

A Nation in Dialogue: Recognition, reconciliation and indigenous rights in Australia¹

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ABSTRACT: During the 1990s indigenous peoples in Australia engaged in a number of major debates and discourses around the foundations of their place in national society. The decade opened with much promise following the revelations and analysis of the Royal Commission on Aboriginal Deaths in Custody. A national program of 'reconciliation' was quickly followed by the High Court's renunciation of the principle of terra nullius and acknowledgement of the persistence of native title. By mid-decade, the issue of genocide was confronted through a major inquiry into past government policies to separate indigenous children from their families. Dialogue with governments and major institutions such as churches, trade unions and industry groups opened prospects for radical change. Rural crisis, the re-emergence of a radically racialized conservative politics, a change of national government, corporatisation of the reconciliation movement and the derailing of native title into costly and remote legal maneuvers have increased the urgent need for dialogue, but fragmented the indigenous rights movement politically. This paper offers a broad overview of the past decade and identifies key issues for the future, including political, cultural, economic, social and environmental concerns.

Australia has been characterized as a 'nation in dialogue' over the application of human rights principles to consideration of the place of indigenous peoples in the nation:

This dialogue has occurred between the Australian Government and two UN treaty committees...; between Indigenous non-government organizations and UN committees...; between the government and Indigenous and non-Indigenous representatives...; and, at a broader level, among Australian citizens and a range of institutions, as part of a continuing debate about the meaning of reconciliation (Jonas, 2001a: 5).

¹ I take my title from the opening chapter of Jonas (2001a).

Although the past decade has presented indigenous Australians with opportunities for dialogue, practical outcomes from major breakthroughs in the early-1990s have been disappointingly modest. The 1991 'judicial revolution' in the *Mabo* case (see e.g. Stephenson and Ratnalapa, 1993, see also Sharp 1996), has been slow to return land to indigenous stewardship. A decade-long national reconciliation process commenced optimistically in 1991, but concluded ambiguously in 2001. Discussion of government separations of Aboriginal children from their families – the Stolen Generations – produced serious debate about genocide, but stubborn refusal to formally apologize from the Commonwealth government.

In many ways, this last decade has polarized Australia's mature, multicultural democracy. Regionally uneven impacts of economic restructuring fostered growth of extreme rightwing politics in rural and peripheral urban areas. The mainstream political parties have had no coherent policy response to this. Yet, at the same time, a popular movement for reconciliation mobilized large numbers of 'ordinary Australians' in support of indigenous rights.

This paper offers an overview of four critical areas of indigenous policy development – native title, environmental politics, reconciliation and genocide. Other key areas such as health, employment, education and criminal justice are beyond the scope of this paper, but have also been areas of challenge, opportunity and disappointment for indigenous Australians in this period.

Native Title: ending the colonial myth of *terra nullius*

In June 1991, following a decade of litigation, a majority judgment of the Australian High Court confirmed that indigenous Australians had systems of property rights and law that the Common Law was not only capable of recognizing, but also obliged to recognize and respect (see e.g. Bartlett, 1993a). Two centuries of colonial and post-colonial legal myth making was overthrown by the *Mabo* judgment.

Debate about the judgment and its implications saw leading conservative politicians and others engage in unprecedented attacks on the High Court. Previously, the legal system had supported the assertion that British acquisition of Australian territory had required neither cession by nor conquest of its indigenous populations because it had been legally 'empty' of property rights (*terra nullius*). In the British colonizers' 'great chain of being', indigenous Australians were so inferior as to be incapable of holding property rights or laws. In defining them as savages and

vermin, the authorities visited upon them a barbarism that Justices Deane and Gaudron referred to as “the darkest aspect of the history of this nation” in a much-quoted passage of their judgment in the *Mabo* case.²

In the Gove Land Rights case in the late-1960s, an attempt to get Australian courts to acknowledge the existence and persistence of indigenous law had produced a judicial affirmation of *terra nullius* as a foundational principle of Australian law (see e.g. Williams, 1986). In the wake of that controversial decision the political landscape was transformed by the Australian Labor Party entering the 1972 national election campaign committed to land rights. This eventually produced a legislative regime of granting land rights to traditional Aboriginal landowners in the Northern Territory, but left indigenous Australians in state jurisdictions with much more limited access to recognition. With the notable exception of the Pitjantjatjara and Maralinga-Tjaratja land rights legislation in South Australia, state-based regimes provided highly constrained recognition of indigenous property rights (Tehan, 1994).

Another legacy of the 1970s, however, provided a catalyst for change. The *Racial Discrimination Act 1975* outlawed racial discrimination by governments and government agencies. In *Mabo*, the High Court found that passage of the *Racial Discrimination Act* had made it illegal for governments to extinguish native title rights in a discriminatory manner. Inevitably, many property transactions made since 1975 – perhaps most controversially the creation of new property rights in resources (new mining tenements, pastoral leases and other titles) – were potentially invalid.

This represented a very significant shift in the balance of power between indigenous and non-indigenous Australians. While earlier land rights legislation had created rights at the discretion of government, the High Court had established that Aboriginal legal systems continued to create rights and interests that pre-dated and persisted beyond the British acquisition of sovereignty. It also confirmed that such rights could be acquired by the Crown only in specified circumstances. Where they persisted into the present, such rights created an obligation on governments and their agents to deal fairly with the people who held them. For the first time, Australian governments were *obliged* to deal with indigenous peoples as co-equals.

² *Mabo v Queensland (No 2)* (1992) 175 CLR 1, per Deane and Gaudron JJ: 109. The passage is quoted in Jonas 2001b: 7.

This has opened up opportunities for new sorts of discussions in Australia, often in the context of co-existing rights, overlapping interests and a 'right to negotiate' that was enshrined in the original drafting of the *Commonwealth Native Title Act 1993*. The response of most governments and industry groups, however, was to advocate only a minimal recognition of native title. In other words, the reaction was to limit the spatial extent of native title, to extinguish native title wherever that was possible, even to pursue wide-ranging 'blanket' extinguishments over specified classes of land title and to insulate 'economic' interests (e.g. farmers, mining interests and others) from the financial burden of dealing with native title claims. In its initial operations, the National Native Title Tribunal faced large numbers of claims, with limited resources and a determination from vested interests, including governments, to test every claim to the maximum extent possible. Complex provisions of the Act, the most amended piece of legislation ever passed by the national parliament, made its operation difficult and unwieldy.³ The legalistic strategies adopted made it a difficult jurisdiction for the native title claimants themselves. Hearings were often highly technical, long and difficult to understand. Resources required to bring claims to fruition were also extensive, with tests involving complex tenure histories, detailed social histories and comprehensive anthropological work demonstrating the persistence of indigenous law and custom and continuing connection to specific areas of land since 1788. Given the hurdles it placed in the way of returning land to its native title owners, one commentator suggested that this was a new means of dispossession rather than a means of effective recognition (Bartlett, 1996).

In late-1996 a second major High Court decision, this time in the *Wik* case on the Australian mainland in north Queensland, established that some land tenures that had often been assumed to extinguish native title did not do so (see e.g. Hiley, 1997). Indeed, pastoral leases, an important form of tenure in many areas of Australia, were found not to completely extinguish native title and to create 'co-existing' rights in the land, although native title was acknowledged to have been extinguished to the extent of any inconsistencies with the lease tenure.

If *Mabo* had unleashed uncertainty on non-indigenous Australia, *Wik* released a pent-up anger and hatred that fanned deeply-entrenched racism in the Australian population. Industry groups in farming and

³ Tickner (2001) offers a detailed account of the negotiation of the *Native Title Act* and its passage through the Parliament.

mining re-opened issues that had been settled in the negotiations that produced the *Native Title Act* a few years earlier, and opportunistic politicians promised a quick resolution – indeed, the Deputy Prime Minister promised rural voters ‘bucket loads of extinguishment’. The government sought to guarantee ‘certainty’ – although not for Aboriginal and Torres Strait Islander property interests. The Commonwealth Government proposed amendments to the *Native Title Act* that would make succeeding in a native title claim even harder, and which restricted the rights that would be available to successful native title claimants. Their ‘Ten Point Plan’ sought to confirm extinguishment and restrict the extent to which native title could disrupt the postcolonial landscape of privilege and development. Pledging a commitment to ‘practical reconciliation’, the Commonwealth Government pushed through legislative amendments and administrative changes that the United Nations Committee on the Elimination of Racial Discrimination found discriminatory.⁴

The concession in the amendments was the inclusion of provisions to encourage negotiation of land use agreements. Some negotiations have proceeded to conclusion under the amended legislation and others are underway. There is a mixed record of outcomes from the recognition of native title.⁵ It has become a field of complex technical legal argument that often leaves indigenous people on the sidelines. But there can be no doubt that it has changed both the legal and the moral landscape of inter-cultural politics in Australia. I will return to consider future prospects in the final section of this paper.

There is no wilderness: environmental politics and indigenous rights

A second area of controversy has been in the field of environmental and heritage management. Two major issues warrant attention as exemplifying the challenges facing indigenous groups in Australia – Jabiluka and Hindmarsh Island.

Jabiluka and Kakadu National Park

In the first case, the Mirrar people, traditional owners of a key area in the Kakadu region of the Northern Territory, sought to oppose the development of a uranium mine within the boundaries of the World

⁴ For a detailed analysis of the international scrutiny of the *Native Title Act* amendments, see eg Jonas 2000 chapter 2, and 2001a chapter 1.

⁵ For a summary of some negotiations responding to the recognition of native title under the *Native Title Act*, see e.g. Senior 1998, O’Faircheallaigh 1996, 1998, Agius et al 2001.

Heritage listed as Kakadu National Park. A well-executed national and international campaign brought enormous pressure on the Australian government. The Mirrar campaign challenged a widely-held view that remote areas of Australia's natural heritage are 'wilderness', in the sense of land empty of human presence and influence. The indigenous assertion in Australia is that there is no wilderness in this sense and that indigenous people have profoundly influenced Australian environments – that all Australian landscapes are cultural, or socialized, landscapes (see e.g. Kohen, 1995; Langton, 1996a, 1998; Rose, 1996; Head, 2000; Baker *et al* 2001).

Kakadu National Park was established in the 1970s in the wake of a complex set of political machinations. Identification of substantial uranium deposits in the region coincided with moves to recognize some form of land rights. Following passage of the *Aboriginal Land Rights Act 1976*, land claim hearings were held as part of the Ranger Uranium Environmental Inquiry (Fox *et al*, 1977). Proposed mining and town development areas were excised from the land that Aboriginal traditional owners could claim, and when the claim was granted, it was conditional on the Aboriginal people agreeing to lease the land back to the Commonwealth for development as a (jointly-managed) national park. While the 'Kakadu model' of joint management has been widely admired, the combined impacts of uranium mining, town development, tourism and related changes in the region have been devastating for local Aboriginal people (Dodson *et al*, 1997; Levitus *et al*, 1997). In this context, the Mirrar sought to overturn a 1982 mining agreement which they claim their elders had signed under duress (Gundjehmi Aboriginal Corporation, 1997). In 1997 the Mirrar people, through their community organization Gundjehmi Corporation, commenced a major political campaign against any development of the Jabiluka mine. The area's status on the World Heritage List became central to Mirrar arguments that the Commonwealth's policy of exploiting uranium resources in Kakadu placed natural and cultural heritage values at risk. Again, Australia's treatment of indigenous issues came under international scrutiny as the Bureau of the World Heritage Committee reported that it had "noted severe ascertained and potential dangers to the cultural and natural values of Kakadu National Park posed primarily by the proposal for uranium mining and milling at Jabiluka. The mission therefore recommends that the proposal to mine and mill uranium at Jabiluka should not proceed" (UNESCO, 1998: 17).

Although the World Heritage Committee backed away from its strong criticism of the Australian Government's role in Kakadu when it met in Australia in November 2000, acquisition of the operating company Energy Resources Australia by Rio Tinto Ltd in October 2000 changed the strategic environment around the Jabiluka project. In March 2001 Rio Tinto announced they would not proceed with mining in the short term, although the Mirrar remain suspicious of Rio Tinto's intentions, fearing they will on-sell the Jabiluka project to another company.

Hindmarsh Island Bridge

In the Hindmarsh Island case (see e.g. Langton, 1996b; Bell, 1998; Tehan, 2000; Tickner, 2001), Ngarrindjeri women in South Australia faced a Royal Commission into the religious beliefs in 1995 after they sought to prevent the construction of a road bridge in an area of secret/sacred significance. Amidst extraordinary political controversy, the Royal Commission found that Aboriginal women had 'fabricated' their claims about the sacred status of the area.

Despite some problems, South Australia has been widely seen as having Australia's strongest Aboriginal heritage protection laws. The Commonwealth legislation, which was invoked by the Minister in 1994 to prevent construction of the Hindmarsh Island bridge for 25 years, was also seen as strongly supportive of Aboriginal religious beliefs. Yet this dispute pitted the Aboriginal sacred against the secular values of developmentalism and progress. The Hindmarsh Island bridge dispute implicated many of the major institutions of Australian life – the media, the universities, the churches, the judiciary, political parties and parliaments. Divisions emerged not simply between 'minority' indigenous people and a dominant majority population, but also within the Ngarrindjeri community, with the claims of sacredness disputed by a group of 'dissident women'. Gelder and Jacobs (1997) suggested that the dispute also highlighted deep divisions within wider Australian society – divisions that have been reflected in many of the disputes about indigenous rights in the 1990s. The divergent positions defended by the various camps, they suggest "articulate a structure of affiliation which has been all-too-apparent in Aboriginal claims about sacred secrets: that the Right is sceptical ('rational', 'commonsensical', masculine), while the Left is gullible ('indulgent', feminine, too accommodating)" (Gelder and Jacobs, 1997, no page numbers).

Six years after the Royal Commission the Ngarrindjeri women and their legal and anthropological consultants faced an A\$20million

compensation claim from the developers of the bridge. In a finding that many felt vindicated the women's stance, a Federal Court Justice concluded he was "not satisfied that the restricted women's knowledge was fabricated, or that it was not part of genuine Aboriginal tradition" (Von Doussa J., *ABC Radio Current Affairs PM 21 August 2001*).⁶ The head of the Aboriginal Legal Rights Movement at the time of the Royal Commission commented outside the court:

This was never ever about money. It was always about the right for people in Australia to stand up and hold their culture and hold their beliefs, and protect that. And this case, this decision, has vindicated the Ngarrindjeri people for what they said and what they done, and tomorrow's headline should be sorry, sorry, sorry, because ... these women are not fabricators (Sandra Saunders, ABC Radio Current Affairs PM 21 August 2001).

Senior Ngarrindjeri elder Dr Doreen Kartinyeri was overjoyed:

I feel happy. I wasn't expecting everything to come our way. Oh I know that my children and my grandchildren and all my people's grandchildren will now have an opportunity to learn their culture, respect it, and treat it as it is being handed down to them from other Ngarrindjeri people. And this is a victory for all indigenous people in this country (ibid.).

These two cases highlight the difficulties indigenous Australians face in protecting their culture, heritage and rights. The list could be lengthened with little effort, but the extent to which recognition has been achieved and entrenched in the ways that Australians generally imagine their place in the world reflects the extraordinary effort of Aboriginal and Torres Strait Islander peoples to reassert their presence as central in Australian landscapes and politics.

Reconciliation: ambiguity, whiteness and diplomacy

In 1991, in response to one of over 300 recommendations from the Royal Commission into Aboriginal Deaths in Custody, the Australian

⁶ Transcript available at <http://www.abc.net.au/pm/s350183.htm> [accessed September 2001].

Parliament established a Council for Aboriginal Reconciliation⁷, with a brief to foster national debate about indigenous rights and to harness processes to deliver social justice, recognition and improved inter-cultural relationships and mutual understanding between indigenous and non-indigenous Australians. The *Council for Aboriginal Reconciliation Act* was passed unanimously in September 1991 and gave the Council a ten-year life, terminating on the 100th anniversary of the Australian Federation.⁸

Under the leadership of Patrick Dodson, the Council established ambitious educational, policy and community programs. The change of government in 1996, with the defeat of the Labor Party and the election of a conservative Coalition government led by Prime Minister John Howard, signaled a shift away from bi-partisanship on indigenous issues and the emergence of the radical right as a political force in electoral calculations. In May 1997, at the Aboriginal Reconciliation Convention in Melbourne, Prime Minister Howard angrily rejected the politics of reconciliation and recognition. He totally refuted the possibility of any treaty-making with indigenous peoples in Australia, committed his government to shifting the balance in social policy away from indigenous rights (particularly on native title), and redefined reconciliation in terms of a 'practical' agenda for change.⁹

Howard outlined a policy that he called 'practical reconciliation', identifying three basic objectives – a commitment to raising the living standards of indigenous Australians; a realistic acknowledgement of the inter-related histories of elements of the Australian population, 'not to apportion guilt for past wrongs, but to build support for a practical program of action'; and 'working together to respect and appreciate our differences and to ensure that they do not prevent us from sharing the future' (Howard, 2000: 90). His practical reconciliation agenda focused on health, housing, infrastructure, education, employment and business development, but his hostility to a rights-based agenda for change in indigenous policy and his poor understanding of symbolic and cross-cultural domains has left him ill-equipped to foster constructive change.

⁷ For an overview of the reconciliation debates see e.g. Grattan (2000). See also the material of the Council for Aboriginal Reconciliation at <http://www.reconciliation.org.au>.

⁸ For an overview of the negotiations underpinning the bi-partisan political support for the legislation see Tickner (2001: 27-47).

⁹ In the same period, Prime Minister Howard also rejected a proposed shift away from constitutional monarchy towards a republican constitution. In 1999, a national referendum, whose question was controversially worded by Howard, was rejected, leaving Australia as a monarchy whose head of state is the British monarch.

At the same time, his ambiguity and opportunism in dealing with the emergence of the extreme right in the late-1990s has seen indigenous rights used as a political football in several elections, where there has been a marked increase in the willingness of conservative politicians to racialize debate.

In many ways, the shift in the reconciliation process that occurred with the change of government in 1996 was a shift away from a confrontation of the need to address dispossession, injustice, oppression and exclusion, and towards a construction of an image of whiteness that could be reconciled with an acceptable sort of indigenous presence in the land. With the Commonwealth government's hostility to indigenous rights as a policy foundation, its efforts to extinguish rather than protect rights where they got in the way of the developmentalist vision of Australia's future, criticism of a 'black armband view of history' mounted from the right.

Efforts for the final Reconciliation Document to advocate a rights-based orientation for the next decade were defused and replaced by a less political declaration (e.g. Jonas, 2001b: chapter 2). The termination of the Council and its replacement by a public foundation has not ended the task of reconciliation, but continued political cowardice in the face of the extreme right and the difficulties of coming to new terms with the nation's colonial and postcolonial injustices have made the task both more urgent and more difficult.

The Stolen Generations and the charge of genocide

Another key element in indigenous politics in the 1990s was the response to the Human Rights and Equal Opportunity Commission's inquiry into the policy of past governments to separate Aboriginal and Torres Strait Islander children from their families (Dodson and Wilson, 1997). The wedge politics of the One Nation Party, led by former Liberal Party candidate Pauline Hanson, produced a racialized and fear-based politics in which both conservative coalition and Labor parties lost the votes of a vocal, disenfranchised regional population (e.g. Adams, 1997; Langton, 1997; Kingston, 1999). As part of a concerted campaign that introduced a bitter racialized discourse into public media debate, right-wing commentators criticized the *Bringing Them Home* report, its authors, its methodologies, its conclusions, its implications and its potential impact on the self-esteem of modern Australia.

Perhaps the most controversial issue raised in the *Bringing Them Home* report was the suggestion that the policies of removing 'half-caste'

children from their Aboriginal families ‘could properly be labeled “genocide”’ and that the practices involved were ‘contrary to accepted legal principle imported to Australia as British common law and, from late 1946, constituted a crime against humanity’ (Dodson and Wilson, 1997: 275). Genocide Studies academic Colin Tatz¹⁰ (1999) offers a careful reading of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide against the policies, practices and discourses of Aboriginal affairs in Australia in the 20th Century, which concludes the label is appropriate (Reynolds 2001).

In a powerful scholarly review of the right-wing critique of *Bringing Them Home* and the issue of the Stolen Generations, Manne (2001) documents an appalling record of lies, misrepresentations and shallow racism that passed for journalistic comment in the Australian mass media in the late-1990s. He also documents the reprehensible political response of the Howard Government to the challenges presented by *Bringing Them Home*. Unlike every other Australian government, the national government refused to consider an official apology for the policies and practices of the past. The then Minister for Aboriginal Affairs, Senator John Herron, explained the government’s thinking in the following terms: ‘The government does not support an official national apology. Such an apology could imply that present generations are in some way responsible and accountable for the actions of earlier generations, actions that were sanctioned by the laws of the time, and that were believed to be in the best interests of the children concerned’ (quoted in Manne, 2001: 75).

Manne concludes that the right-wing efforts to undermine *Bringing Them Home*, to deny the possibility of genocidal policies as part of Australia’s national history and to refute the appropriateness of a formal apology, is part of the nation’s struggles ‘to come to terms with the crimes committed during the settlement of their country’ (Manne, 2001: 102). He also concludes that the right-wing denial of history, responsibility and morality has a range of inter-connected symptoms. These include the emergence of One Nation as an extreme but powerfully influential element of electoral politics, the ‘profound ambivalence’ of the Howard government on issues of race, justice and identity, and the re-

¹⁰ Colin Tatz is Director of the Centre for Genocide Studies at Macquarie University Sydney. He has been a significant analyst of Aboriginal social conditions for forty years since leaving South Africa. Among his most significant contributions were his chairing of the Social Impact of Uranium Mining Project in the Kakadu region in the early-1980s (1986), and his most recent analysis of Aboriginal suicide patterns (2001).

writing of history in the popular media and the right-wing journal *Quadrant* (Manne, 2001: 104-105). With the prospect of a national election in late-2001 and the merging of these internal racial issues into a fear-and-loathing campaign about ethnic-related crime, rural crisis and refugees who are characterized in hostile racial and religious terms, this denialism reflects a major polarization of politics and social policy in Australia, at great cost to the welfare and well-being of indigenous Australians.

The politics of difference: indigenous challenges and opportunities

Australia has widely been seen as a mature, humane and tolerant multicultural society, whose innovative policies of indigenous recognition, multiculturalism and social welfare offer a valuable example to nations facing similar challenges. The radical shift to the right in Australian politics and political commentary that has occurred in the 1990s threatens that reputation and the effectiveness of the policies in shaping a coherent national identity and polity. In contrast to the accusations that dealing with indigenous claims of sovereignty and self-determination threatens Australia's national coherence, it has been the divisive and racialized discourses of the right that have threatened to split Australians into hostile competing and potentially violent opposing camps.

In summary, then, at this point in 2001, the Australian Government has institutionalized discrimination through the *Native Title Act*, despite criticism from the UN Committee on the Elimination of Racial Discrimination. Emergence of the One Nation party and its racialized politics of blame and division has increased visible racism markedly. And there has been deep division amongst indigenous peoples about the prospects for and implications of the reconciliation agenda, which has been re-focused towards a depoliticized notion of 'practical reconciliation'. The challenges of producing a convincing vision of national policies built on recognition, justice and diversity remain urgent in Australia. For indigenous peoples, the task of rebuilding the institutions of self-governance in such hostile circumstance present huge difficulties. Yet there are glimmers of positive shifts. In South Australia, for example, over twenty native title claim groups have organized themselves into a Congress that presents a united voice on negotiations with the state government on issues of native title and social justice (Agius *et al*, 2001). In Cape York, Rio Tinto subsidiary Comalco Ltd. has recently signed the Western Cape York Communities Coexistence Agreement that recognizes

Aboriginal interests in new and innovative ways (Cape York Land Council and Comalco, 2001; O'Faircheallaigh, 1998). And throughout Australia indigenous peoples are re-asserting their own values, relationships and rights in many domains from sport, the arts and the economy to the daily processes of family life. The prospects for structural change that shifts the Australian polity towards justice and recognition in a sustainable way in the face of the radical conservatism introduced by the Howard government in the late-1990s remain uncertain, but, as the public support for reconciliation and the Stolen Generations has shown, there are clearly many Australians willing to address the challenge.

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