Published in abridged form as Jull P & Kajlich H, 2001:
Chapter 21, 'First Peoples, Late Admissions: Recognising Indigenous Rights',
Beyond the Republic: Meeting the Global Challenges to Constitutionalism,
ed C Sampford & T Round, The Federation Press, Sydney, 257-269 (& Appendix 2, 303-305).

First Peoples, Late Admissions:
Recognising Indigenous Rights[1]

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Conference Paper, 1999 Fulbright Symposium,
Beyond The Republic: Modernising the Australian Constitution,
Key Centre for Ethics, Law, Justice and Governance (KCELJAG),
Griffith University, Brisbane, September 29 – October 1, 1999

Background

A basic international consensus on indigenous political economy has been growing in recent decades (IWGIA 1999; Jull 1998a; Wilmer 1993). This has resulted from advocacy and court-decreed or negotiated practices of indigenous peoples and governments – some very reluctant governments becoming some of the most enthusiastic advocates when they have been won over. Change has resulted largely from social, educational, political, and attitudinal changes following World War II among both indigenous and non-indigenous peoples. The United Nations framework and ideals, and court decisions in various countries, may be seen as cause or effect, or both. But the move to more enlightened politics *vis-à-vis* ethno-cultural and racial diversity is complex, and the precise role of any factor hard to isolate. Australians, meanwhile, tend to under-rate the relevance of North American indigenous experience on the grounds that wonderful constitutional, legal, and treaty frameworks there make that situation utterly remote from Australia. That view is incorrect. The complex of changes on both continents is similar.

The vehement debates within parts of the indigenous world on some issues and, more precisely, on their remedies, may also obscure trends. Indigenous peoples everywhere have a common basic agenda. Apart from re-asserting their former status as self-sufficient and recognised 'nations', in particular they want respect by outsiders for their traditional territories of land, sea, and freshwater; continued access to their resources and livelihoods based on those; respect as distinct cultural and political communities; and freedom to take significant decisions and choices for their future and the future of their descendants. Ideally this translates into governance and ownership or control of territory, or some such arrangement to the extent achievable in contemporary terms where non-indigenous settlement and industry have impinged

[1] Now published in abridged form as Jull P & Kajlich H, 2001: 'First Peoples, Late Admissions: Recognising Indigenous Rights' (Chapter 21), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism,* ed C Sampford & T Round, The Federation Press, Sydney, 257-269 (and Appendix 2, pp .

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on or overwhelmed traditional territories. The large and increasingly educated portions of indigenous communities relocated to urban areas in recent decades are working through other complex questions. Mixing both views may be Sami, 'the Lapps', who retain strong local and regional roots in remote hinterlands with high living standards, while representing themselves through highly educated professionals, artists, and educators stressing a cultural more than 'land claims' agenda.

Initially isolated in their failed indigenous policies – when not trying to blame these on the 'apathy' or recalcitrance of 'the natives'! – developed European-peopled countries have come a long way in the post-1945 period. Some countries have worked through significant portions of the indigenous political agenda, including constitutional recognition and affirmation of rights, recognition of new or renewed self-governing institutions, both ownership and use rights for land and waters, acceptance of cultural autonomy, etc. They have even come to share ideas and problems internationally in seeking solutions, e.g., through the Arctic Council. While this has incidentally broadened non-indigenous national political cultures, it may not yet have overcome grim indigenous realities, e.g., bitterness and socio-economic ravages. Collective pride and restored identity are essential ingredients, not fragmenting forces. (Boldt 1993; Alfred 1999; Richardson 1991) Indigenous needs are generations long while non-indigenous attention span in the TV era is very short.

The legal and political status of Aborigines and Torres Strait Islanders is widely and increasingly recognised as a touchstone for the identity and future of Australia. The dismal social and economic conditions in which so many indigenous people live is often seen as a national failure and a matter of international shame. Nevertheless, there is little consensus within or among governments, the public, universities, or other commentators on what should be done. In the past several years, populist politicians including some in the federal Liberal-National coalition government have widened those differences of opinion and attacked what progress had been made. 'Recognition, rights and reform', in the title phrase of one important report, is needed in the Australian constitutional system in respect of indigenous people (ATSIC 1995).

At this conference we have heard affectingly from several speakers about the South African transformation, notably the expansion and renewal of political culture and society resulting from the 'reconciliation' processes underway there after many decades of the deepest and most painful division. Canada, too, has been transforming its political culture through accommodation or reconciliation with indigenous peoples since the 1960s. It is important to move beyond the frequent assumption by public figures in Australia that reconciliation diminishes and takes away something from the majority and transfers it to a needy group. Rather, reconciliation enlarges prospects and perspectives, identity and nationhood.

Northern Territories

The constitutional politics of their 'northern territories', Alaska and the Northern Territory, has been a striking parallel between the USA and Australia. Both enjoy iconic status as national hinterlands, and both enjoy communicating their eccentric charm to awed fellow citizens in more temperate climates. But those facts obscure

the basic political dynamic: that in each of those regions a highly transient non-indigenous population and more permanent settlers are in collision with the cultures, claims, political values, and economic imperatives of the resident indigenous peoples. (Downing 1988; Berger 1985; Taylor 1991)

In Alaska the basic rights and imperatives of indigenous peoples have been protected up to a point by national institutions, notably Congress, courts, and the Executive Branch. Although statehood was granted in the 1950s, the national government did not abandon Alaska Natives or their land rights, and the *Alaska Native Claims Settlement Act, 1971* – or ANCSA as it is known – was negotiated by indigenous leaders with Congress. It was sped along by American desire for access to the supplies of oil of the Beaufort Sea region of the Arctic Ocean, supplies which would be immune to the international politics or wars of non-Americans. The *c.* 200 villages of Native Alaska and the dozen or so indigenous regions are the cultural matrix of this old and persistent Alaska, while Anchorage, Fairbanks, and Juneau account for most of the non-indigenous population. Although several times larger than the NT, Alaska has a similar proportion of largely transient non-indigenous to permanent indigenous people, about 4 or 5 to 1. There are two Alaskas with two ways of life. (Berger 1985; McBeath & Morehouse 1980; 1994)

The Northern Territory since 1978 has been self-governing with one-party rule and that party not receptive to Aboriginal rights, imperatives, or aspirations. The NT government wants to take over the federal NT land rights legislation and have full control of Aboriginal lives on the same model as Australia's 1901 constitutional settlement (Chesterman & Galligan 1997; Jull 1996). Under that 1901 framework Australia's indigenous peoples continued to be marginalised, abused, and sometimes massacred. The lack of constitutional and legal protection for indigenous peoples was a departure from British Empire practice – USA, Canada, and New Zealand all inherited a different approach from Britain, although the British sometimes had similar good intentions for Australia (Reynolds 1987; 1995). NT Aboriginal leaders and peoples want to work out their constitutional status at local, regional, and territory-wide level rather than be marginalised in a system designed by white settlers eager to exploit Aboriginal land. To the amazement of many people, a supposedly safe win for the preferred NT government statehood constitution was defeated in a referendum 1998, thanks in no small part to Aboriginal organisation of 'anti' forces.

In the post-1945 world the 'first world' has tried to do things in a new spirit – one might almost say a post-colonial spirit. Old habits die hard, and indigenous people in Australia, USA, or anywhere else would laugh at the notion that 'the White Man' had really reformed.[3] However, Alaska, like Northern Canada, Northern Scandinavia, Greenland, and New Zealand in the post-war years, saw indigenous peoples treated in a new way – paternalistic at first but tending towards a new respect and equality. That is, those countries departed significantly from their 19th century style of frontier indigenous policy.

World War II was no less important for Australia's Torres Strait Islanders and Aborigines in its social and political impacts (Ball 1991: Beckett 1987). However, the constitutional arrangement whereby the states had exclusive power in indigenous

[3] White Man is not a politically incorrect slip here but a much-used term among indigenous (and many other) peoples for the historical fact of past and present European dominance.

affairs persisted until a massive national referendum vote in 1967 saw the federal government given paramountcy in the field. Nevertheless, the mindset of state control has largely persisted despite some brave federal steps by some prime ministers at some times. The current federal government believes land issues are appropriately a state or territory matter. US and Canadian experience accords, but with the exception that indigenous land rights are a particular federal and national responsibility there. The Australian experience of leaving indigenous rights to settler and development interests who control state and territory capitals has been disastrous, of course.

Australia and the NT have the opportunity to 'do it right'. Section 121 of the Australian Constitution invites federal Parliament to 'make or impose such terms and conditions... as it thinks fit' when adding states to the federation. The 20th century has taught the world, including Australia, many things about race relations and ethno-cultural accommodation. Recent decades have also set new standards of practice and ideals in the accommodation, or *reconciliation* in the Australian term, of indigenous peoples and territories within contemporary nation-states. These latter lessons have not been learned by some politicians in Australia. The future of the Northern Territory provides a critical test. If Aborigines and their lands and seas are handed over to a Darwin-based government they distrust, and without a system or systems of local and regional government under their control, it will be very wrong. Australia will be deservedly criticised abroad and face ructions at home.

NT Aboriginal peoples have taken their own constitutional initiatives. Workshop-style conferences in 1989, 1992, and 1993, as well as the successful Kalkaringi and Batchelor constitutional conventions of 1998 have shaped, restated, and updated constitutional outlooks at sub-national NT as well as national levels. (E.g., Surviving Columbus 1994; Brown & Pearce 1994; Pritchard 1998; Batchelor 1998) Many other discussions of related self-government and native title issues, and problems of community governance, occur all the time. Outsiders have also paid attention to the constitutional situation of NT indigenous peoples, to the annoyance of the NT government who have wanted attention focused instead on white 'grievances'. (E.g., Gray et al. 1994) Unlike Alaska or Northern Canada, however, indigenous peoples have not been anything like real partners in the negotiation of new structures. In Canada's Northwest Territories a frank multi-ethnic legislature committee found indigenous peoples disaffected from a government they did not consider their own, a valuable prelude to serious constitutional reform. (MacQuarrie 1980) It is not hard to imagine what such authentic soundings would find in the NT.

In Alaska, as in other northern hinterlands – Northern Canada, the Scandinavian North (or *Sapmi,* 'Lapland') – national authorities and political parties have had to encourage their northern friends to fall into line with modern values of racial tolerance and cultural diversity. In Australia, however, Australian federal and state political leaders – not all of them from the Right side of politics – have gone to the NT seeking advice over the years on dealing with Aborigines, a dubious sort of advice about electoral advantage to be gained from stirring racial fears. It would have been better for the country if that particular genie had not been let out of the bottle.

Backsliding is not unique to Australia. In Norwegian areas of Sapmi (Lapland), a burst of nasty populism has entangled recent local government elections. After a Sami notable suggested that some Sami language and culture should be elements of

curriculum for all school-children, an uproar ensued – over and above the simmering tensions over Sami territorial rights of land, freshwater, and sea. During our conference week the prime minister, KM Bondevik, opened the Sami Parliament session in Karasjok with many fine words about strengthening the Sami Parliament role and powers. However, when Sami Parliament president Sven-Roald Nystø said they looked forward to negotiating land and water rights with the government, Prime Minister Bondevik was abrupt and dismissive (*Nordlys,* Tromsø, 29-9-99; *Finnmark Dagblad,* Vadsø, 29-9-99; & personal communications). In a political system when everyone from fishers to herders to model plane clubs negotiate agreements with Oslo, this appears to make Sami third-class citizens. It also undermines the role and purpose of the Sami Parliaments which now exist in Finland, Sweden, and Norway, as Ole Henrik Magga, the founding president of Norway's Sami Parliament, commented (*Nordlys* 30-9-99). The Sami Rights Committee, an expert commission working since 1980, has made a total mess of the Sami rights issue in North Norway in recent years despite the fine work it did earlier under its first chair, so positive outcomes and calm are urgently needed (Brantenberg 1993; 1995). Like Aboriginal leaders in Australia (see below), Sami leaders are looking for a sort of political accord to produce a workable and satisfactory outcome for all sides. We may hope that Prime Minister Bondevik's mixed messages in Karasjok, Sami persistence, and the Nordic reputation for progressive and rational policy will yet produce a good outcome. There are ugly forces loose in the world but ethno-cultural relations are not a matter on which our civilisation can be allowed to unravel.

Lands, Seas, Coasts, Environment

Another Australian 'northern territory' is Torres Strait, a maze of reefs and islands lying between the Australian continent's north-eastern tip and Papua New Guinea. Part of the state of Queensland, Torres Strait has had a dramatic short history in relation to Australian politics, economy, and society. (Singe 1989; Beckett 1987; Sharp 1992 & 1993; Shnukal 1992) It is also the scene of the landmark *Mabo* case in which the High Court discovered native title rights in 1992. (Bartlett 1993; Sharp 1996) The Strait has a confident and maturing regional sentiment for self-government and sea rights, a sentiment cautiously supported by both sides of federal politics. (Lui 1994; Lieberman 1997; also *TSRA News,* No. 26, April 1999)

The Islanders, a Melanesian people who stress their distinct culture and society *vis-à-vis* Aboriginal Australia, are the subject of a complex boundary treaty between Australia and Papua New Guinea. It attempts to manage the environment and social relations through the Strait region for the benefit of the local peoples. (Babbage 1990) Torres Strait is a place of passionate indigenous fishing and sea rights politics, as well as constructive indigenous-led efforts to work out practical and comprehensive coastal management (Mulrennan & Hanssen 1994). A major national coastal zone inquiry has made promising recommendations for Islander and Aboriginal rights and roles, drawing in no small part on Inuit and Indian experience in USA and Canada. (RAC 1993) Progress to date has been too limited to say more. However, while we are meeting in Brisbane an indigenous sea rights conference is meeting in Hobart with calls for action and study of precedents abroad ('Blacks push for fishing zones', *The Mercury,* Hobart, 28-9-99).

The rights of coastal peoples ensured by treaties in the USA, and on Canada's Pacific coast by recent court decisions and federal policy, and Arctic Inuit in both countries, have provided some 'tough love' in recent decades for governments serving outside interests or doing sloppy marine management. (E.g., Jull 1993; Anjum 1984) Indigenous peoples have been working to safeguard marine stocks and habitat. Such constitutional protections are not available in Australia, and the major sea rights case to date is severely limited in its scope.[4] The people of Torres Strait have invited cooperation on coastal rights and sustainable development regimes. They are now securing their basic native title rights as part of their progress towards a stronger regional agreement.[5] The need, always, in achieving the best results is for central governmental authority to support local or regional indigenous initiative and knowledge. Government will have to act sooner or later. The tragedy is that political will and action may have to wait for a tanker accident or other environmental disaster in Torres Strait. Indigenous stewardship or 'custodianship' (in the Australian, not American sense[6]) is an important area of public policy through which Australia could participate in the contemporary world (Brundtland 1987). Despite these difficult years in federal indigenous policy, Australian environmentalists, including officials, remain active in the world and keep some indigenous-centred thinking in the public domain. Meanwhile the only affluent country in the world's Tropics, other than two city-states, is letting slip the opportunity to demonstrate wise use of the world's diminishing marine resource and a sustainable economy for now disadvantaged coastal peoples. When the rich countries pass up such opportunities, what hope for poor ones?

National Recognition and Rights

Some Australians seeking constitutional reform since the 1960s have been interested in Canadian experience from the late 1970s onward and Norwegian reform of the 1980s, both involving national constitutional amendments and careful wording (HREOC 1995, 9-18; Jull 1998b & 1999a). At the Constitutional Centenary Conference of April 2-5, 1991, the beginning of serious national constitutional work towards the centenary of federation in 2001, Australian notables and constitutional specialists delivered to Prime Minister, Premiers, Chief Ministers, and Opposition leaders, their *Statement* after a week's work. It recommended among other items for action that the Reconciliation process should 'seek to identify what rights the Aboriginal and Torres Strait Islander peoples have, and should have, as the indigenous peoples of Australia, and how best to secure those rights including through constitutional changes' (CCC 1991). This was very much how similar Canadian work had begun in 1978 (Jull 1981, 45-48).

In the first days of June 1993, exactly a year after the *Mabo* decision, the then Prime Minister issued a formal response to prepare the way for national native title legislation. In those same days, and with its participants avidly reading that formal response while they waited for the next speaker, a conference on 'the position of indigenous peoples in national constitutions' was also taking place in Canberra (CAR-

[4] *Mary Yarmairr & Ors v Northern Territory of Australia & Ors* [1998] FCA 771, 6 July 1998, Olney J.
[5] *Saibai People v State of Queensland* [1999] FCA 158, 12 February 1999, Drummond J.
[6] I.e., not merely 'caretaker', 'janitor', as in *American Heritage Dictionary,* 1st ed.

CCF 1993a; 1993b). The USA, New Zealand, and Canada had indigenous experts present to tell of their recent national experience. Despite the extremely heterogeneous invitation list and the novelty of the subject, there was a startling degree of consensus bubbling up through the workshops and plenary sessions that:

- indigenous peoples are distinct political communities in Australia with unique needs; and
- processes should be established as soon as possible for them to work out the nature and details of their constitutional place in Australia.

At the conference dinner Professor Daes of the United Nations thanked Australia for its support in advancing work for the world's indigenous peoples by substantially unveiling the *Draft Declaration on the Rights of Indigenous Peoples.*

Then, in 1994-95, an extraordinary indigenous policy process took place in Australia, one not attempted in any other country. Three national indigenous organisation at more or less arm's length from the executive administration, drawing on various other indigenous leaders, and holding two rounds of indigenous community hearings around Australia, worked together, debated (often heatedly) together, and summoned experts in many fields to workshop tough questions before issuing three distinct but overlapping and essential consensual reports. (CAR 1995; ATSIC 1995; HREOC 1995. For a summary, see ANTaR 1999.) The main proposals were constitutional and process-oriented. That is, it was recognised that issues of constitutional recognition of indigenous peoples, self-government, sea rights, 'regional agreements' (as the claims settlements in northern North America from Alaska to Greenland are called in Australia), ownership, indigenous sovereignty, etc., required processes for dialogue, research, understanding, and negotiation rather than quick or glib replies by uncomprehending white politicians and officials. During these years there were various other major reports and inquiries which also noted the need for resolution of indigenous political status.

From February 11-13, 1996, the indigenous Constitutional Reform Conference met in Adelaide, sponsored by ATSIC, and identified the need for more information and discussion of constitutional issues in the indigenous community. One of the resource papers available, ombudsman Mick Dodson's constitutional chapter, found particular favour with delegates ('Constitutional Reform', HREOC 1995. 9-18). Professor Cheryl Saunders, head of the Constitutional Centenary Foundation, noted that there were many pressures for constitutional work in Australia, and that despite the political earthquake looming, that work would continue.

The federal election campaign of February-March 1996 brought out Aboriginal issues as a negative issue. Afterwards the new government, backed by new populist forces which later coalesced as Pauline Hanson's One Nation party, belaboured what it called 'the Aboriginal industry'. However, the High Court decision in *Wik* at the end of 1996 became the focal point for indigenous policy debate, leading to toughened laws on native title passed in mid-1998 amid fears of a national 'race election' tearing the country apart. (Hiley 1997) Following the May 1997 release of a national report on indigenous 'Stolen Children' systematically removed from generations of black mothers, another powerful issue, and demands for a formal national apology, made the federal government seem heartless (Wilson 1997). The federal government,

meanwhile, has maintained the position that indigenous policy 'progress' achieved during the 13 years of Labor government was élite whimsy rather than real or valid social or political change.

On the night of his re-election, October 3, 1998, Prime Minister Howard, who keeps indigenous affairs in his own portfolio of responsibilities, said, to the surprise of many, 'I also want to commit myself very genuinely to the cause of true reconciliation with the Aboriginal people of Australia by the centenary of Federation [January 2001]. We may differ and debate about the best way of achieving reconciliation, but I think all Australians are united in a determination to achieve it.' Unfortunately a conceptual gulf rather than noble sentiments have appeared to prevail since. However, the Prime Minister again surprised Australia by mooting and later unveiling a draft constitutional preamble, and a much revised further draft later again (i.e., March 23 and August 11, 1999), while the Council for Aboriginal Reconciliation released its long-awaited draft 'document of reconciliation', also in two successive drafts, March 5 and June 3, 1999. (PMA 1999; CAR 1999) Both documents involved the Prime Minister in heated public exchanges, and both involved the missing word, *custodianship,* in reference to indigenous links to territory. The February 1998 national Constitutional Convention had recommended in its Communique that 'the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders' be acknowledged in such a preamble (CC 1998). The Prime Minister's revised draft preamble to be put to referendum on November 6 now says: 'We the Australian people commit ourselves to this Constitution' while, among other things, 'honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country'. Its words are exempted from any role in court interpretation, a let-out clause which Aborigines see as taking away with one hand anything gained with the other (while experts foresee further and more basic problems with this attempted exemption, see CCF 1999).

The federal government faces some real pressure, despite its official view that social, education, and health programs, not a political or rights agenda, are what is needed (e.g., Herron 1999). Mere welfare state programming of this type has not undercut indigenous political and constitutional demands anywhere else, it may be noted. There is strong public support for indigenous constitutional progress among Coalition voters as well as among Labor, Democrat, and Green voters, while foreign attention and reports (e.g., M Dodson 1999) and some diplomatic rebuffs have provided another sort of measuring stick. A reliable insider had warned beforehand that a Howard government would be uncomfortable with social and cultural diversity and with discussions of ideas, and he was right (Henderson 1995). Nevertheless, there are great problems accumulated in this country and plenty of years' work for plenty of hands and minds to remedy. (E.g., Kidd 1997; HREOC 1991; Leveridge & Lea 1993)

Getting to There from Here

Now Australia's most widely respected Aboriginal leader, Pat Dodson, formerly the founding head of the Council for Aboriginal Reconciliation, has issued a call for a framework agreement – that is, a formalised political accord – and negotiation process through which to build a new relationship between indigenous and non-indigenous

Australians secured in constitutional arrangements and law. (P Dodson 1999, and **Appendix** below for excerpted agenda items.) There is a new or renewed consensus among Australia's indigenous leaders for such a moderate and directed approach to overcome the lack of progress or understanding in recent indigenous relations with the federal government (e.g., Djerrkura 1999b & 'Unfinished business...', M. Kingston, *Sydney Morning Herald,* 16-9-99; see also ATSIC 1999a & Djerrkura 1999a). Indeed, Aboriginal leaders explicitly endorsed the political accord and negotiation approach at a special conference in mid-September 1999 (ATSIC 1999b). Some federal, state, and territory politicians affect to believe that indigenous aspirations are outrageous, but despite public scare-mongering by them and others, the indigenous Australian agenda is modest and practicable by international standards. What is more, it is well-precedented abroad where its elements have not caused national fragmentation, *mirabile dictu,* or the other woes typically predicted there and here. Indeed, the inclusion of alienated and marginal groups and regions within the socio-economic and political mainstream can only benefit national cohesion and strength. Australians have taken bemused note of the recent media attention paid to the establishment in 1999 of the Inuit-run territory, Nunavut, which makes up one-fifth of Canada's expanse, although other achievements in indigenous self-government and resource and territory management in USA, Canada, Greenland, and elsewhere are too little known here. (Soublière & Coleman1999; Jull 1999a)

Pat Dodson says of a proposed framework agreement that it 'should define, and set out a path, to resolve all the matters of unfinished business between the Parliament and the Aboriginal peoples. It will also need to extend the period of time beyond the current Olympian and millennium sunset clauses *[in 2000 and 2001 AD respectively]* and establish an independent body to facilitate and mediate the issues towards resolution.' (P Dodson 1999) Certainly the regions where basic discussion is going on between the indigenous and non-indigenous societies are rethinking their own history and broadening their own assumptions about society – e.g., Alaska or Northern Canada, or whole countries like New Zealand or Canada. That requires some national openness and goodwill, but produces new confidence and even pride. Australia seemed to have that spirit before the populist backlash of recent years. Progress also requires structured processes or forums to achieve tangible results, and intellectual and moral leadership from some on each side. The use of political accords to mark progress made, note consensus, and define or refine further agendas is helpful, as Canada's indigenous constitutional processes in national and several regional contexts in recent decades have shown. (Jull & Kajlich 1999) Such processes and accords allow the slower and faster, the more and less informed, the more aggrieved and less convinced to remain part of a moving consensus without breakdown, recrimination, or failure. Maintaining indigenous hope and willingness to give the White Man's system another chance, and official willingness to keep talking, are critical.

The week our Fulbright conference was meeting, Norway was not the only relevant news offstage. Canada's Atlantic fisheries were in turmoil after a court decision which belatedly recognised the marine rights of Micmac (Mi'kmaq) and Maliseets promised in a 1760 British treaty (e.g., *Globe and Mail* and *Ottawa Citizen* daily). While some white fishers have treated themselves to tantrums against the Indians to relieve decades-old anxiety about an industry which governments, non-indigenous fishers, and industry have all mishandled – and with no Indian input! – Indian leaders

and the federal government are calling for a political accord to guide a process for accommodation of interests and needs. The federal minister is providing firm and calm leadership, as are Mi'kmaq organisations, despite free-lances both indigenous and non-indigenous stirring the pot ('Dhaliwal to propose fish accord', *Ottawa Citizen* 1-10-99). In such sudden emergencies, no less than in working through ancient and entrenched injustice, the *political accord* is useful.

We may note that indigenous leaders and their non-indigenous supporters have consistently called for processes through which Aborigines, Torres Strait Islanders, and other Australians[7] may work to explore and understand each other's views and negotiate practical outcomes. Process, dialogue, accommodation, and mutual respect are the keys to all other hard political issues, so why not indigenous status? (Jull & Kajlich 1999; Tully 1995) In a country which prides itself on the vehemence and vividness of its public rhetoric, it would be disingenuous to fall in a faint when indigenous peoples strongly outline their view of rights, a view which has been under negotiation and implementation recently in more earnest 'first world' countries. As for the USA, it did its hard thinking *per* the Marshall court decisions early in the 19th century.

Australia's failure to deal justly with indigenous peoples or to accept them as political communities, and the failure of the British authorities before there were self-governing Australian colonies from the mid-19th century, provide a major constitutional challenge for the 21st century. While indigenous leaders are ready, willing, and able for the task, and large numbers of that mythical and much-patronised species, 'ordinary Australians', are ready, too (as support for Australians for Native Title and Reconciliation, ANTaR, has shown), current political élites are not.

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[7]The word 'Australian', like the word 'Tasmanian', originally referred to Aborigines only!

References

Alfred T, 1999. *Peace, Power, Righteousness: an indigenous manifesto,* Oxford University Press, Toronto.

Anjum S, 1984. 'Land-use Planning in the North Slope Borough', *National and Regional Interests in the North: Third National Workshop on People, Resources, and the Environment North of 60°,* [ed. D Leamann], Canadian Arctic Resources Committee, Ottawa, 269-289.

ANTaR, 1999. *Indigenous Social Justice: What it means and how to achieve it,* ANTaR Occasional Paper No. 2, Australians for Native Title and Reconciliation, Sydney, 4 pp.

ATSIC, 1995. *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures,* Aboriginal and Torres Strait Islander Commission (ATSIC), Canberra.

ATSIC, 1999a. *Indigenous Peoples, Constitution and Treaties,* A Paper for Presentation at A Dialogue on Indigenous Rights in the Commonwealth Institute of Commonwealth Studies (London), Aboriginal and Torres Strait Islander Commission (ATSIC), Canberra. [accompanied by speech by Gatjil Djerrkura, see separate reference] Online (under Issues – International): http://www.atsic.gov.au/default_ns.asp

ATSIC, 1999b. 'Indigenous Leaders Summitt *[sic]* Urges Federal Government Talks on Rights', *Media Release,* Aboriginal and Torres Strait Islander Commission, Canberra, September 15, 1999.

Babbage R et al., 1990. *The strategic significance of Torres Strait,* Strategic and Defence Studies Centre, Australian National University, Canberra.

Ball D (ed), 1991. *Aborigines in the Defence of Australia,* Australian National University Press, Sydney.

Bartlett R (ed), 1993. *The Mabo Decision, with commentary... and the full text of the decision...,* Butterworths, Sydney.

Batchelor, 1998. *Resolutions,* Northern Territory Aboriginal Nations [Convention] on Standards for Constitutional Development, Batchelor, NT (c/o Northern Land Council, Darwin).

Beckett J, 1987. *Torres Strait Islanders: custom and colonialism,* Cambridge University Press.

Berger T, 1985. *Village Journey: The Report of the Alaska Native Review Commission,* Hill and Wang, New York.

Boldt M, 1993. Chapters 3 & 4, *Surviving as Indians: The Challenge of Self-Government,* University of Toronto Press, Toronto.

Brantenberg OT, 1993. 'The end of 13 Years of Silence: The Sami Land Rights Issue in Norway', *IWGIA Newsletter,* No. 4/1993 (October-December), 26-40.

Brantenberg OT, 1995. 'Murky Agenda in the Mørketid: Norwegian Policy, Sami Politics and the Tromsø Conference', *Becoming Visible: Indigenous Politics and Self-Government,* The Centre for Sami Studies, University of Tromsø, Norway, 27-38.

Brown H & Pearce D, 1994. 'National Aboriginal Constitutional Convention Report', *Aboriginal Self-Determination in Australia,* ed. C Fletcher, Report Series, Australian Institute of Aboriginal and Torres Strait Islander Studies, Aboriginal Studies Press, Canberra, 107-112.

Brundtland GH et al., 1987. 'Empowering Vulnerable Groups', *Our Common Future: [Report of the] World Commission on Environment and Development,* Oxford University Press, 114-117.

CAR, 1995. *Going Forward: Social Justice for the First Australians,* A Submission to the Commonwealth Government from the Council for Aboriginal Reconciliation, Canberra. See http://www.austlii.edu.au/au/orgs/car/

CAR, 1999. Documents of Reconciliation, Council for Aboriginal Reconciliation, Canberra. Online: http://www.austlii.edu.au/au/orgs/car/

CAR-CCF, 1993a. *The Position of Indigenous Peoples in National Constitutions: Conference Report, June 4-5, 1993,* Council for Aboriginal Reconciliation, Canberra, and Constitutional Centenary Foundation, Melbourne.

CAR-CCF, 1993b. *The Position of Indigenous Peoples in National Constitutions: Speeches from the Conference, June 4-5, 1993,* Council for Aboriginal Reconciliation, Canberra, and Constitutional Centenary Foundation, Melbourne.

CC, 1998. *Communique,* Constitutional Convention, Canberra, February 13, 1998.
CCC, 1991. *Statement,* Constitutional Centenary Conference 1991, April 5, Sydney, Secretariat, Centre for Comparative Constitutional Studies, University of Melbourne.
CCF, 1999. *1999 Referendum: A New Preamble,* Fact Sheet, Constitutional Centenary Foundation, Melbourne.
Chesterman J & Galligan B, 1997. *Citizens without rights: Aborigines and Australian citizenship,* Cambridge University Press, Melbourne.
Djerrkura G, 1999a. 'Indigenous Peoples, Constitutions and Treaties' *Speech,* Chair of Aboriginal and Torres Strait Islander Commission (ATSIC), Dialogue on Indigenous Rights in the Commonwealth Institute of Commonwealth Studies (London), Canberra. Online: http://www.atsic.gov.au/
Djerrkura G, 1999b. 'No secret in unfinished indigenous business', *Sydney Morning Herald,* September 29, 1999.
Dodson M, 1999. 'The Human Rights Situation of Indigenous Peoples in Australia', *Indigenous Affairs,* 1/1999 (January-March), International Work Group for Indigenous Affairs, Copenhagen, 32-45.
Dodson P, 1999. *Until the Chains Are Broken,* 4th Annual Vincent Lingiari Memorial Lectures, Northern Territory University, Darwin, August 27, 1999. Online: http://www.ntu.edu.au/cincrm/events/lectures/lectures/dodsonht.htm
Downing J, 1988. *Ngurra Walytia: Country of My Spirit,* Australian National University North Australia Research Unit, Darwin.
Gray R, Lea D & Roberts S (eds), 1994. *Constitutional Change in the 1990s,* Northern Territory Legislative Assembly Sessional Committee on Constitutional Development and the Australian National University North Australia Research Unit, Darwin.
Henderson G, 1995. *A Howard Government? Inside the Coalition,* Harper Collins, Sydney.
Herron J, 1999. Speech to the United Nations, Minister of Aboriginal and Torres Strait Islander Affairs, Geneva, July 29, 1999. Online: http://www.atsia.gov.au/fr_press.html
Hiley G (ed), 1997. *The Wik Case: Issues and Implications,* Butterworths, Sydney.
HREOC, 1991. *Racist Violence: Report of the National Inquiry into Racist Violence in Australia,* Race Discrimination Commissioner, Human Rights and Equal Opportunity Commission, Canberra.
HREOC, 1995. *Indigenous Social Justice, Vol. 1, Strategies and Recommendations,* Submission to the Parliament of the Commonwealth of Australia on the Social Justice Package by Michael Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Canberra. [Vol. 2, *Regional Agreements,* & Vol. 3, *Resource Materials]*
IWGIA, 1999. Special Issue for 50th Anniversary of the Universal Declaration of Human Rights, *Indigenous Affairs,* No. 1/1999 (January-March), International Work Group for Indigenous Affairs, Copenhagen.
Jull P & Kajlich H, 1999. *A Reconciled Constitution & Reconciled Queensland: Opportunity for a Political Accord?,* Brief to the Constitutional Reform Commission (Queensland), Department of Government, University of Queensland, Brisbane, September 16, 1999, 15 pp. + appendices
Jull P, 1981. 'Aboriginal Peoples and Political Change in the North Atlantic Area', *Journal of Canadian Studies,* Vol. 16, No. 2, 41-52.
Jull P, 1993. *A Sea Change: Overseas Indigenous-Government Relations in the Coastal Zone,* Resource Assessment Commission, Commonwealth of Australia, Canberra, September 1993.
Jull P, 1996. *Constitution-Making in Northern Territories: Legitimacy and Governance in Australia,* Central Land Council, Alice Springs, NT, 44 pp. ISBN 0 9596377 7 X
Jull P, 1998a. "'First world' indigenous internationalism after twenty-five years', *Indigenous Law Bulletin,* Vol 4, No 9 (February 1998), 13-16.
Jull P, 1998b. *Constitutional Work in Progress: Reconciliation & Renewal in Indigenous Australia and the World* (A background paper for Indigenous Law Centre, University of New South Wales, Sydney), Centre for Democracy, University of Queensland, Brisbane, 62 pp incl. 'executive summary'.
Jull P, 1999a. 'Constitutional Ambles and Preambles. With or without the country's indigenous peoples!?', Note, Department of Government, University of Queensland, Brisbane, February 11, 1999, 9 pages.

Jull P, 1999b. 'Reconciliation & Northern Territories, Canadian-Style: The Nunavut Process and Product', *Indigenous Law Bulletin,* Vol. 4, No. 20, 4-7.
Kidd R, 1997. *The Way We Civilise: Aboriginal Affairs – the untold story,* University of Queensland Press, Brisbane.
Leveridge V & Lea D, 1993. *Takeback: Planning for change in Aurukun,* Australian National University North Australia Research Unit, Darwin.
Lieberman L et al., 1997. *Torres Strait Islanders: A New Deal – A Report on Greater Autonomy for Torres Strait Islanders,* House of Representatives Standing Committee on Aboriginal & Torres Strait Islander Affairs, Parliament of the Commonwealth of Australia, August 1997.
Lui (Jr) G, 1994. 'A Torres Strait perspective', *Voices from the Land: 1993 Boyer Lectures,* Australian Broadcasting Corporation, Sydney, 62-75.
MacQuarrie R, 1980. *Report of the Special Committee on Unity to the 3rd Session of the 9th Assembly at Frobisher Bay, October 22, 1980,* Tabled Document No 16-80, Legislative Assembly of the Northwest Territories, Yellowknife.
McBeath GA & Morehouse TA, 1980. *The Dynamics of Alaska Native Self-Government,* University Press of America, Lanham, Maryland.
McBeath GA & Morehouse TA, 1994. *Alaska Politics & Government,* University of Nebraska Press, Lincoln.
Mulrennan M & Hanssen N (eds), 1994. *Marine Strategy for Torres Strait: Policy Directions,* Australian National University North Australia Research Unit, Darwin, and Island Coordinating Council, Torres Strait.
PMA, 1999. Media Releases, Prime Minister of Australia, Canberra
Online: http://www.pm.gov.au/media/pressrel/index.htm
Pritchard S, 1998. 'Constitutional Developments in the Northern Territory: The Kalkaringi Convention', *Indigenous Law Bulletin,* Vol. 4, No. 15 (October 1998), 12-13.
RAC, 1993. 'The Role of Indigenous People', *Coastal Zone Inquiry: Final Report,* Resource Assessment Commission, Commonwealth of Australia, Australian Government Publishing Service, Canberra, 165-189.
Reynolds H, 1987. *The Law of the Land,* Penguin, Melbourne.
Reynolds H, 1995. *Fate of a Free People,* Melbourne.
Richardson B, 1991. *Flooding Job's Garden,* Video, Tamarack Productions & UNESCO, National Film Board, Montreal.
Sharp N, 1992. *Footprints Along the Cape York Sandbeaches,* Aboriginal Studies Press, Canberra.
Sharp N, 1993. *Stars of Tagai: The Torres Strait Islanders,* Aboriginal Studies Press, Canberra.
Sharp N, 1996. *No Ordinary Judgment: Mabo, The Murray Islanders' Land Case,* Aboriginal Studies Press, Canberra.
Shnukal A, 1992. 'Pacific Islander immigrants in Torres Strait', *Voices,* Winter 1992, 5-14.
Singe J, 1989. *The Torres Strait: People and History,* University of Queensland Press, St. Lucia.
Soublière M & Coleman G (eds), 1999. *Nunavut '99: Changing the Map of Canada,* Nortext Multimedia & Nunavut Tunngavik Inc., Iqaluit.
Online: http://www.nunavut.com/nunavut99/english/index.html
Surviving Columbus, 1994. 'Towards a consensus?', *Surviving Columbus: Indigenous Peoples, Political Reform and Environmental Management in North Australia,* ed. P. Jull *et al.,* Australian National University North Australia Research Unit, Darwin, 165-166.
Taylor J, 1991. 'Alaska and the Northern Territory: Demographic Change', *The Challenge of Northern Regions,* ed. P Jull & S Roberts Australian National University North Australia Research Unit, Darwin, 6-16.
Tully J, 1995. *Strange Multiplicity: Constitutionalism in an age of diversity,* Cambridge University Press.
Wilmer F, 1993. *The Indigenous Voice in World Politics: Since Time Immemorial,* Sage, Newburg Park, CA.
Wilson R et al., 1997. *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families,* Human Rights and Equal Opportunity Commission, Commonwealth of Australia, Sydney.

Appendix

Items proposed for Framework Agreement and Political Negotiations Process, from
Mr Pat Dodson's Vincent Lingiari Memorial Lecture, August 27, 1999,
Northern Territory University, Darwin
text on-line: http://www.ntu.edu.au/cincrm/events/lectures/lectures/dodsonht.htm

1. Equality.

Aboriginal peoples have the right to all the common human rights and fundamental freedoms recognized in national and international law, as well as to our distinct rights as indigenous peoples.

2. Distinct characteristics and identities.

Aboriginal peoples have the right to maintain and develop our distinct characteristics and identities, whilst taking part in the life of the country as a whole. This includes the right to identify as indigenous.

We shall not be subject to:

Actions which threaten our distinct cultures and identities;
The removal of our children from our families and communities;
Taking of our lands and resources; or

Any other measures of assimilation.

3. Self determination.

Aboriginal peoples have the right to self-determination. A right to negotiate our political status and to pursue economic, social and cultural development.

4. Law.

Aboriginal peoples have the right to our own law, customs and traditions, and equality before the National Law.

5. Culture.

Aboriginal peoples have the right to our unique cultural traditions and customs. This includes aspects of our cultures such as designs, ceremonies, performances and technologies.

We have the right to own and control our cultural and intellectual property, including our sciences, technologies' medicines, knowledge of flora and fauna, arts and performances. Our cultural property taken without consent shall be returned to us.

6. Spiritual and Religious Traditions.

Aboriginal peoples have the right to our spiritual and religious traditions. This includes the right to preserve and protect our sacred sites, ceremonial objects and the remains of our ancestors.

7. Language.

Aboriginal peoples have the right to our languages, histories, stories, oral traditions and names for people and places. This includes the right to be heard and to receive information in our own languages.

In courts, other proceedings and in the criminal justice system, we shall have the right to understand and be understood, through interpreters and other appropriate ways.

8. Participation and partnerships.

Aboriginal peoples have the right to participate in law and policy-making and in decisions that affect us. This includes the right to choose our own representatives. Governments shall obtain our consent before adopting these laws and policies.

Governments shall negotiate partnerships with Aboriginal peoples representative bodies at local, regional, State and National levels.

9. Economic and social development.

Aboriginal peoples have the right to determine priorities and strategies for economic and social development. This includes the right to determine health, housing, and infrastructure, and other economic and social programs and, to the extent possible, to deliver these through our own organizations.

There shall be recognition of the importance of empowerment for decision-making and development at regional and community levels.

There shall be indigenous participation in all regional planning processes.

Aboriginal peoples shall have full access to, and equitable outcomes from participation in relevant mainstream programmes.

10. Special measures.

Aboriginal peoples have the right to special measures to improve our economic and social conditions. This includes the areas of employment, education and training, housing and infrastructure, and health.

11. Education and training.

Aboriginal peoples have the right to all forms and levels of public education and training.

We also have the right to our own schools and to provide education in our own languages.

Aboriginal children living outside communities shall be able to learn their own cultures and languages.

12. Land and resources.

Aboriginal peoples have the right to own and control the use of our land, waters and other resources.

This includes the right to return of land and resources taken without our consent. Where this is not possible, we shall receive just compensation.

Governments shall obtain our consent before giving approval to activities affecting our land and resources, including the development of mineral resources. We shall receive just compensation for any such activities.

13. Self-government.

As a form of self-determination Aboriginal peoples have the right to self-government and autonomy in relation to our own affairs. This includes the right to determine the structure and membership of our self-governing institutions.

Governments shall facilitate the negotiation of self-government and regional agreements.

15. Constitutional recognition.

The Federal parliament shall initiate processes leading to concrete constitutional change to recognize and protect the special place and rights of the Aboriginal peoples in the Australian polity.

16. Treaties and agreements.

The Federal Parliament shall enact legislation establishing a framework for the negotiation of agreements with the Aboriginal peoples.

Governments shall respect treaties and agreements entered into with Aboriginal peoples.

17. Ongoing processes.

The Federal Parliament shall establish a discussion, research, information and negotiation forum to promote public awareness and to draft national legislation enacting principles of recognition, guidelines for public policy, and the framework for negotiation of agreements referred to above.