciliation process continues to confront them with issues which they resent having to concern themselves with and which appear to be beyond resolution.

This bleak outcome is avoidable if Australia takes the path of direct negotiation.

1. The Council's Discussion Paper

The Council is to be commended for developing and circulating a Discussion Paper on a process for addressing the "unfinished business" of Reconciliation. The Paper has stimulated much debate about this particularly important issue. However, ANTaR has some fundamental concerns about the approach which the Council has outlined in its Paper.

The "unfinished business"
On page 1 of the Discussion Paper, the Council lists a number of issues remaining to be resolved before Reconciliation can be achieved. It suggests that those issues over which there is continuing community debate and uncertainty constitute the "unfinished business" of Reconciliation.

ANTaR strongly disagrees with this approach. The nature of the unfinished business and how it is approached from this point are matters which go to the heart of the relationship between indigenous and non-indigenous Australians.

The unfinished business of Reconciliation is not a list of isolated issues about which there remains community disagreement, such as the need for a national apology to the Stolen Generations. Those issues (and many others not listed) are merely illustrations (albeit dramatic and painful) of the urgent need to change the relationship between indigenous and non-indigenous Australia in a fundamental way.

There has been much change in recent years in the hearts and minds of many people. Changing the ***formal*** relationship between indigenous and non-indigenous peoples in Australia is the true, unfinished business of Reconciliation, and the Council's recommendations regarding legislation should focus squarely on it.

Indigenous involvement
ANTaR is also concerned that the Paper makes proposals for legislation which will fundamentally set the structure for the Reconciliation process for many years to come, without those proposals being the product of negotiations with indigenous Australians.

The Council has asked for comment as to how it might "…recommend a process that will allow the unfinished business of reconciliation to be *identified fully, discussed widely and dealt with cooperatively*…." (our emphasis). ANTaR sees a need for clearer delineation in the process between those matters which should be decided by indigenous people themselves and those which can be appropriately decided on a wider basis. Our comments here relate particularly to questions 9, 10 and 11.

Respect for both indigenous peoples and their right to self-determination should ensure that decisions as to what is best for them are made by them, not for them. This includes identifying both the best *processes* for dealing with the unfinished business of Reconciliation and also which issues, in their view, *constitute* the unfinished business of Reconciliation.

ANTaR urges the Council to recommend in its coming report that indigenous people themselves be resourced to answer the question for themselves. These decisions can

then be taken into the negotiation process, where the mutual or competing aspirations of the various parties can fairly take their chance.

In our view, it is essential that the processes and structures adopted for this next stage of the Reconciliation process are developed through direct negotiations with Indigenous people themselves. Direct negotiations, under the broad umbrella of the Reconciliation process, are the obvious mechanism for creating and implementing a fundamentally altered relationship. The resulting agreement/s will safeguard against a return to the old order.

Emphasis on process

The Council's proposed Australian Reconciliation Act 2001 will set objectives, standards and implementation targets and, as such, should be seen as an *end-product* of extensive, exhaustive direct negotiations. To go straight to matters of substance, as Council is proposing, would be fatally misguided and would ensure the collapse of Reconciliation.

Reconciliation in Australia must be a staged process. We must recognise that we are in the very early stages and not be tempted to jump too many stages.

The treaty process in Canada, for example, was given plenty of time, a major reason for its success. A great deal of thought and discussion was allowed for the preliminary issues, giving later negotiations over substance the best chance of succeeding.

In our submission to Council which follows, we particularly draw attention to the experience of Canada. The recognition of Aboriginal title as a legal right in the landmark 1973 Canadian Supreme Court decision of *Calder* was sufficient to cause the federal government to establish a land claims process. With the enactment of the *Constitution Act*, 1982, Aboriginal rights and treaty rights were recognized and affirmed.

However, as in Australia following *Mabo*, it remained unclear in Canada exactly where those rights and titles continued to exist. To resolve this situation, the Canadian government and First Nations realised they had two options: either negotiate land, resource, governance and jurisdiction issues through a treaty process or go to court and have Aboriginal rights and title decided on a case-by-case, right-by-right basis.

The province of British Columbia in Canada chose the option of treaty negotiations and has adopted a six-staged process, one which was itself developed through negotiations:

1. **Statement of Intent**. A First Nation wanting to initiate treaty negotiations must file a statement of intent with the Treaty Commission.
2. **Preparation for Negotiations**. The three parties confirm their commitment to negotiate a treaty, establish that they have the authority and resources to commence negotiations, have a means of developing their mandates and broadly outline what each of them wishes to negotiate.
3. **Negotiation of a Framework Agreement**. The Framework Agreement defines the issues the parties have agreed to negotiate, establishes the objectives of the negotiation, identifies the procedures that will be followed and sets out a timetable for negotiations.

4. Negotiation of an Agreement in Principle. Substantive treaty negotiations take place in this stage. The Agreement in Principle sets out the key objectives and elements to be part of the treaty.
5. Negotiation to Finalize a Treaty. At this stage, outstanding legal and technical issues are resolved.
6. Treaty Implementation. The plans to implement the treaty are put into effect or phased in as agreed.

ANTaR urges the Council in the strongest terms to make its ***principal recommendation*** in the coming report to Parliament that: **government must address the overwhelming need for good faith direct negotiations, beginning with issues of process rather than of substance, and must commit itself fully to this course.**

2. Our country needs a treaty

The notion of a Treaty as an option for Australia has been raised many times. A treaty is essentially a compact formed between two nations or communities, having the right of self-government. Is it not essential that each party possesses the same attributes of sovereignty to give force to the treaty. In the words of Justice McLean of the US Supreme Court, "(t)he only requisite is that each of the contracting parties shall possess the right of self-government, and the power to perform the stipulations of the treaty".[1]

A 1983 joint-parties Australian Senate Committee saw nothing outlandish in exploring the concept, and neither did the Council of Australian Governments in 1992. However, in practice, Australian Governments have declined to take up the opportunities a treaty process presents, preferring the socially more damaging and costly, but politically easier, risk of continuing court claims and counter-claims.

Many indigenous spokepeople have argued in favour of a treaty process backed up by constitutional and legislative change. Such a process might take the form of a network of regional and sectoral agreements within a constitutional pathway. It might take the form of a series of documents, such as agreements which are negotiated for certain geographic areas or on certain issues.

One of the major benefits of a treaty process is the opportunity it offers for *renewing* relations between indigenous Australians and the Australian state. The British Columbia Treaty Commission has recognised that treaties "…can reconcile the interests of First Nations, government and community by establishing new relationships based on mutual trust, respect and understanding through political negotiations."[2] Countries like Canada and Greenland have found formal, binding agreements to be an avenue to reconciliation with indigenous people.

Treaties also increase certainty. If economic and community development is to take place, people need to know who owns a piece of land, who has the right to the resources on it and who has law-making authority over it. They also reduce or put an end to conflicts over lands and resources between indigenous peoples and others. When disputes do arise in the future, treaties provide an agreed-upon process for resolving them.

Treaties also give much needed certainty to indigenous peoples, in that their rights are entrenched in a form that cannot be wiped out by the next hostile government with a temporary majority.

Because treaties are developed by and agreed to by the parties themselves, they are made to last. Lasting solutions derive from negotiation rather than the ultimatums that

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[1] Justice McLean of the USA Supreme Court in *Worcester* v *State of Georgia* (1832), quoted in Restructuring the Relationship, Volume 2 Part 1 of the Report of the Royal Commission on Aboriginal Peoples, Canada Communication Group Publishing, Ottowa, 1996, at page 48

[2] British Columbia Treaty Commission: http://www.bctreaty.net/files/

Australian governments have so often preferred. As Mick Dodson said at Corroboree 2000, “the only agreement that’s going to work is one that’s got consensus”.

Implications for Reconciliation

Without a fundamentally changed formal relationship, derived from a process of direct negotiation and binding agreements or treaties, the Reconciliation process will become adrift.

Those in favour of Reconciliation will become frustrated with the lack of change. Those more equivocal about Reconciliation will also become frustrated because, for as long as there is no resolution, they will continue to be confronted by the problems.

Directing the Reconciliation process towards negotiated agreement has the capacity to gain the support even of those who are not supporters of indigenous rights, because of the opportunity for “closure” which it offers.

A direct negotiations process will help focus community debate and draw community support for Reconciliation. It will provide a tangible framework through which the community can measure the progress of Reconciliation and see the outcomes which are being worked towards. There could be no stronger boost to Reconciliation than to see, after 212 years, Australia finally joining other Commonwealth countries in negotiating a treaty with our indigenous peoples.

Thinking ahead

The history behind the commencement of treaty negotiations in Canada is strongly reminiscent of recent circumstances in Australia, and it is to our advantage to think ahead and learn from Canada’s experience, including its mistakes. In Canada, the political need and appetite for beginning treaty negotiations with First Nations grew out of a realisation that the detriments of not entering treaty negotiations were considerably higher than the benefits.

Direct action by First Nations in Canada was prominent throughout the 1970s and 1980s, with sit-ins, blockades and rallies. In the 1980s, these actions were aimed at asserting Aboriginal title and halting specific resource-development projects. First Nations political organizations evolved and consolidated during these two decades. Various bodies became active at provincial and national levels, and tribal councils began to take root. Demands for recognition of an inherent right to self-government became more forceful.

By the late 1980s, political support for the resolution of First Nations issues had grown, partly because of the activities of First Nations organizations and several court judgments favourable to First Nations' aspirations.

By 1990, the economic cost of British Columbia’s refusal to participate in negotiations was beginning to tell. Direct action and court rulings had delayed resource-development projects pending the outcome of disputes over Aboriginal rights and title. Economic activity was disrupted and investment in the province was down. In 1990, Price

Waterhouse calculated the cost to British Columbia of not settling land claims to be $1 billion in lost investment and 1,500 jobs a year in the mining and forestry sectors alone.

As a result, the BC government made the decision to join First Nations and Canada in resolving long-standing issues through negotiations. The government's decision was also a response to the legal situation which had developed. Although a series of landmark court judgments have confirmed Aboriginal rights and title - not "giving" rights to First Nations, but recognizing and protecting continuing rights – the judgments have not indicated *where* it exists. That will either be determined through a treaty process or decided by the courts case by case.

In the Supreme Court's view, the challenge facing Aboriginal and non-Aboriginal governing structures is to "reconcile the pre-existence of Aboriginal societies with the sovereignty of the Crown." Good-faith negotiations, with give and take on all sides, is the way the Supreme Court of Canada has suggested this be done.

Respecting human rights

Australia's human rights performance has for some time been under heavy internal and external criticism. There have been many grounds for these criticisms, but most can be traced to our refusal to recognise the special status of indigenous Australians or to admit that this status compels us to respect their inherent rights as indigenous peoples.

Indigenous peoples in Australia have never consented to possession being taken of their country. The instructions given to Captain James Cook in 1770 were to "…with the Consent of the Natives . . . take possession of Convenient Situations in the Country . . . or if you find the Country uninhabited take possession . . . by setting up Proper Marks . . ."[3] Cook found the country inhabited but never sought the consent of the indigenous peoples to take possession of even a 'convenient situation,' let alone the whole of the land.

Australia's indigenous peoples have consistently opposed occupation of their traditional lands, fought against it, and lost. They were conquered and have not ceded sovereignty to the Australian State. They have consistently and eloquently called for recognition of their unique status and implementation of their right to self-determination. Indigenous people in Australia have repeatedly called for a negotiated and binding outcome or treaty between themselves and government to deal with the sovereignty issue, self-determination and other unaddressed aspects of the relationship. In 1988, the Hawke Labor Government agreed to negotiate a treaty or Makarrata with indigenous people, but the initiative lapsed.

The following comment relating to Canada can be said with even greater force for Australia, with its poor history of dealings with indigenous peoples:

> "(We hold) a unique place among the nations of the world, considered a model of democratic ideals, pluralism, and respect for individual and group rights, which

[3] Quoted from the Constitutional Commission's Final Report 1988 in Council for Aboriginal Reconciliation, Overview of Key Issue Papers No 1-8: Addressing the Key Issues for Reconciliation, AGPS Canberra 1993, at page 47

> co-exist in a rare and precious balance. The weak spot in (our) international reputation, however, is that we have not honoured our obligations to Aboriginal peoples, a situation that has often been the subject of critical comment from international human rights bodies.
>
> "(We) also recognise that Aboriginal peoples have been treated unjustly; many have a sense of unease about this part of (our) history. Unfortunately, many (of us) believe that it is too late to remedy these injustices. There is a genuine fear that the cost of justice might be too high.
>
> "The Commission believes, however, that a just and fair fulfilment of (our obligations to Aboriginal peoples) is fundamental to preserving (our) honour in the eyes of the world . . . ".[4]

Recognising the rights of indigenous peoples and putting into place special measures for them are not 'unequal' or discriminatory treatment, nor do such measures accord to indigenous people 'more rights' than non-indigenous people have in Australia. The "more rights" view is based on a mistaken premise, failing to understand the meaning of equality under international law, Australian law and in practice.

Many of the rights of indigenous peoples are different, as is appropriate when dealing with people in a different situation. Indigenous peoples are entitled to *substantive* equality, that is, they are entitled not merely to receive the same *opportunities* (formal equality), but also to receive the same *outcomes* (substantive equality). If they, or any other group in Australia, are less able to receive the same outcome from the same service, then they are entitled to extra measures as elements of the process towards the same outcomes.

In the 1998 Native Title Report, the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner gave an extensive and clear account of the meaning of substantive equality for indigenous people in Australia.[5] Referring to the Howard Government's endorsement of mere formal equality for indigenous peoples, the Commissioner commented: "This approach to equality and discrimination, enshrined in the amended Native Title Act, relies on a narrow frame of reference. It looks primarily at the formal rule applied, rather than its wider context and the impact of the rule. It does not address the question as to whether identical treatment has the effect of impairing or nullifying human rights or fundamental freedoms".[6] A failure to accord *substantive* equality to indigenous peoples constitutes racial discrimination.

Similarly, in 1999, John Basten QC observed, in relation to the indigenous right to negotiate under the Native Title Act: "Because the right to negotiate was seen as something 'special' or unique to indigenous people, it has been the subject of vigorous attack by those who see it as an intrusion on the principles of equality. That attack is

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[4] Restructuring the Relationship, Volume 2 Part 1 of the Report of the Royal Commission on Aboriginal Peoples, Canada Communication Group Publishing, Ottowa, 1996, at page 21

[5] Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 1998, Human Rights and Equal Opportunity Commission, Sydney 1999, at pages 94-116

[6] Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 1998, Human Rights and Equal Opportunity Commission, Sydney 1999, at page 95

inherently misguided: to treat that which is different equally is as much an abrogation of the principles of equality as to treat unequally that which is the same."[7]

Australia is under international scrutiny to ensure that our indigenous peoples receive substantive equality. Australia is a signatory to the Convention to Eliminate All Forms of Racial Discrimination which, in Articles 2 and 5, condemns racial discrimination and binds signatories to eliminating it. The Australian Government has legislated the terms of this Convention into Australian law by way of the Racial Discrimination Act. Australia has expressed its "unqualified commitment to racial equality and eliminating racial discrimination", identified racial discrimination as "morally repugnant", and has tied its best interests and international reputation to its rejection of racial discrimination.[8]

In March 2000, however, the UN Committee on the Elimination of Racial Discrimination, which monitors the conduct of signatory countries, expressed its concern that, in the Commonwealth Government's amendments to the Native Title Act, Australia was not acting in accordance with Convention's Articles 2 and 5. The Committee gave emphasis to the need for substantive, and not merely formal, equality in the Commonwealth Government's dealings with indigenous peoples.[9]

The UN Committee cited many other issues of concern regarding Australia's treatment of indigenous peoples and their rights. It began by pointing to the absence from Australian law of any entrenched guarantee against racial discrimination. Censure was directed at measures taken by the Howard Government since 1996: the discriminatory native title amendments, dramatic curtailment of the operations of ATSIC, the loss of confidence in the Reconciliation process, the absence of a formal national apology and compensation for the Stolen Generations, the rate of incarceration of indigenous people, the lack of indigenous interpreter services, mandatory sentencing and the dramatic disparities between indigenous and non-indigenous access to economic, social and cultural rights.

The Government immediately rejected the Committee's findings, maintaining its opposition to the concept of substantive equality and defending its human rights record generally.[10]

For all of these reasons, it is imperative that the Council ***recommends to Parliament*** **in the strongest terms** that a negotiating process should be commenced, with a view to striking binding agreement.

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[7] John Basten QC, The Significance of the 1993 Agreement, paper to 'Forging a New Relationship' seminar, ANTaR, 2 June 1999, unpublished, at page 3

[8] Department of Foreign Affairs and Trade, In the national interest – Australia's Foreign and Trade Policy White Paper, Commonwealth of Australia, Canberra, 1997, paras 24 and 25, quoted in Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 1999, Report 1/2000 Human Rights and Equal Opportunity Commission, Sydney 1999, at page 43

[9] Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 1999, Report 1/2000 Human Rights and Equal Opportunity Commission, Sydney 1999, at page 27

[10] Attorney-General, Media Release, 19 March 1999, quoted in Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 1999, Report 1/2000 Human Rights and Equal Opportunity Commission, Sydney 1999, at page 42

3. Self-determination a prerequisite to Reconciliation

The Reconciliation process can not move forward without recognition of indigenous Australians' right to self-determination. This is because recognition of the right to self-determination confers the necessary status on indigenous peoples to enter into negotiations towards agreement as an equal and independent party. There can be no agreement – no compact, accord or treaty - except between two identifiable parties with authority to make the agreement. Self-determination is a prerequisite to the fundamental change in formal relations between indigenous and non-indigenous Australians which the Reconciliation process needs to bring about.

Recognition of and respect for the indigenous right to self-determination must be a ***central recommendation*** of the Council's report to Parliament.

International law

The status of being indigenous peoples imports, necessarily, the right to self-determination. Australia's indigenous peoples have never given up their inherent right to self-determination.

The Canadian Royal Commission on Aboriginal Peoples noted that the right of indigenous self-determination is founded in emerging norms of international law and, importantly, in basic principles of public morality.[11]

In the development of the UN Declaration on the Rights of Indigenous Peoples and in dialogue with policy-makers in Australia, indigenous representatives have stipulated recognition of their right to self-determination as the *sine qua non* of their participation.[12] Article 1 of both the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), states that: "All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."

Article 3 in both Covenants states:

> "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

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[11] Restructuring the Relationship, Volume 2 Part 1 of the Report of the Royal Commission on Aboriginal Peoples, Canada Communication Group Publishing, Ottowa, 1996, at pages 165-166

[12] Dr Sarah Pritchard, Some Observations on the Processes of Reaching Agreement on a Document or Documents of Reconciliation, paper to 'Forging a New Relationship' seminar, ANTaR, 2 June 1999, unpublished, at page 1

Australia is a signatory to both Covenants and has signed the First Optional Protocol to the ICCPR, allowing individuals in Australia to make complaints in relation to Australia's breaches of the Covenant.

The UN Committee on the Elimination of Racial Discrimination (the CERD) has stated that "self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based on the principles of equal rights".[13] The CERD has also observed that "(t)he right to self-determination of peoples is a fundamental principle of international law".[14]

ATSIC has identified all rights of indigenous peoples – rights connected with autonomy, identity and territory – as falling under "the overarching principle of self determination".[15] ATSIC has argued that recognition of and support for indigenous self-determination is fundamental to acceptance of the inherent collective rights of indigenous peoples and that "(t)here is no right more fundamental for indigenous people than that of self-determination".[16]

Other countries

Canada has based its processes of reconciliation with its indigenous peoples on acceptance of the right to self determination, confirming "the essential link between the right and power of a people to govern themselves and the act of treaty making".[17]

The Government of the United States unequivocally recognises the pre-eminence of the right of its indigenous peoples to self-determination. Inexplicably inconsistent with its domestic approach, the Government of the USA has opposed the use of the term 'self determination' in the UN Draft Declaration on the Rights of Indigenous Peoples. Australia has been inconsistent in a different sense.

It is widely considered that Australia is out of step with comparable countries in its treatment of the indigenous right to self-determination.

Australia's view of self-determination

Indigenous self-determination became Commonwealth Government policy in 1972 and was recognised for 26 years by a succession of Governments, both Labor and Liberal-National Party coalition.

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[13] Committee on the Elimination of Racial Discrimination, General Recommendation XXI, Self-determination, 1996, UN Doc A/50/18 para 9

[14] Committee on the Elimination of Racial Discrimination, General Recommendation XXI, Self-determination, 1996, UN Doc A/50/18 para 7

[15] ATSIC, Recognition, Rights and Reform, a Report to Government on Native Title Social Justice Measures, 1995, at para 3.4

[16] ATSIC, Recognition, Rights and Reform, a Report to Government on Native Title Social Justice Measures, 1995, at para 3.24

[17] Restructuring the Relationship, Volume 2 Part 1 of the Report of the Royal Commission on Aboriginal Peoples, Canada Communication Group Publishing, Ottowa, 1996, at page 48

The current Australian Prime Minister, John Howard, voiced his own and his (then) Opposition party's objection to the concept in 1988, when he had "difficulty" with its inclusion in a Parliamentary resolution. The resolution, which was not supported by the Howard Opposition, "affirm(ed) 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".[18]

Confident in 1994 that self-determination was "a non-controversial statement of the legitimate and recognisable aspirations of indigenous Australians . . . while remaining part of the nation-state", the Council for Aboriginal Reconciliation said that such a resolution, if ever re-introduced into Parliament, "ought now be able to receive unanimous support".[19]

But in 1996, the Minister for Aboriginal and Torres Strait Islander Affairs announced that the (new) Government's indigenous affairs policy would no longer be based on the principle of self-determination. The Minister described self-determination as "merely an end in itself" and proposed "self-empowerment" as the preferred means to a different end – "ultimately social and economic equality". [20]

In doing so, the Minister wilfully or in error misstated the nature of self-determination; it is the beginning, not the end, of addressing indigenous issues. And by defining the desired 'end' of the Government's dealings with indigenous people as "social and economic equality", the Minister by-passed any negotiation with indigenous people as to their preferred outcomes.

The Australian Government has since undertaken a campaign to remove reference to self-determination from the UN Draft Declaration on the Rights of Indigenous Peoples. In December 1999, the UN Commission on Human Rights Working Group considered a large number of submissions on the issue of the reference to self-determination, and Australia was conspicuous in speaking alone with the USA against use of the term. In answer to Australia's claim that "for many people it implied the establishment of separate nations and laws",[21] several indigenous representatives responded that the exercise of the right to self-determination provided a means for the peaceful settlement of disputes and that it would strengthen, rather than weaken, national unity.[22]

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[18] Quoted in Council for Aboriginal Reconciliation, Key Issue Paper No 7: Agreeing on a Document, AGPS Canberra 1993, at page 27

[19] Council for Aboriginal Reconciliation, Key Issue Paper No 7: Agreeing on a Document, AGPS Canberra 1993, at page 27

[20] Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 1999, Report 2/2000 Human Rights and Equal Opportunity Commission, Sydney 2000, at page 19

[21] Commission On Human Rights Fifty-sixth session Item 15 of the provisional agenda Indigenous Issues Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 at para 62

[22] Commission On Human Rights Fifty-sixth session Item 15 of the provisional agenda Indigenous Issues Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 at para 45

The Australian Government has also preferred the term "self-management." Self-management is no substitute for self-determination; it is merely the exercise of a granted or delegated authority, while self-determination is authority itself. In the 1988 Australian Parliamentary resolution mentioned earlier, self-determination and self-management were joined, the one leading to, but not substituting for, the other.

Self-government in Australia

Self-determination as negotiated by Australia's indigenous peoples may or may not extend to self-government: self-government is one option through which the right to self-determination may be expressed.

Self-government is distinct from sovereignty. Sovereignty is, in essence, the power and authority to govern. Australia's indigenous peoples have never ceded sovereignty and retain the right to it. Recognising indigenous self-determination means recognising that the continuing status of indigenous sovereignty – their power to govern – has not been resolved. Settling the agreed terms on which that sovereignty might be exercised is a crucial part of the business of Reconciliation.

Patrick Dodson has described indigenous people as seeking a society "where we meet our obligations as citizens but where we are accommodated also as Aborigines".[23] Indigenous people recognise there may be limits to self-determination, depending on the circumstances within a country and the particular rights possessed by the indigenous peoples.

This reflects the position under international law. Article 42 of the UN Draft Declaration on the Rights of Indigenous Peoples, which deals with the right to self determination, expressly states that nothing in the Declaration shall be interpreted as contrary to the United Nations Charter. Article 2(4) of that Charter guarantees the territorial integrity of nation-states. In other words, the right to indigenous self-determination is subject to the right of nation-states to territorial integrity.[24]

The Canadian reconciliation process has led to diverse and widely accepted forms of indigenous self-governance. For example "(t)he 1998 Nisga'a Treaty aims to reconcile the Aboriginal rights of the Nisga'a people and the sovereignty of the Crown, and to provide the basis for future dealings between Nisga'a, the Province of British Columbia and Canada. It addresses land title, public access and rights of way, forest resources, fisheries, environmental assessment and protection, Nisga'a government, dispute resolution and fiscal relations".[25]

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[23] Pat Dodson Beyond the Mourning Gate – Dealing with Unfinished Business, Wentworth Lecture 12 May 2000 at 6

[24] However, Resolution 2625 of the UN General Assembly recognises that there may be situations in which a nation-state engages in such severe and systematic violations of human rights that the victims of those abuses are entitled to secede and to be recognised as peoples of an independent state. An example is the former Yugoslavia.

[25] Dr Sarah Pritchard, Legal Framework for a Nation, Sydney Morning Herald, 1 June 2000 at page 19.

Within our own system of government, Australia is familiar with the self-government of Australian people with particular status: Norfolk Island and the Cocos Keeling Islands are clear examples.

It is uncontroversial that, prior to colonisation, Aboriginal and Torres Strait Islander peoples had developed complex forms of community governance. Self-government currently takes place in the Northern Territory, Queensland and South Australia under local Government or State land rights legislation. The Commonwealth *Aboriginal Councils and Associations Act* anticipates the incorporation of governing councils for Aboriginal communities [26]

Although limited recognition of self-determination in Australia has allowed indigenous people to engage in self-governance, "(t)he distinctness which Aboriginal and Torres Strait Islanders feel has not been reflected in political arrangements for power sharing".[27] What indigenous Australians believe has been lacking is negotiation over forms of self-governance which are particularly responsive to matters which Aboriginal and Torres Strait Islanders consider to be important.[28]

[26] ATSIC, Recognition, Rights and Reform, a Report to Government on Native Title Social Justice Measures, 1995, at paras 4.70-71

[27] ATSIC, Recognition, Rights and Reform, a Report to Government on Native Title Social Justice Measures, 1995, at paras 4.64

[28] ATSIC, Recognition, Rights and Reform, a Report to Government on Native Title Social Justice Measures, 1995, at paras 4.72

4. The negotiating process

Some operational principles

The following comments and observations have been drawn from many sources and are offered as a contribution to on-going discussion in this area. ANTaR does this subject to the overriding principle that indigenous peoples must be enabled to decide for themselves how they intend to approach issues around negotiation.

Australia has to find its own way forward. It is not possible to pick up a document that has worked elsewhere and simply adopt it in Australia. Documents from, say, the Canadian experience, represent merely a moment in the much larger context of political movements. Such documents are not transportable to other situations.

In fact, the Canadian experience strongly reinforces the importance of grounding processes in the particular, in geographic realities, in specific historical experiences, in daily lives and priorities. Australia could gain a great deal from looking closely at the Canadian experience, particularly in relation to "process" issues.

The process cannot be rushed. The need to give adequate time to the process was an over-riding theme in the 1995 Social Justice submissions by the Council, ATSIC and the Human Rights and Equal Opportunity Commission (HREOC). Those reports identified the fundamental need to address and resolve the place of indigenous peoples in Australia's constitutional, legal, political and social frameworks through processes which permit discussion and negotiation over time, to enable mutual understanding to be generated and legitimacy of outcomes to be achieved.

A party to negotiation will need to obtain advice, to explore positions, to consider, consult and reconsider and to feel free from undue pressure by time or other constraints that cut across the merits of the issues. The successes in Canada resulted from "a consultation process, official negotiators, accountability structures and a resourcing arrangement to assist the process to occur. It took some time. These are complicated, difficult issues. But compared to another 100 years of blueing and arguing, what's a 10 year period".[29]

The integrity of the process is also important. Legitimacy and workability flow from the way things are done as much as from the words ultimately written on the document.

Respect must be accorded to indigenous preferences as to how the process should go ahead. If the right to self-determination is respected and forms a fundamental basis for a negotiation process, then no so-called 'solution' can be imported or imposed. Resolution of outstanding issues can be achieved only through negotiation between equals. Negotiation will lead to agreed outcomes, owned and respected by the parties. Indigenous peoples will need to debate and make decisions as to the nature of the process. Only indigenous peoples themselves can settle what constitutes the unfinished business arising from the occupation of their land, the substance of the Reconciliation process and of a new, formal relationship. This necessity was respected in the Canadian processes, where the Royal Commission said "(i)t would be entirely

[29] Pat Dodson, quoted in The Australian 31 May 2000

inappropriate for the Commission to specify the substantive content of the treaty processes".[30]

An eloquent metaphor for the importance to indigenous people of constructive, inclusive process is Mandaway Yunupingu's description of the making of *ngathu*, an indigenous bread. It is made collectively, according to traditional and revered allocation of duties, and slow detailed steps that must be taken to ensure the *ngathu* is edible. Yunupingu compares the making of *ngathu* to the making of Reconciliation: "there are ways of proceeding that, structurally, ensure the interests of all are recognised and respected".[31]

Indigenous participation in the Reconciliation and resolution processes must be representative. While organisation of this will be complex, negotiations are unlikely to be able to proceed until there is a broad consensus about indigenous representation. Indigenous people might decide on an approach to concepts of individual, community and representation which is culturally different.

An analogy with the Maori experience highlights the importance of true representativeness to the success of the endeavour. After Maori negotiators came to an agreement with the New Zealand Government in relation to fishing rights, it was observed that "the four Maori Crown negotiators were appointed by the Crown . . . (W)hen is it a partnership when one partner decides who will negotiate on behalf of the other partner?" Full and final settlement is not possible "without every [tribe] and every [clan] being directly involved in the extinguishment of their own rights".[32]

The reconciliation process in Canada recognised the distinctive culture of governance among the indigenous people there. That culture, which the Canadian reconciliation process has accommodated, is described in the Royal Commission report, with remarkable resonances for Australia:

> "In most Aboriginal nations, political life has always been closely connected with the family, the land, and a strong sense of spirituality. In speaking to the Commission of their governance traditions, many Aboriginal people emphasized the integrated nature of the spiritual, familial, economic and political spheres . . . Aboriginal people generally view government . . . as inseparable from the totality of communal practices that make up a way of life."[33]

It should not be necessary to say that **the participation of indigenous peoples is also essential** for the Reconciliation and negotiation processes to be successful. The

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[30] Restructuring the Relationship, Volume 2 Part 1 of the Report of the Royal Commission on Aboriginal Peoples, Canada Communication Group Publishing, Ottowa, 1996, at page 72

[31] Mandaway Yunupingu, Yothu Yindi, Finding Balance, 'Voices from the Land', 1993 Boyer Lectures, ABC 1994, quoted in Council for Aboriginal Reconciliation, Overview of Key Issue Papers No 1-8: Addressing the Key Issues for Reconciliation, AGPS Canberra 1993, at page 3

[32] Council for Aboriginal Reconciliation, Key Issue Paper No 7: Agreeing on a Document, AGPS Canberra 1993, at page 25

[33] Restructuring the Relationship, Volume 2 Part 1 of the Report of the Royal Commission on Aboriginal Peoples, Canada Communication Group Publishing, Ottowa, 1996, at page 115

Council of Australian Governments has recognised this as a guiding principle[34], and "indigenous people have continually expressed the importance of this principle".[35]

However, in March 1999, the UN Committee for the Elimination of Racial Discrimination expressed its concern that Australia had not complied with Article 5 (c) of the Convention and General Recommendation XXIII, which requires the "informed consent" of indigenous peoples in decisions relating to their interests. The Committee noted "the lack of effective participation by indigenous communities" in relation to the Native Title Act amendments (the Ten Point Plan). The Australian Government admitted this but said that it viewed the requirement of effective participation as "aspirational" rather than as imposing a real obligation. The Committee replied: "…it is not understood by this Committee in that sense". [36]

The international position is repeated in the UN Draft Declaration on the Rights of Indigenous Peoples: Article 20 states that "indigenous peoples have the right to participate fully, if they choose, through procedures determined by them, in devising legislative or administrative measures that may affect them."

Australia's compliance with the requirement to engage its indigenous peoples in processes leading to decisions that affect them is under on-going and close international scrutiny.

In 1998, in response to the Northern Territory Government's failure to consult indigenous people on the proposal for statehood, the Constitutional Convention of the Combined Aboriginal Nations of Central Australia issued The Kalkaringi Statement, saying, in part:

> "We deplore the failure of the Northern Territory Government to negotiate with the Aboriginal peoples of the Northern Territory in relation to the proposed move to Statehood". The Statement sought "good faith negotiations between the Northern Territory Government and the freely chosen representatives of the Aboriginal peoples of the Northern Territory"

A treaty must be a living document that is capable of accommodating change and evolution as both indigenous and non-indigenous cultures change and evolve.[37] In Canada, "(t)he treaties must be acknowledged as living instruments, capable of evolution over time and meaningful and relevant to the continuum of past, present and future".[38]

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[34] The Council of Australian Governments National Commitment to Improved Outcomes in Program and Service Delivery for Aboriginal Peoples and Torres Strait Islanders, 1992

[35] Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 1999, Report 2/2000 Human Rights and Equal Opportunity Commission, Sydney 2000, at page 16

[36] Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 1999, Report 1/2000 Human Rights and Equal Opportunity Commission, Sydney 1999, at pages 38-39

[37] ATSIC, Recognition, Rights and Reform, a Report to Government on Native Title Social Justice Measures, 1995, at para 4.80

[38] Restructuring the Relationship, Volume 2 Part 1 of the Report of the Royal Commission on Aboriginal Peoples, Canada Communication Group Publishing, Ottowa, 1996, at pages 70-71

Some substantive issues

The issues to be negotiated will be many, but no list of them compiled so far can be considered exhaustive. This is because no process has been designed and resourced to enable Australia's indigenous people to identify and agree on them. It would be a fatal error to attempt to list them at this stage.

Having said that, it should be noted that the inherent rights of First Peoples have been recognised at the highest international levels, but have been largely denied here in Australia. The starting point for any discussion of the issues in Australia would probably be the preliminary, core issue of recognition and protection of the unique and distinct place or status of indigenous Australians.

In 1995, ATSIC reviewed the history of indigenous peoples' calls for social justice and identified common, underlying themes. ATSIC brought these themes together and formulated draft principles for adoption by the Government as the foundation for its relations with indigenous people.[39] Those principles included acceptance and recognition of indigenous peoples' rights to recognition as the original owners of Australia, self-determination, protection of cultures and many more.

ATSIC also made the point that a commitment to principles of this type is "hardly a radical notion". It noted the adoption by the Council of Australian Governments in 1992 of guiding principles for improved program outcomes for Aboriginal people and Torres Strait islanders[40]. They included empowerment, self-determination and self-management; economic independence and equity consistent with Aboriginal and Torres Strait Islander social and cultural values; the need to negotiate; and, the need to maximise participation.

Starting from the belief that the negotiation and agreement processes need to be approached in a committed and formal way, Peter Yu, Director of the Kimberley Land Council, has proposed a "national framework agreement" which "would set out a process for negotiations on nationally-agreed components of Reconciliation". This, he says, is something for which the Council for Aboriginal Reconciliation should recommend legislation.[41]

Yu's proposed framework agreement would be based on constitutional recognition and protection of indigenous rights; recognition of traditional customary law within the Australian legal system; protection of indigenous cultural heritage; the development of

[39] ATSIC, Recognition, Rights and Reform, a Report to Government on Native Title Social Justice Measures, 1995, at para 1.26

[40] ATSIC, Recognition, Rights and Reform, a Report to Government on Native Title Social Justice Measures, 1995, at para 1.22

[41] Peter Yu, Keynote Address, 'Forging a New Relationship' seminar, ANTaR, 2 June 1999, unpublished, at page 3

an agreed document on Australia's history; and, symbolic protocols recognising the special status of indigenous peoples within the Australian nation. [42]

Patrick Dodson, too, has listed the indigenous rights that must be formally recognised in the Reconciliation and negotiation processes,[43] including the rights to equality, identity, self-determination, customary law, culture, spiritual and religious traditions, language, participation and partnerships, economic and social development, special measures, land and resources, self-government, constitutional recognition, treaties and agreement and legislation.

The Kalkaringi Statement mentioned earlier called in 1998 for recognition of similar rights as the basis for any negotiations.

There are many other perspectives on what might be discussed in a treaty negotiation process. Those briefly referred to above give an idea of the breadth and complexity of the possibilities. Ultimately, which issues indigenous people choose to place on the negotiating table is a matter for them.

Lessons from Canada

Australia has much to gain from looking closely at the Canadian experience and developments in British Columbia (BC) illustrate this well. In particular, the British Columbia treaty processes and the issues discussed offer interesting possible models for Australian consideration.

The BC treaty process is a voluntary process of political negotiations among First Nations, Canada and British Columbia. It is intended as a constructive alternative to litigation and direct action.

The current BC treaty process began in 1990 when Canada, British Columbia and First Nations established the BC Claims Task Force to make recommendations on the scope of treaty negotiations, the organization and processes to be used, interim measures and public education. In its report, the Task Force made 19 recommendations, which were all accepted by the three parties.

Subsequently, First Nations, Canada and British Columbia signed an agreement in September 1992 to establish the BC Treaty Commission. The Treaty Commission Agreement is supported by federal and provincial legislation and by a resolution of the First Nations Summit. In December 1993, the Treaty Commission began receiving Statements of Intent from First Nations wanting to negotiate a treaty with Canada and British Columbia.

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[42] Peter Yu, Keynote Address, 'Forging a New Relationship' seminar, ANTaR, 2 June 1999, unpublished, at pages 3-4

[43] Pat Dodson, Towards the Document of Reconciliation, Discussion paper, unpublished, November 1999 at pages 5-8

Through these political negotiations, the parties are attempting to "establish a new relationship based on mutual respect, trust, and understanding." This was a key recommendation of the BC Claims Task Force report.

The Task Force report listed elements it considered essential to successful treaty negotiations in BC:

- the parties should be committed to the treaty process and have adequate resources to reach agreements;
- the process should be managed in BC;
- it should provide a level playing field for all parties;
- Canada, BC and First Nations should be equal partners in the management of the process; and
- the treaty process should encourage effective and efficient negotiations. [44]

Toward these ends, the parties have generally attempted to adopt an interest-based approach to negotiations. They try to explore, understand and creatively accommodate the interests and needs that underlie each other's positions.

The issues being addressed in BC treaty negotiations are complex and sometimes contentious. Treaties will differ from “table to table.” However, they are generally expected to cover three broad subject areas:

- First Nations government jurisdictions, services and structures and related financial arrangements;
- jurisdiction over and ownership of lands, waters and resources; and
- cash settlements.

Treaties will also be expected to set out the processes for resolving disputes and making changes to the treaty.

Treaty negotiations in BC pass through six stages:

Stage One: Statement of Intent. A First Nation wanting to initiate treaty negotiations must file a statement of intent with the Treaty Commission. The statement must identify the First Nation and its members, describe the First Nation's traditional territory, indicate that the First Nation has a mandate to enter into and represent its members in treaty negotiations and appoint a formal contact person.

Stage Two: Preparation for Negotiations. The three parties confirm their commitment to negotiate a treaty, establish that they have the authority and resources to commence negotiations, have a means of developing their mandates and broadly outline what each of them wishes to negotiate. By the end of Stage Two, Canada and BC must also submit readiness documents to the Treaty Commission in which they identify community interests in the region and establish ways to address those interests. The “table” moves on to Stage 3 when the Treaty Commission is satisfied that the parties have met these requirements.

[44] For more information, see www.bctreaty.net and the guide to publications by the First Nations Summit, the federal and provincial governments and the Treaty Commission.

Stage Three: Negotiation of a Framework Agreement. The Framework Agreement defines the issues the parties have agreed to negotiate, establishes the objectives of the negotiation, identifies the procedures that will be followed and sets out a timetable for negotiations. The parties expand their public consultation in local communities and initiate a program of public information.

Stage Four: Negotiation of an Agreement in Principle. Substantive treaty negotiations take place in this stage. Land, resources, self-government and financial components usually form part of the negotiations. The Agreement in Principle sets out the key objectives and elements to be part of the treaty.

Stage Five: Negotiation to Finalize a Treaty. At this stage, outstanding legal and technical issues are resolved. Formal signing and ratification of the agreement brings the parties to Stage Six.

Stage Six: Treaty Implementation. The plans to implement the treaty are put into effect or phased in as agreed. The "table" remains active to oversee the implementation of the treaty.

The BC Treaty Commission Agreement defines a First Nation for treaty purposes as: "(A)n Aboriginal governing body, however organized and established by Aboriginal people within their traditional territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia."

The BC treaty process is open to all First Nations in BC, but not all First Nation groups have chosen to engage in treaty negotiations. Some First Nations oppose the treaty process, preferring instead to negotiate separately and directly with the federal and provincial governments. Other First Nations will enter the process as they become organized to do so. Still others will wait and see what can be achieved before committing themselves.

5. Public support for a treaty process

"Sunday's People's Walk across the Harbour Bridge was probably the largest turn-out on a single day for a particular cause in Australian history. The crowd far exceeded the roll-ups of those who opposed Australia's Vietnam commitment in the late 1960s and early 1970s." Gerard Henderson, SMH, 31/5/00.

Many Indigenous leaders took the opportunity of the Bridge Walks to identify, yet again, the need for a formal process of direct negotiation with government – a treaty process - as the way towards agreement and a resolution to the Reconciliation process.

Dr Scott recently expressed concern about use of the word treaty, saying that any such formal settlement 'might be called a treaty or something else, but one thing's for sure: it will only be called whatever the Australian people want it to be called." Her concern is that, without broad public discussion and education about its possible mechanisms and content, talk of a treaty will allow the enemies of reconciliation to obscure and confuse the issues. Deputy Chair Sir Gustav Nossel has indicated his concern that the calls for a treaty could be too much, too fast and could prejudice some of the progress towards Reconciliation made so far.

Already we have seen the Prime Minister and the Minister for Reconciliation attempt to do exactly that, with their clamour on the very night of the Harbour Bridge Walk that the call for a treaty is shorthand for a separate Aboriginal nation. Essentially, Mr Howard's appeal to fear over division seeks to reinforce denial of the value, even the existence, of an unique indigenous culture and peoples.

The Government also promotes the view that the status of indigenous peoples is a matter for personal preference or majority will, rather than a matter which requires national resolution with the informed consent of indigenous people themselves. In response to similar views in Canada, the British Columbia Treaty Commission responded:

> "Treaties are about rights, not voter preferences. The Supreme Court of Canada has repeatedly confirmed Aboriginal rights and title. These rights cannot be denied regardless of the results of a referendum.
>
> "Canadian democracy means more than majority rule. It also means the protection of fundamental rights by the rule of law."[45]

People want unity

The two recent opinion polls indicating that 45% of those surveyed support a treaty indicate a strengthening of sentiment in the community in favour of a negotiated settlement. The fact that this sentiment was expressed before any public education has taken place is very significant.

[45] Media Handbook, British Columbia Treaty Commission, The Issues – Treaty Approval, page 6. (www.bctreaty.net/files/mediahandbook.html)

Many obviously find it hard to take seriously the Government's warning that talking with indigenous fellow-Australians - who want to work towards mutually-agreed solutions - will solidify division, rather than promote unity. The warning also goes squarely against the evidence from other countries, where no modern-day treaty negotiations have led to division or secession.

Calls for a treaty cannot sensibly be simply swept under the carpet. The desire for recognition as "different" by indigenous peoples is a deep and enduring current in the world. In Australia, indigenous people continue to have their own internal systems of law, culture, land tenure, authority and leadership. Indigenous people are asking for recognition of and respect for the things that make them *indigenous*.

Many would agree that the most unifying response to the fact of difference is to sit down and talk. Negotiating about difference is, by definition, an exercise in creating a viable unity – a way of living together which respects and accommodates difference. As the Council has noted, Australia stands alone as the only Commonwealth country which has not gone down the negotiation and agreement path.

Of course, a process of negotiations will not be without its difficult aspects, but the rewards offered make it well worth pushing beyond the difficulties. Negotiations offer a forum for parties' views to be heard, for complex issues to be "unbundled" and considered deeply, for increasing awareness of each other's concerns and essential values, for goodwill and mutuality to develop. To those weary of the endless verbal and legal warfare, negotiations offer closure on many issues. With engagement from both sides, negotiations offer a process for solutions to be developed at many levels to seemingly intractable problems.

Nor are negotiations a distraction from the real business of improving indigenous standards of living and life expectancy. The limited achievements of the "welfare model," which still underpins the Prime Minister's rhetoric of practical reconciliation, flow from the failure to confront the need for self-help through an exercise of self-determination.

Clearly, many in the community understand that negotiating offers a chance for lasting outcomes - not one day's photo opportunity, but something which is going to work day after day through the future and through many changes. By involving all those who must live with what is agreed, negotiations stand the best chance of providing enduring solutions.

This is the true unfinished business of Reconciliation. **Australia relies on the Council to place the need for negotiations at the top of the list for this next, vital stage in the Reconciliation process.**

APPENDIX:

British Columbia's response to community concerns

As is to be expected with any new process, concerns have been raised in the Canadian community about a treaty process. A concerted public education program is in place to answer questions, and consultation processes provide avenues for on-going community concerns to be taken up. The following is based on material produced by the British Columbia Treaty Commission in response to those concerns.

Special rights. Many people were concerned that treaties will give Aboriginal people special rights and status based on race and that treaties will create inequality. The Supreme Court of Canada has clarified that Aboriginal rights, including property rights, are different from the rights of other Canadians. The courts did not create these rights but recognized that these rights continue to exist whether or not they are set out in a treaty. But without a treaty, there is uncertainty about how and where these rights apply. Treaty negotiations need to take place so that these rights can be defined in a way that creates certainty and ends conflict for both Aboriginal and non-Aboriginal people.

Self-government. Many people have expressed concern that self-government will mean:

- raced-based rights that no other Canadians will have;
- 50 or 60 homelands, each with its own laws;
- a justice system based on race; and
- non-Aboriginal people living on settlement lands might be charged property taxes but not be able to participate democratically in public decisions that affect them.

Aboriginal self-government is not a new concept. Before European settlement, First Nations governed themselves as organized societies. First Nations have long demanded constitutional recognition of their inherent right to govern themselves according to their traditions, not European traditions. Governments have increasingly recognized the need for alternatives to existing policies governing Aboriginal people. Self-government will allow First Nations communities to shed the dependency created by the *Indian Act* and increase their self-sufficiency.

Self-government provisions will differ among treaties. Rather than creating homelands, treaties will generally aim to transfer control to First Nations over those matters that are internal and integral to their cultural survival and that are necessary to manage their lands and resources. First Nations people will still be subject to the laws of BC and Canada. Self-government will also allow First Nations communities to shed the dependency created by the *Indian Act* and increase their self-sufficiency.

Non-Aboriginal interests. One of the challenges is to guard the interests of non-Aboriginal residents on settlement lands while protecting Aboriginal self-government from being swamped by a non-Aboriginal majority. For example, under the Nisga'a Treaty, the federal and provincial laws in force for all residents of British Columbia will apply to everyone living on Nisga'a lands. The majority of Nisga'a laws will apply only to Nisga'a people (for example, adoption,

solemnization of marriages, child custody, language and culture). The Nisga'a will be required to consult with non-Nisga'a residents on decisions that directly affect them (for example, school, health and police board matters).

Land and resources. People have expressed concern that private land will be on the negotiating table or that leased lands will be transferred. They are concerned about access to Crown land for recreation and about their ability to develop resources, establish businesses and own property. It is important, however, to consider the land issue within the following context:

- In most cases, it will be Crown lands and resources transferred under treaties or private lands where there is a willing seller.
- Economic studies have concluded that increased control by First Nations will boost their self-sufficiency and result in joint venture and partnership business opportunities for non-Aboriginal people as well.
- The transfer of land and resources will enable First Nations to develop their own businesses and create taxable revenues.

First Nations people view lands and natural resources as fundamental components of modern treaties. Their values, their way of life and their economic viability and independence hinge on land and the ability to benefit from natural resources. First Nations people expect to increase their self-sufficiency and independence through recognized land ownership. This will allow them to invest in and develop successful businesses, which have spin-off benefits for all British Columbians.

Costs and benefits. People worry that, as treaties are finalized:

- the province will lose substantial tax revenues and royalties;
- governments will still be funding welfare, health care, policing, justice services and education while Aboriginal people will be receiving huge cash settlements; and
- because there are no cash reserves these treaties will bankrupt the governments, leaving health care and education underfunded.

Although cash settlements will be part of all treaty negotiations, the amounts will vary with the circumstances and the lands involved.

Economic studies have evaluated the cost of treaty making and concluded that treaty settlements will create economic growth for BC. A 1996 KPMG report projected positive financial and economic outcomes from treaty settlements. It forecast a significant employment increase for British Columbia, estimated at 7,000 to 17,000 new jobs. A similar conclusion was reached in a March 1999 study by independent consultant Grant Thornton, which confirmed that completing treaties to settle Aboriginal land claims will bring a net financial benefit of between $3.8 billion and $4.7 billion to British Columbia over the next 40 years.

Consultation and openness. People have expressed concern that:
the provincial mandate within which treaties will be settled does not take into account what British Columbians want in a treaty;

- the public is not represented at the negotiating table; and
- there is little knowledge of what is being negotiated until the treaty is completed.

In fact, under the BC treaty process there are numerous channels for public consultation. The federal and provincial governments use input from numerous groups to inform and refine their mandates. These include:

- the *Treaty Negotiation Advisory Committee*, that provides input from key interest groups (business, labor, environment, recreation, fish and wildlife groups and municipalities).
- *Regional Advisory Committees*, with representatives from key social and economic sectors in the region where negotiations are taking place, including members of the local community.
- *Local Advisory Committees* established by local residents in some communities.
- *Treaty Advisory Committees*, comprising local government representatives, to allow officials in adjacent communities to discuss their issues, interests and concerns, advise provincial negotiators about local government issues and participate in negotiations.
- Individual tables are also responsible for mounting their own public information initiatives, such as public forums, addresses, displays, newspaper inserts and question-and-answer sessions.

Certainty of agreement. Some people worry that treaties will not be final and that First Nations might make subsequent claims or look for bigger settlements because of subsequent treaties signed by other First Nations.

In the past, certainty was achieved by blanket extinguishment of First Nations' rights, title and privileges. The BC Claims Task Force rejected that approach in its 1991 report to Canada, BC and First Nations. First Nations should not be required to abandon fundamental constitutional rights simply to achieve certainty for others.

While there is no such thing as absolute certainty in complex relationships, hard work and skilled negotiations can produce reasonable certainty and predictable procedures for revision and amendment. The parties must strive to achieve certainty through treaties which state precisely each party's rights, duties and jurisdiction.