VIEWPOINT

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Peoples, Nations and Peace

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Mabo Oration
Address to the Anti-Discrimination Commission of Queensland

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PEOPLES, NATIONS AND PEACE

Mabo Oration

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Let me thank the traditional owners for their welcome to their country. Let me also acknowledge the Elders and members of the Indigenous Torres Strait Islander and Aboriginal community of Brisbane – I bring greetings from our people in Cape York Peninsula.

Chief Justice de Jersey, our most senior judicial Elder in the State of Queensland, it's an honour to be present with you this evening: your commitment to reconciliation is a beacon to the people of this State.

To Commissioner Susan Booth and the Anti-Discrimination Commission of Queensland, I commend your decision to establish this annual Oration in memory of the late Eddie 'Koiki' Mabo, whose name will forever endure as having fought and won what I consider to be the most profound of all of the struggles that lay at the heart of the conflict between the Indigenous peoples and the non-indigenous people of Australia.

Of all of our distinguished guests here this evening, ladies and gentlemen, let me in particular acknowledge the one who established the very human rights framework within which Eddie Mabo and the late Ron Castan QC, and their colleague plaintiffs and legal associates were able to secure victory, in *Mabo and Others v The State of Queensland*[1] – former Prime Minister, EG Whitlam, revered as a statesman by the non-indigenous people of Australia and held in great affection and respect by its indigenes.

Mabo as a foundation for reconciliation

Let me address my opening remarks to Mrs Bonita Mabo and to members of the Mabo family: your late husband, father and grandfather did not just make a lapidary contribution to the history of this country such that his name will never be forgotten – he was the key figure in the achievement of something more important than fame: 3 June 1992 was the day that Australia was offered the means for its colonial redemption. I hope that it will one day be the national day of reconciliation.

I have had cause to reflect on this proposition – that the principles established by *Mabo* represented the best opportunity for resolution of the colonial grievance between Indigenous and non-indigenous Australians; what I have often called a once-in-a-nation's-lifetime opportunity – and I still believe in the correctness of this view. *Mabo* was and is still our only opportunity. *Mabo* was and is our cornerstone for reconciliation. Legally, politically, historically, morally – I can conceive of no

[1] 175 CLR 1

alternative foundation, either presently available or which can be conjured in the future.

As to whether this country will seize the opportunity of *Mabo* will depend upon whether we are faithful to its substantive principles as well as its spirit. I have on previous occasions expressed the fear that the opportunity of *Mabo* was going to be squandered by the Australian people, and that too many of our political and judicial leaders just simply *know not what they do,* when they treat Eddie Mabo's achievement as simply a legal doctrine relating to real estate – rather than as the principles which effect a reconciliation of the original occupation and ownership of this continent and its islands by its indigenous peoples and the assumption of sovereignty by the British Crown to which the Australian nation is successor.

The Supreme Court of Canada described the institution of Aboriginal (or native) title now protected by section 35 of the Canadian Constitution, precisely in terms of reconciliation. In the landmark case *Delgamuukw* in 1997[2] the then Chief Justice Lamer said that:

> … those rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory. They attempt to achieve that reconciliation by "their bridging of aboriginal and non-aboriginal cultures" (at para. 42). Accordingly, "a court must take into account the perspective of the aboriginal people claiming the right. . . . while at the same time taking into account the perspective of the common law" such that "[t]rue reconciliation will, equally, place weight on each" (at paras. 49 and 50)

I will not rehearse my views on how we are letting this opportunity slip from our hands, except to make one point more explicit: that it is the Australian judiciary which is eroding the opportunity of *Mabo*. It is their poor articulation of the statute and common law of native title that is short-changing Aboriginal rights. For those who think that poor judgments have been handed down by the judges of the High Court who have been appointed since the Coalition ascendancy in 1996, I say that some of the most intellectually disappointing judgments have come from the judges earlier appointed by Labor.

If it is indeed possible to say 'in my respectful view' when making bitter criticism; it has been some of the crucial judgments of Justices Kirby and Gaudron which supported the conceptual deterioration of native title[3]. And Justice McHugh's hand-

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[2] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010, para 81

[3] **On jurisdiction as a concomitant of the recognition of Aboriginal law:** The question of whether communal native title involves a jurisdictional right is still open in the common law of Canada: see *Delgamuukw, op cit,* para 171. If native title involves the recognition of Aboriginal law, then this law does not just govern the relationship between the natives and the land – it also governs relationships within the native community itself. Internal governance is a necessary dimension to the recognition of Aboriginal law and custom by the common law. Despite this logic and the fact that the question is a serious one deserving proper consideration, Kirby J peremptorily dismissed the possibility in his judgment in *Wik Peoples v The State of Queensland* 141 ALR 129 at 256. **On the alleged fragility of native title:** In his judgement in *Fejo v Northern Territory* (1998) 156 ALR 721, Kirby J referred repeatedly to the "inherently fragile" nature of native title: para 107, para106, para 108, para 112: "So

wringing in *Mirriuwung Gajerrong*[4] about how the native title "deck is stacked against the native titleholders", and calling for the court's role to be replaced by the legislature – must be seen for its dissembling. McHugh destroys the legal leverage of indigenous peoples before the courts whilst at the same time saying that it is rightly a matter for political resolution: but how can a political settlement be encouraged if the negotiating position of indigenous peoples is being destroyed by court judgments such as his own? Not since Justice Wilson (as he then was) gave his dissenting judgment in *Mabo (No 1)*[5] – which would have allowed then Premier Joh Bjelke-Petersen to destroy the progress of the *Mabo* case by its enactment of the *Queensland Coast Islands Declaratory Act 1985 (Qld)*, had not the 4-3 majority in the High Court held the draconian Queensland legislation invalid by operation of the Commonwealth *Racial Discrimination Act 1975 (Cth)* – has there been such egregious disingenuousness.

The Australian courts fail to understand, at a fundamental level, that the law of native title is the law of reconciliation. This is not to say that all land and cultural justice could and would be delivered through the strict working out of native title – legislative and political measures were and still are necessary to account for dispossession – but *Mabo* established the over-arching moral framework for such reconciliation. That framework encompassed three basic principles: firstly, that the accumulated entitlements of the colonisers and their descendants were now indefeasible and could not be disturbed; secondly, that the remnant, un-alienated lands

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fragile is native title and so susceptible is it to extinguishment that the grant of such an interest, without more, "blows away" the native title forever**",** footnote 164. There are many problems with this characterisation of native title. Whilst *Mabo (No 2)* established the susceptibility of native title to extinguishment by valid sovereign act, Kirby J's characterisation of native title as "inherently fragile" is without precedent. It is one thing to accord an extinguishing power in the sovereign, it is another to characterise native title as (inherently) fragile. Moreover, Kirby J refused to grapple with the fact that the failure in *Mabo (No 2)* to apply the common law rule against derogation to native title has no precedent, and that the rule establishing the "fragility" of native title in the common law of Australia is discriminatory: see Kent McNeil, "Racial Discrimination and Unilateral Extinguishment of Native Title" (1996) 1 *Australian Indigenous Law Reporter* 181. No reference was made to McNeil's article which was available at the time that *Fejo* was considered by the High Court. **On the alleged non-applicability of overseas precedents to native title in Australia:** The most damaging dismissal of the relevance of overseas precedents on native title to the development of the common law of Australia came from Kirby J in *Fejo.* Kirby J virtually licensed the High Court to ignore important precedents from North America, not the least the Supreme Court of Canada's decision in *Delgamuukw, op cit.* See Noel Pearson, "Land is Susceptible of Ownership" in Peter Cane (ed) *Centenary Essays for the High Court of Australia*, Butterworth-Heinemann (2004), 111. **On the misinterpretation of section 223 of the Native Title Act 1993-1998 (Cth):** Both Kirby and Gaudron JJ joined the majority of the High Court in their misinterpretation of the definition of native title in section 223: see Noel Pearson, 'The High Court's Abandonment of "The Time-Honoured Methodology of The Common Law" in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta' (paper presented at the Sir Ninian Stephen Annual Lecture 2003, University of Newcastle, Newcastle, 17 March 2003). This misinterpretation has had a profoundly deleterious effect on the concept of native title in Australian law, and enabled the High Court to confine the interpretation of native title by reference to its statutory definition, rather than by reference to the common law.

[4] *Western Australia v Ward and Others* (2002) 191 ALR 1, 165 at para 561.

[5] *Mabo and Others v. the State of Queensland (No. 1)* (1988) 83 ALR 14 at 18.

endured for the benefit of their traditional owners; thirdly, that in respect of certain larger categories of land such as pastoral leases and national parks the Crown and native titles would coexist.

My address this evening is entitled 'Peoples, Nations and Peace' and my discussion will traverse the concepts of self-determination, sovereignty and people-hood. Before I embark on this discussion let me first make some preliminary and simple points about human rights.

Human Rights

My primary concerns with human rights are not so much their recognition and declaration, but their *realisation* and *enjoyment* in reality rather than mere theory. There are two ways in which human rights are secured.

Firstly, some rights are amenable to enjoyment simply through the formal operation of law: such as the right to be free from discrimination by acts of governments. The enactment of the *Racial Discrimination Act 1975 (Cth)* by the Whitlam Government therefore secured tangible and substantive human rights protections for indigenous people against discriminatory treatment by hostile governments. The defeat of Joh Bjelke-Petersen's attempt to extinguish the claim to the Murray Islands – described in *Mabo (No 1)*[6] – and the defeat of Richard Court's attempt to replace native title in Western Australia with the *Land (Titles and Traditional Usage) Act 1993 (WA)* – described in the *Western Australia v The Commonwealth*[7] *(*the so-called *Native Title Act Case)* – was the result of human rights standards which could be enjoyed by operation of law.

Secondly however, there is a more vast set of human rights which cannot be secured by formal operation of legal rights. The rights of children for example and the rights to economic, social and cultural development of indigenous peoples – cannot be realised by the recognition and declaration of standards. The problem with lawyers and advocates of human rights is that they have a tendency to believe that the law can effect social and economic justice by simple fiat.

My insistence is that the achievement of the vast proportion of human rights requires individuals, families and communities *to take responsibility to effect the social and economic changes* that would enable indigenous peoples to enjoy justice in reality, not just theory. If the rights of indigenous children are to be enjoyed by them in practice, then some people have to take responsibility for producing the conditions for them to enjoy their rights. These responsibilities do not just fall upon governments, though they must play a crucial role. The primarily responsibility falls upon individuals, families and communities – without which the rights of the child cannot be realised. Responsibilities and rights therefore are inextricably bound together, as two sides of the same coin.

In the debates on indigenous policy there is much focus on the critical importance of "the rights agenda". To the extent that the proponents of the rights agenda think that these rights can simply be brought about by legal and political fiat, then they are

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[6] *Mabo and Others v The State of Queensland* (1989) 166 CLR 186

[7] (1995) 183 CLR 373

deluded. The great majority of the human rights of indigenous people can only be achieved through social and economic reforms – which require our people to take responsibility as much as enjoying to the fullest those rights that can be delivered through political and legal settlements. It was the then indigenous Premier of Greenland, Lars Emil Johansen, who opened my eyes to this truth when he told us in Cape York Peninsula in a visit in 1994: "Self-determination is the right to take responsibility. Self-determination is hard work."

Let me now turn to a discussion of peoples and nations.

Peoples and Nations

We usually do not reflect on the fact that it is quite remarkable that large ethnic groups such as the Australian settler culture with Anglo-Celtic origins do exist. Such collectives consist of individuals who have only a few dozen or a few hundred relations and professional or personal relationships with other people. But each member of an ethnic group strongly identifies with millions or thousands of unknown people only because they belong to the same people.

We live in the age of people-hood. The ancestors of indigenous Australians quite recently lived under circumstances where the people they strongly identified with numbered not more than hundreds. Each individual knew or had met most other individuals amongst his or her people. Such was life in all parts of the world in ancient times.

On the other end of the spectrum, the idea has existed for a long time about a universal human community. From a philosophical point of view, the original small close-knit social units and a possible future united humankind may seem like more natural ways of organisation than our current state of people-hood in between those two extremes.

It is remarkable that the notion of the people, which is intermediate between tribal organisation and a universal culture, is so resilient.

I will not attempt to explain the phenomenon of people-hood. However, people-hood is a fact. It is the most important factor in modern history and contemporary politics.

It is important to remember that the sovereign states are older than nationalism and the principle of "one people, one state". After the emergence of nationalism, the system of sovereign states has gradually been transformed to correspond more closely with ethnic boundaries. The Treaties after World War 1 and the Russian Revolution were a great leap forward for the principle "one people, one state" in Europe. However, the ideal is unattainable for political, historical and practical reasons. This is much more the case outside Europe because of the lesser role of national movements and the greater role of colonialism in the shaping of the borders of the sovereign states. Therefore, almost every sovereign state is a shared state; almost every sovereign state has a domestic political question about the relationship between the peoples within its borders.

Iceland has no such domestic question. She was settled by a homogeneous group of people. Every Icelander lives in Iceland except voluntary emigrants, and all residents of Iceland are Icelanders except legal immigrants.

The Commonwealth of Australia is not as fortunate as Iceland. The prolonged insistence that she was, has caused her indigenous peoples great grief.

We have now realised that Australia is a country shared by three peoples. People often refer to the Aboriginal Australians as several Indigenous nations, reflecting the smaller pre-contact social units I mentioned before, but it is obvious that colonisation has had a unifying effect on Aboriginal people and that it is today justified to regard us as one national minority.

I recognise the distinctness of the Torres Strait Islanders – Eddie Mabo's people – but for simplicity I will in most of this speech refer to non-Indigenous and Indigenous Australians as the two Australian peoples.

The questions that face us in Australia are the same questions that every sovereign state shared by two or more peoples has to contend with. Both the majority people and the minority have to grapple with the possible strategies of assimilation, separatism and integration. We have to grapple with these issues both as individuals and as collectives.

I aspire and work for a successful integration, combined with a strong recognition of the rights of the minority. What that should mean in practice I will return to later, but first I want to say a few words about the lack of definition of the right to self-determination for peoples in international law.

The difficulty with coming to terms with the place of peoples within nations is that the right to self-determination has only been defined and declared in international law in respect of the recognised sovereign states, and in individuals. The place of sub-groups and peoples, not the least indigenous peoples, has never been defined and their right to self-determination has never been formally articulated.

The Working Group on Indigenous Populations established in the early 1980s sought to develop a *Declaration on the Rights of Indigenous Peoples* and the formal drafting process commenced in 1995[8]. This process has proceeded very slowly and may or may not come to a conclusion. We should not hold our breaths for an outcome, but there are two points that I will make in relation to the work on the draft declaration.

[8] The text of an initial draft declaration was developed over a ten-year period by the United Nations Working Group on Indigenous Populations (WGIP). When the WGIP completed its work in 1994, the Commission on Human Rights established the UN Working Group on the Draft Declaration on the Rights of Indigenous Peoples in 1995 to develop a Draft Declaration, taking into account the WGIP draft. As a working group of the CHR, the group's membership consisted of governments, although indigenous peoples' representatives were enabled to participate in an observer capacity. See Caroline E Foster, 'Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples', *European Journal of International Law*, Vol 12(1) (2001), pp 141-157. The Group was supposed to complete its work within the timeframe of the International Decade of the World's Indigenous People, which ended in 2004, but this was not achieved.

Firstly, that the declaration seeks to address the fact that the international framework needs an articulation of the rights of peoples within nation states. Secondly, that whatever the outcome might be, it will be premised upon the recognition of indigenous peoples *within* the nation states in which they are located. There is absolutely *no question* that such a declaration will entitle indigenous peoples to be established as separate sovereign entities from the nation states in which they are located. Whatever hopes indigenous peoples may hold for the recognition of sovereignty within the meaning of international law as an outcome of the proposed declaration – they are misplaced.

So there is no international legal framework for dealing with tensions between peoples within sovereign states. The scope of the decolonisation process led by the United Nations is limited. The number of people of living in territories defined as "non-self-governing territories" by the United Nations is less than two million, but we know that the tensions between peoples involve more people than that.

The settling of national issues is largely a political process driven by the peoples concerned. It seems to me that there are three possibilities for dealing with the tensions between peoples within sovereign states and between dominant states and dependent territories.

The first possibility is decolonisation, independence, separatism, secession and similar processes that lead to an increase in the number of sovereign states. However the decolonisation process that began after the Second World War, which resulted in the formation of independent states throughout Africa and Asia has been exhausted, no matter how unsatisfactory its outcomes. By the last decade of the last century there remained only the liberation of nation states following the fall of the Communist union states. Fifteen years later that shakeout is now largely exhausted, again, no matter how unsatisfactory its outcomes. We are left with one reality: the decolonisation process in world history is near to an end. East Timor and the imminent State of Palestine will be among the last of the new sovereign states. There are thousands of distinct peoples across the world and 200 sovereign states. Few new states will be created.

The second possibility is the denial of the rights of minorities and the preservation of the unitary sovereign state. This is likely to lead to continued discontents, because the claims and grievances of minorities and peoples within nations, lie at the heart of many of the conflicts which consume our planet. These claims and grievances never abate without proper resolution.

The third possible choice is recognition and reconciliation: to recognise the status of peoples and to secure reconciliation within the unitary nation state on the foundations of freedom, democracy and

development. The challenge facing the world is not the recognition of peoples through the creation of new sovereign states, but the working out of the relationship between peoples within sovereign states.

I believe that Australia has no choice but to choose recognition and reconciliation as the way to deal with the question of its distinct indigenous peoples.

The question then is how the policy of recognition and reconciliation should be implemented in Australia.

My main thought about the policies for equality of Australia's peoples that I hope indigenous and non-Indigenous Australians can unite behind, is this: we should think about Indigenous Australians as a First World minority instead of an indigenous minority, or more precisely a First World indigenous minority.

What Indigenous Australians need most is to take their fair share of the national and global economies. Economically, we need to become as equal to the non-Indigenous majority as the French-speaking people of Geneva are to the German-speaking majority of Switzerland. My reason for making this assertion is not that I think that the economy should be prioritised before cultural and social issues. I believe that without economic equality, Indigenous Australians will be more likely to lose their Indigenous heritage.

When we discuss the national rights of Indigenous Australians, it is necessary to take as the starting point the ultimate context in which Indigenous people in Australia are situated: the economic context.

Indigenous Australians as a First World minority

In much of the discussion and thinking about "indigenous peoples" there is an assumption that the Indigenous people of Australia are in a similar position to indigenous peoples elsewhere in First World countries (Maoris in New Zealand, Native Americans in the United States, Aboriginal Peoples of Canada, Samis in Scandinavia, et cetera) as well as indigenous peoples living in the Third World (Latin America, Sarawak, West Papua et cetera).

Whilst there are no doubt many commonalities between indigenous peoples living in these various circumstances, I am seeking focus on the fundamental difference between indigenous peoples living in a First World country, in our case Australia, and in the Third World, whether they may govern their own nation state (such as in Papua New Guinea) or are minorities within a nation state which they do not govern (such as the people of Western Papua).

This fundamental difference is the economic context: it is a completely different thing for indigenous people to live within a welfare state provided by a First World country

and in the absence of one in a Third World country. The economic context in which the Aboriginal and Torres Strait Islanders of Australia live, is completely different to that of our indigenous friends over the border in PNG. This difference between the Melanesians who are Australian Torres Strait Islanders and the Melanesians of Papua New Guinea is most starkly apparent on the northern-most islands of the Torres Strait, where both groups meet. PNG does not have a welfare state and is unlikely to develop one for the foreseeable future. Australia is a welfare state and is unlikely to cease being one in the foreseeable future.

The crucial thing about a First World welfare state is this: it can *completely replace* the traditional or post-colonial economies of indigenous communities, with income support through the government transfer system. The safety net guarantee of sustenance for all citizens means that indigenous peoples in a First World situation can cease their traditional economic activities – because their livelihood can be obtained from the government.

Whilst this complete replacement has not occurred and Indigenous communities in remote Australia live in "hybrid" economies – with some real traditional economic activity and some real modern economic activity – it must be admitted that what I have called "passive welfare" is today the predominant component of Indigenous economies in Australia. And the important point is that the welfare state could go on to become the sole source of sustenance for Indigenous people and their traditional economy could stop altogether – and my people would still have a livelihood.

This is the power of the First World welfare state: it has a complete alternative economic replacement for any real indigenous economy.

In my view this distinction, between the indigenous peoples living in a First World welfare state context and those who do not – is *decisive*, and is not properly comprehended when people think about "the survival of indigenous cultures and societies in a globalised world". It may not be properly comprehended by indigenous leaders contemplating the prospects of their people being able to retain their cultures in a changed and changing world.

When I have been observing the incredible cultural vibrancy and diversity of Papua New Guinea in spite of their severe problems, two thoughts have returned to me.

The first was that across the world cultural and linguistic diversity is being maintained because the lifestyles around which these cultures exist, still continue and traditional economic life still continues. It continues not just by the choice of the people of these societies, but by virtue of *necessity*. The sustenance and livelihoods of these societies is *intimately connected* with their lifestyle and their traditional cultural forms. Traditional culture and traditional economy are integrated. Or it may be that the economy may not be "traditional" (in the sense of classical) but the current economy supports and is suited to the maintenance of traditional cultural forms. There was a time when the pastoral economy in which Aboriginal people were involved in northern Australia was conducive to the maintenance of traditional cultural forms, because it gave stock workers and their families access to their traditional country and economy.

The problem which indigenous peoples living in a First World welfare state face is this: there is now no longer any *necessity* to maintain the traditional economy or lifestyle. With the dominant economic base being passive welfare there is now a break between the economic base of Aboriginal society and the cultural forms of our society. There is no longer the necessary integration between economy and culture. The retention of traditional cultural forms then becomes a matter of *choice* rather than necessity.

The second thought was that passive welfare and traditional economy/lifestyle are not compatible. Indeed passive welfare undermines and ultimately unravels traditional relationships and values – and gives rise to social problems and ultimately, social breakdown. You cannot live a traditional lifestyle underwritten by passive welfare: it may seem possible in the short term, but in the long run passive welfare is socially and culturally corrosive.

I undertake this discussion of the economic context in which our people are located so that we can have some clarity in relation to the choices which we face as an indigenous people living in a First World welfare state. There are in theory three choices that I can think of.

One choice is "to remain where we are": attempting to retain our traditions and cultures whilst dependent upon passive welfare for our predominant livelihood. For the reasons advanced earlier, I would say this is not a choice at all. If we do, the social and cultural pauperisation of Indigenous society in Australia will continue unabated, and we will not establish the foundations necessary for cultural vitality and transmission to future generations. We therefore need to confront and demolish the mistaken policy that passive welfare can subsidise the pursuit of traditional lifestyles in remote communities.

The second choice is to "go back": to maintain our cultural and linguistic diversity in the same way as the peoples of PNG are able to, or other such indigenous peoples throughout the Third World. But this is hardly possible. Indigenous Australians are now *engulfed* by the Australian economy and society, and it is impossible to see how territories could be established where the welfare state no longer reached, and traditional economies could be revived (this is not to say we cannot *reform* the welfare state within indigenous regions). For one thing, indigenous people would simply refuse this course in practice.

The third choice is to "go forward" and find solutions to a bicultural and bi- and multilingual future. That is, Indigenous Australians must face the challenge that comes with culture and traditions no longer being linked with our economy in a relationship of *coincidental necessity*, but rather one of conscious choice. This is what I have in mind when I suggest a First World indigenous people, rather than a Fourth World people. Some of the elements and requirements are as follows.

Firstly, it is about being able to retain distinct cultures, traditions and identity, whilst engaging in the wider world.

Secondly, Indigenous Australians will need to ensure that the economic structure underpinning our society is "real". This will require fundamental reform to the

welfare system affecting our people so that we are rid of passive welfare. It will also mean that our people gain our livelihood through a combination of all available forms of "real" economic activities – traditional, subsistence, modern – and this will include the need to be mobile through "orbits" into the wider world and back to home base again.

Thirdly, education will be key to enable bicultural and multilingual facility and maintenance – as well as to enable economic mobility.

Fourthly, we will need to deliberately and decisively shift our cultural knowledge from its oral foundations to written and digitised foundations. We will need fundamental traditionalists to be learned in our languages and cultures to fight for cultural scholarship and maintenance that can withstand whatever social and economic changes we will confront.

I earlier argued that the preservation of Indigenous Australian culture depends on our conscious choice. This is true, but this choice which we have to make ourselves should be made easier by a successful process of recognition and reconciliation.

When I suggest that Indigenous Australians have the right to retain a link to their ancestral lands and their culture, and that this should be accomplished not just through their own efforts but also with legislative and administrative support of government, then I do suggest that Indigenous Australians should be treated differently to non-Indigenous Australians. Non-Indigenous Australians have no recognised right to retain a link to a certain area or a certain culture. Whether or not a family of non-Indigenous Australians continue to own, say, land that their ancestors have cultivated for five generations, or whether or not they continue to speak, say, German, those questions are determined by market forces and personal choice.

Therefore, the answer to the question what constitutes the national rights of the Indigenous Australian people is:

- the right to take responsibility for achieving economic equality with other First World peoples, and

- the right to retain a link with ancestral lands and culture that is guaranteed by agreements and legislation, and by the enduring goodwill of the non-Indigenous majority.

There is one sense in which the concept of sovereignty has been discussed which in my view most aptly describes the special indigenous relationship with their homelands. It is in a passage in Judge Amoun's ruling in the International Court of Justice's advisory opinion in the *Western Sahara Case*[9], which was quoted by Justice Brennan (as he then was) in *Mabo (No 2):*[10]

[9] 1975 ICJ 12, at 85-86.
[10] *Mabo and Others v the State of Queensland* (1992) 107 ALR 1, 28.

> Mr Bayona-Ba-Meya, goes on to dismiss the materialistic concept of terra nullius, which led to this dismemberment of Africa following the Berlin Conference of 1885. Mr Bayona-Ba-Meya substitutes for this a spiritual notion: the ancestral tie between the land, or 'mother nature', and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.

This passage captures the essence of the traditional relationship with land, not just in Australia, but in my view right across the world. It captures a universal concept of Indigenous relationship with the soil of their ancestors – known to Japanese and Amazonian Indian cultures, I expect, as much as to the cultures of Australia's two indigenous peoples. It is the very meaning of 'ancestral homeland'.

It has been proposed by Indigenous and non-Indigenous leaders and commentators that the requisite reconciliation founded on the recognition of Australia's Torres Strait Islanders and Aboriginal people as distinct peoples within the nation – can be secured through what some have called a 'treaty' and others a 'national settlement'.

Treaty

The Aboriginal Treaty Committee established in 1979, chaired by HC 'Nugget' Coombs and including Stewart Harris, Judith Wright and others, advocated a treaty in the early 1980s. The work of the Treaty Committee precipitated the inquiry by the Senate Standing Committee on Legal and Constitutional Affairs, commissioned by the Fraser Government and concluded after the election of the Hawke Government in 1983, into "the feasibility of a compact or 'Makarrata' between the Commonwealth and Aboriginal People". The Committee's report, *Two Hundred Years Later*[11], recommended that there be an amendment to the Australian Constitution which would authorise the Commonwealth Government to negotiate and settle an agreement between the Commonwealth and Indigenous peoples covering an unspecified range of issues.

The work of the Aboriginal Treaty Committee and whatever consistency there was with the position of the Indigenous leadership in the then National Aboriginal Conference, was nevertheless shadowed and superseded by an alternative view of a treaty which became the campaign for a Treaty in 1988 – one of the most energetic

[11] Senate Standing Committee on Constitutional and Legal Affairs, (Tate, M. C., Chairman) *Two Hundred Years Later ... Report on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People*, Australian Government Publishing Service, Canberra, 1983.

advocates of which was the late Wiradjuri intellectual, Kevin Gilbert. Gilbert published blistering criticisms of the concept of the Makarrata describing it in 1980 in 'Aboriginal way' as follows:

> "Makarrata' is a dog deal, a Jacky Jacky deal, a pact with the devil on the devil's terms"… and "the kiss of Judas"…[12]

The differences between those who pushed for a compact or Makarrata and those who pushed for a treaty were profound, but perhaps not substantial.

The first difference was whether what was being sought was going to be called a treaty or some other form of agreement – such as compact or Makarrata.

The second difference was whether the proposed agreement was one premised on the assumption of Aboriginal sovereignty, and whether such agreement would be between two sovereign nations – the Australian nation and an Indigenous nation or nations. One approach – the Makarrata – was not proposed as a treaty within the meaning of international law, that is, a treaty between two sovereign nation states. The other approach, which became the approach of the Aboriginal Provisional Government in the 1980s, of which Michael Mansell was the most well-known proponent – was proposed as a treaty within the meaning of international law and was premised on the recognition that the Indigenous peoples of Australia were sovereign prior to colonisation and their sovereignty has not been lawfully extinguished, and a treaty would be an agreement between nations recognised in international law.

As to the substantive subject matter which would make up the terms of a 'treaty' or 'Makarrata' – the differences were less obvious. Both approaches contemplated that issues to do with land rights, jurisdictional rights, economic and political rights would form the subject matter of the agreements. So, putting aside the profound differences in (a) nomenclature and (b) international legal status of the parties to the agreement and the agreement itself – the substantial issues that were sought to be covered by a Makarrata or a Treaty, were similar.

Of course, the Bicentenary target of 1988 remained unfulfilled, notwithstanding Bob Hawke's commitment to a treaty – subsequently called a compact – at the Barunga Festival in 1987.

The 1990s was the 'reconciliation' decade and talk moved from treaty, Makarrata and compact to 'unfinished business', 'document of reconciliation' and 'national settlement'. The High Court's *Mabo* decision in 1992 gave hope that there would be substance to reconciliation. However, the Centenary of Federation target of 2001 came and went unfulfilled.

Now is not the time for me to say whether or not a treaty, Makarrata or national settlement should be pursued and what purpose might be served for all Australians if we were to achieve an agreement between the descendants of the original and the newer Australians more than 200 years later. Too much confusion surrounds these

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[12] Kevin Gilbert "Makarrata: NAC sellout", Aboriginal-Islander Message, No 13 (1980), p.5, 12-13 (http://www.aiatsis.gov.au/lbry/dig_prgm/treaty/t88/m0019849_a.pdf).

questions, and little will be gained from either supporting or rejecting the concept of a national agreement, until we get much more clarity in the discussion.

I think that confusions and cross-purposes surround the following questions:

- The necessity and purpose of a settlement
- The fundamental legal premise of a settlement
- The nomenclature of a settlement
- The strategy for the achievement of a settlement

Let me make some brief comments on each of these.

The necessity and purpose of a settlement

Of course the Right questions the necessity and purpose of a settlement. Judith Wright and others, including people from the liberal Right such as Malcolm Fraser, have advanced the case for a national settlement. There are two comments I will make in relation to how cogent the case for the necessity and purpose of a settlement is. Firstly, advocates have often assumed that the achievement of a treaty is a precondition to Indigenous social and economic recovery. I do not accept this. We must and we can act now to confront and start to resolve the problems afflicting our people. We cannot allow the uncertain goal of achieving a national agreement leave us sitting on our hands. Secondly, I do not accept the assumption that the achievement of a legal/political settlement will automatically guarantee solutions to social and economic problems. Legal/political settlements can only be a part of any solution. As I have said, the other part involves responsibility and hard work.

I think much more rigorous thinking is needed still on the construction of the case for the necessity and purpose of a settlement. There is far too much, and often justified, scepticism in the Australian community about what substantive gains will result from the achievement of what is currently seen as a 'symbolic' gain. The case must be made for how and why Indigenous and non-indigenous Australians will gain from a national settlement.

The fundamental legal premise of a settlement

I first expressed my views on this in an article in the *Indigenous Law Bulletin* in 1993[13]. My views remain unchanged. A national agreement would be a domestic legal agreement, between the Indigenous *peoples* of Australia and the Commonwealth

[13] Noel Pearson, "Reconciliation: to Be or Not to Be", 61 *Aboriginal Law Bulletin* 14 (1993).

Government on behalf of the Australian nation. Treaties in the United States, Canada and New Zealand have not had the character of international legal agreements between nation states. This acceptance does not deny the fact that Indigenous peoples possessed sovereignty before colonisation and it does not deny the fact that Indigenous peoples did not consent to colonisation and the extinguishment of their original sovereignty. It also does not deny the possibility of sovereignty or jurisdiction in a domestic sense. It is an acceptance of the *Realpolitik* that talk about treaty in the sense of an agreement between two sovereign nation states is fantasy.

The nomenclature of a settlement

The implication that a treaty involves an agreement between sovereign nation states, is the source of much of the rejection of the proposal. Only if it were clear that the treaty that is proposed is a *domestic treaty* would it be at all possible for the term 'treaty' to be acceptable. It is astounding to me how much the nomenclature of any proposed agreement represents a longstanding and as yet, unresolved, impediment to the identification of possible common ground. For many opponents the word 'treaty' represents a threat to the Australian nation. For many supporters any word less than treaty is not good enough (ever since I saw the Moir cartoon in the Sydney Morning Herald of an Aboriginal sitting in front of a mirror applying Bob Hawke's new 'compact' – the word has not done a great deal for me either).

These opposing positions ignore three facts: firstly, that the word treaty has been used in its domestic meaning in North America and New Zealand; secondly, that most of the supporters of a treaty are in fact talking about a domestic agreement; and thirdly, that many of the opponents of a treaty would support a domestic agreement.

The strategy for the achievement of a settlement

This is where I believe proponents of a treaty have been the weakest: they have failed to articulate the necessary strategies to achieve their desired goal. Indeed they have not even faced up to basic considerations.

Almost all of the proponents of a national agreement, whether the Aboriginal Treaty Committee or the Senate Standing Committee that reported on the Makarrata – have all concluded that a treaty would require amendment to the Australian Constitution. Much of the discussion facilitated by the Council for Aboriginal Reconciliation around a 'document of reconciliation' during the 1990s was based on the hope that it would lead to a national agreement underpinned by constitutional amendment. Even the proposals put forward by Kevin Gilbert included amendment of the Australian Constitution which would set out a Bill of Aboriginal Rights.

Well the basic consideration in relation to any proposal to amend the Australian Constitution is this: you need *a majority of voters in a majority of the States* to support a referendum to amend the constitution. That is, you need the support of 80-90% of the Australian people at a referendum. In order to have any chance of securing 80-90% of the Australian people in support of constitutional amendment, you will need bipartisan political support – and furthermore, in the case of an amendment concerning Indigenous peoples, it will have to be championed by the conservative political parties if it is to have any chance of succeeding.

I think it is as plain as day that unless a national agreement has the support from the most conservative (but decent) end of the Australian political spectrum – regional and rural Australia – and their political leaders, then any form of national settlement stands no chance at all of even being a possibility.

In conclusion let me say to the Mabo Family and to our hosts, the Anti-Discrimination Commission of Queensland, that it has truly been my privilege and honour to deliver the inaugural 2005 Mabo Oration.