# FOREWORD

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This issue of the *University of New South Wales Law Journal*, "Indigenous Peoples: Issues for the Nineties", makes an important contribution to the understanding of the legal and constitutional basis of the relationship between Aboriginal and Torres Strait Islander peoples and the wider community.

The International Year for the World's Indigenous Peoples has prompted people around the world to re-examine the justifications and rationalisations of colonial powers for their conquest of indigenous peoples. This reassessment of the past has naturally led to a re-evaluation of the present relationship between nations and their indigenous peoples.

This process, which in Australia is called the process of reconciliation, must tackle some very basic legal issues and concepts. Issues such as sovereignty, self-determination, land rights, racial discrimination, customary law and native title require legal analysis and explanation if indigenous and non-indigenous Australians are going to reach any greater understanding of each other, or reach a settlement of the outstanding issues which currently divide them.

Lawyers and historians have a crucial part to play in helping a country to understand its past, define its values, to help give it a vision for the future and recommend how our laws and political system can embody that vision.

The Council for Aboriginal Reconciliation, at its first meeting, agreed on a vision for the Australian society that they would like to see realised in 2001:

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A united Australia which respects this land of ours, values the Aboriginal and Torres Strait Islander Heritage and provides justice and equity for all.

A better understanding of legal and constitutional concepts and issues affecting indigenous people in this country is an essential prerequisite of the Council fulfilling its functions under the *Council for Aboriginal Reconciliation Act* 1991. Those functions include: consultation with Australians on whether reconciliation would be advanced by a formal document or documents of reconciliation; assessment of whether such a document or documents would benefit the Australian community as a whole; and, if so, the making of recommendations to the Minister on the nature, content and manner of giving effect to such document or documents.

This edition of the *Journal* is timely in this education process given the focus on indigenous legal issues generated by the High Court decision on native title and the lively debate on whether Australia should become a republic which has led to calls for wider constitutional reform.

The International Year for the World's Indigenous Peoples has focussed attention on how other countries approach the complex and sometimes unsettling issues which remain unresolved between indigenous peoples and the wider community. An international perspective can bring more rationality into the discussion and remove the limits of a parochial and entrenched view. For example the word 'treaty' when used in the context of indigenous people is generally used and accepted in Canada without causing the anxiety that it arouses in Australia. Finding out why this is the case is likely to lead to a more informed and open discussion about such a document in Australia.

In this special issue of the *Journal*, Camilla Hughes examines the nature and extent of the fiduciary duty which the Crown owes to indigenous people in Australia. She throws light on this by outlining cases concerning fiduciary duty in Canada and the United States and drawing out the implications of these cases for Australia. This article has assumed more interest since the case of *The Wik Peoples v The State of Queensland & Ors* which is not only based on native title claims but also on the existence of a fiduciary duty owed to the Wik people by governments.

Richard Boast turns his attention to New Zealand to evaluate the contribution of the Waitangi Tribunal to advancing the Maori people and examines its suitability for Australia. Tribunals have been recently proposed in Australia as arbitrators between parties unable to negotiate settlement of native title claims. Tribunals could have a place in giving effect to the general terms of any formal settlement reached between Aboriginal and Torres Strait Islander people and the wider community. A comparative look at the Waitangi Tribunal will inform these discussions.

Not surprisingly, the High Court of Australia's decision in *Mabo v Queensland (No 2)* is the focus of four contributions to this edition. Garth Nettheim continues to provide a valuable service to the debate by cutting through some of the

exaggerated rhetoric and allaying unfounded fears with a clear exposition of its likely impact. Peter Hanks looks afresh at the power of the Commonwealth to legislate in the area of indigenous affairs, a matter brought to a head by the need for Australia to agree on a national response to the *Mabo* decision and the possible dissent of state and territory governments from a Commonwealth solution. Greg McIntyre's article suggests that grants of land made before the enactment of the *Racial Discrimination Act* are still vulnerable to native title claims. Henry Reynolds puts an historical perspective on the *Mabo* decision, pointing out the recognition of Aboriginal rights in official colonial policy in Australia.

Desmond Sweeney examines the statutory and common law recognition of the rights of indigenous peoples to fishing, hunting and gathering and whether these extend to commercial fishing. He also looks at mechanisms to achieve an equitable sharing of these resources between indigenous peoples and the wider community. An analysis of these issues has important implications for the maintenance of traditional lifestyles and of providing a firmer foundation for economic self sufficiency.

It is often assumed that Aboriginal people and environmentalists see eye to eye on everything. This is not the case as traditional hunting rights can be viewed by some environmentalists as a threat to a particular species. Differences sometimes have to be negotiated in the management of national parks. Graeme Neate looks at the interplay between environmental and Aboriginal land rights legislation and at how traditional notions of responsibility for land have been given recognition in legislation.

Frank Brennan and Hal Wootten look at some practical issues. Frank Brennan examines how self-determination applies to Aboriginal communities seeking to govern themselves and, in some cases, to enforcing their laws on both Aboriginal and non-Aboriginal people. Hal Wootten reflects on the relationship between Aboriginal people and the police in light of his long involvement in Aboriginal legal issues. Along with Garth Nettheim and Henry Reynolds, the latter two contributors have helped the public to understand the *Mabo* decision, an understanding which a recent survey showed to be reasonably informed, given the complexity of the decision and the misinformation being spread about it.

There is little doubt that the law in the latter part of this century has been an important means of advancing the rights of indigenous peoples and giving them a basis on which to negotiate on more equal terms with the wider community. This collection of writings elucidates rights already acknowledged, explores further development of those rights and provides some guidelines on how Australia can give expression to legal and constitutional reform for indigenous peoples. This collection is part of an ongoing process of education of Australians which is essential if we are to realise the Council's vision of a united Australia in 2001 which provides justice and equity for all.