

PRACTICAL RECOLONISATION?

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Fire stalks the land, raging through bush, swamp and desert. The whole continent is dry and virtually starved of its life giving force. Fire snakes along the forest floor; one spark and the gum bark kindles a relentless blaze. Green and blue eucalyptus trees burst into flame, their oils mingling in explosive fragrances. Fires twist and meander over wide tropical floodplains through billabongs and swamps, heading underground if their path is obstructed from above. Desert fires thirst after small shrubs and foliage, stinging the red land as its crimson tails uncoil.

Fires can destroy and create, devastate and renew. They can be deliberately set to clean up the country and manage the land or they can be used to decimate ecosystems and despoil life's sources. There can be cultural fires and wild fires. Cultural fires are set by the land's traditional owners; wild fires are those sparked by storms and other natural events. Many plants are fire-adapted and thus actually depend on fire for the completion of their life cycle. Other plants are fire sensitive and would suffer greatly if caught in a huge firestorm.¹ Indigenous Australians and Canadians know about fire. They have used it to cultivate their homelands for centuries.²

Indigenous Australians and Canadians know about another kind of fire, a heat so intense that it can burn both heart and home: colonialism. It has been used to destroy, devastate and despoil. Like a wild fire it has swept across the land, damaging those caught in its path. It's time to reverse this trend and seek for places where small, controlled, cultural fires can be set to regenerate the land and its people. A properly set fire can cause long dormant fruits and seeds to germinate and take root in their natural habitat. Proper burning requires

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1 Deborah Bird Rose et al, *Country of the Heart: An Indigenous Australian Heartland* (2002) 41.

2 William Cronon, *Changes in the Land: Indians, Colonists and the Ecology of New England* (1983); Shepard Kresh III, *The Ecological Indian: Myth and History* (1999).

*detailed knowledge of the terrain and a range of local factors such as prevailing winds, plant communities and the fire history of particular places.*³

*Nanabush and Dingo stalk the land and look for ways to steal fire.*⁴ *They head south and west, towards burning bright skies.*

I PRACTICAL COLONISATION

The colonisation of Australia could be considered a practical matter. The redistribution of land and political power away from Indigenous peoples and towards others has produced many benefits for the majority of people in the country. The security of non-Indigenous tenure and access to resources has allowed for great financial investment and socio-economic development around the continent. Strong non-Indigenous control of governance, largely unfettered by Indigenous concerns, has facilitated widespread peace and order throughout most of the land. By nearly all measures colonisation has been a great success, and Australians enjoy one of the highest standards of living in the world.⁵

But despite all its seeming practicality, colonisation contains a fatal flaw. It does not provide as many benefits for those who have been colonised. Colonised peoples often suffer a loss of land, restricted access to resources, diminished decision-making authority, and impediments to individual autonomy, while those initiating colonisation enjoy increased land-holdings, preferential resource rights, broad governance powers, and greater individual freedoms. It might be asserted that many of the colonist's most significant gains come at the expense of those who are colonised. Joseph Conrad once wrote: 'The conquest of the earth, which mostly means the taking it away from those who have a different complexion or slightly flatter noses than ourselves, is not a pretty thing when you look into it'.⁶

When Conrad critiqued colonialism he was writing from his perspective as a citizen of colonial society. He could not shake the feeling that something was wrong with his culture's dispossession of others, and he tried to address this problem through his fiction. Though he himself said troubling things at times, his statement captures a strand of sentiment that has usually been detectable in Australian colonial society. For example, in 1834 Quaker James Backhouse wrote to his friend, British Parliamentarian Thomas Buxton, 'Aborigines have had wholesale robbery of territory committed upon them by the Government, and the settlers have become the receivers of stolen property'.⁷ In 1841, in the *R v Bonjon* case, decided in Port Phillip, Willis J recognised the continued existence

3 Rose et al, above n 1, 21.

4 Indigenous stories about fire are found in Rose, *ibid*; Jacqueline Greene, *Manabozho's Gifts: Three Chippewa Tales* (1994); Joseph McLellan, *Nanabosho Steals Fire* (1990); Joanne Thomson, *Txamsem Steals Fire* (1992); Bill Reid and Robert Brighurst, *The Raven Steals the Light* (1984); Katharine Luomala, *Oceanic, American Indian, and African Myths of Snaring the Sun* (1940).

5 See United Nations Development Program, *Human Development Report 2005*, Human Development Index, 219.

6 Joseph Conrad, *Heart of Darkness* (first published 1902, 1999 ed).

7 United Kingdom, *Report of the Select Committee on Aborigines*, British Parl Paper No 7, 538 (1836) 680.

of Indigenous authority in Australia after the assertion of British sovereignty.⁸ This opinion, however, was not sustained and it soon became a hidden legal relic, buried in the dusts of jurisprudential time. Nevertheless, if one digs deep enough, one can find that voices of dissent have been raised against the dispossession of Indigenous peoples throughout Australia's colonial history.⁹

In fact, non-Indigenous voices of dissent against government policies directed towards the colonisation of Indigenous peoples have not subsided.¹⁰ The society that has benefited from the taking of Indigenous lands and life has not been universally supportive of their government's appropriation of land and power. While these forces of dissent have never been strong enough to turn the tide of colonisation, they try to bring into question the 'justice' of the process. They point to alternative legalities and/or moralities and catalogue the failures of colonisation in Australia.¹¹

Neyaashiinigming Indian Reservation, Chippewa of the Nawash First Nation, Lake Huron, Ontario, Canada

'So, did you learn much down south?' Mishomis asks his grandson. 'I heard you've been doing some travelling.'

The man looks at his grandfather across the boat from him, baiting a hook with some roe. He deftly winds it around the metal barb with his strong sinuous fingers. His grandmother Nokomis is beside him, her line in the water. She has caught all the fish today.

'It's been interesting. I spent about five months in Australia during my sabbatical.' He gazes out over the bay to the escarpments beyond. 'When I think about my time there I guess I feel pretty sad, Indigenous people aren't doing very well. When I arrived there I was shocked to discover that the average Aboriginal man lives twenty four years less than a non-Aboriginal man. To give you a comparison, the difference in life expectancy between Indigenous and non-Indigenous people in Canada is about ten years less, which is still a cause for great concern. In Australia though, the gap is getting worse, while at least the gap is steadily narrowing here at home. People live longer in Bangladesh or sub-Saharan Africa (once AIDS is factored out) than do Indigenous people in Australia. What's ironic is that Australia is one of the most prosperous countries in the world. I couldn't imagine living in a community where all the Elders are gone, where people over the age of fifty-four are rare. That made me very sad.

'The country is very beautiful though. When you walk off the plane the first thing you notice is how different the songs are in the trees. There are parrots, budgies, lorikeets, cockatoos, cockatiels, kookaburras, and so on. Their colours are brilliant and their voices are so different from anything you would hear over here. Even their crows seem to have a distinctive accent. There were other differences too. At night I loved to look up at the stars and see a whole different

8 *R v Bonjon* (1841) United Kingdom, *Papers Relative to the Aborigines, Australian Colonies*, British Parl Papers (1844) 146 ff, vol 8.

9 See Henry Reynolds, *The Law of the Land* (3rd ed, 2003).

10 See, eg, the work of Henry Reynolds, Hal Wooten, Fred Chaney, Garth Nettheim and Lisa Strelein.

11 See, eg, Bain Attwood, *Rights for Aborigines* (2003).

side of the universe. The Southern Cross is distinctive. We also saw herds of kangaroos and wallabies in the grasslands. There were lots of lizards, spiders and snakes when you walk around too.'

'Did you see any dingoes?' Nokomis asks. 'I hear they have dogs there that are half wild, half tame.'

'I don't think I saw one Nokomis, though you never can be quite sure.'

As they bob on light waves in the bay the late fall winds gently rock the boat. The leaves have long since fled from the trees but the sun has been warm today. Some might call it Indian Summer.

'I heard an old story about a Dingo when I was in Canberra,' the man says. 'It's a little like the way we tell things here. You interested in hearing it?'

'I always love a good yarn,' Mishomis says as he casts his line in the water. 'Do they have meanings like our stories do? I'd be interested in hearing what they're like.'

'Their stories do have meaning Mishomis, though I am not always sure I understand at first. The one about the Dingo sticks in my mind though, probably because it sounded familiar. It's about fire.'

II RECONCILIATION: PRACTICAL AND OTHERWISE

Both Indigenous and non-Indigenous Australians see a problem in their midst: Indigenous peoples, by and large, do not have access to the benefits of Australia's position of relative wealth. Many share Conrad's concern, that the conquest of Australia is not a pretty thing when you look into it too much.¹² Therefore, despite the practical advantages that colonisation has endowed upon non-Indigenous people, there has been talk of trying to overcome its worst features through reconciliation.

Reconciliation implies a resolution of problems that exist between Indigenous peoples and others in the country. Reconciliation is a powerful metaphor. It can mean many things to different people. It can be a verb or a noun, a process and/or an outcome. Reconciliation can have a relational connotation, and is often invoked to describe couples that have overcome a period of estrangement. Reconciliation in this context generally refers to a process that brings people together to enjoy a more peaceful, mutually acceptable, and settled state of affairs. The process usually begins when each is able to recognise something wrong between them. It involves understanding another's point of view, and can include concession, compromise and mutual adjustment. In accounting matters, a financial ledger is reconciled when there has been a thorough recounting of

12 While colonisation may not be 'pretty', some say that we should not be 'consumed' by colonisation's worst features: 'Australian history should never be a source of smug delusions or comfortable superiority. But nor should it be a basis for obsessive and consuming national guilt and shame': John Howard, 'Confront Our Past, Yes, but Let's Not Be Consumed by It', *The Australian* (Sydney), 19 November 1996, 13. See also, Geoffrey Blainey, *A Shorter History of Australia* (2000), xii: 'I do not share the desire of many historians and commentators to denounce sweepingly the white history of Australia in order to enthrone the black history and the present-day Aboriginal demands'.

income and expenditures, where outstanding promises and obligations have been resolved. In these contexts reconciliation seems to refer to a restorative process that brings a state of affairs into balance.

Reconciliation has also taken on a political meaning over the past few decades.¹³ Many nations have engaged their populations in discussions that attempt to repair deep and sometimes violent rifts within them. Perhaps the most famous movement towards reconciliation occurred in South Africa. In 1995, the Truth and Reconciliation Commission was set up as part of the transition from apartheid to a free and democratically elected government.¹⁴ Headed by Bishop Desmond Tutu, the purpose of the Commission was to provide an opportunity for South Africa to come to grips with its past while moving forward into the future.¹⁵ Many literally regarded their task as trying to heal their nation.¹⁶ Twenty-three thousand applications were received before the Commission ended. Victims of apartheid told graphic and compelling stories about the discrimination they faced under this brutal regime. Their stories were riveting and captured the attention of the nation through street-level discussion and nightly newscasts. Those who perpetrated violence under apartheid were also heard from. Many former officials applied for individual amnesty from prosecution for crimes in exchange for giving a full disclosure of their human rights abuses under the system. Their stories were also profound. The process was not without its critics, particularly that the amnesty process frustrated justice by allowing escape from punishment. If a person disclosed their crimes they were free to participate in the new government, though shame was a powerful factor in forcing many to take other paths.¹⁷

In the early 1990s the Hawke Labor Government implemented a formal process to achieve reconciliation between Indigenous and non-Indigenous Australians by the end of the millennium. The *Council for Aboriginal Reconciliation Act 1991* (Cth) was passed, which created a body whose job it

13 Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (2000).

14 The Truth and Reconciliation Commission was established by the *Promotion of National Unity and Reconciliation Act 1995* (South Africa).

15 *Promotion of National Unity and Reconciliation Act 1995* (South Africa). The purposes of Act are: 'To provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights; and for the said purposes to provide for the establishment of a Truth and Reconciliation Commission, a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation; and to confer certain powers on, assign certain functions to and impose certain duties upon that Commission and those Committees; and to provide for matters connected therewith'.

16 Alex Boraine and Janet Levy (eds), *The Healing of a Nation* (1995).

17 See generally Robert Rotberg and Dennis Thompson (eds), *Truth v Justice: The Morality of Truth Commissions* (2000).

was 'to enable the nation to move forward over the coming decade with a broadly defined agenda which will meet the aspirations of Aboriginal people'.¹⁸ The Council delivered a series of Reports over its life that dealt with specific issues concerning reconciliation.¹⁹ In 2000 the Council delivered its final agenda to the government.²⁰ It suggested that Indigenous peoples should be recognised as having distinct rights because of their First Nations status. Legislation was proposed to recognise self-government and customary law, to provide for compensation, reparation and the comprehensive settlement of native title, deaths in custody and children's issues. The Council also suggested that a bill of rights be created and that constitutional recognition be extended to Indigenous peoples' rights.²¹

The agenda delivered by the Council did not meet with the approval of the federal government and the Prime Minister, John Howard,²² who were not in favour of treating Indigenous Australians differently, and declined to implement the Council's recommended distinctions in law and policy.

As a result, the Prime Minister launched an alternative agenda dealing with the need to achieve 'practical reconciliation'. Prime Minister Howard said that three objectives lie at the heart of his government's practical reconciliation process.²³ The first is a shared commitment to improved living standards as part of providing equality of opportunity for all Australians. The second is an acknowledgement of the interrelated histories of Australia, where blame or guilt is not apportioned for past wrongs. The third objective is a mutual acceptance of the importance of working together and appreciating differences in a way that does not prevent people from sharing their futures together. This agenda is premised on the idea that: 'True reconciliation can never be said to have occurred until Indigenous Australians enjoy the same opportunities and standards of treatment as other Australians'.²⁴ For the Howard government, the true measure

18 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 1991, 4498 (Robert Tickner, Minister for Aboriginal Affairs).

19 Council for Aboriginal Reconciliation, *Walking Together: The First Steps, Report to the Federal Parliament* (1994); Council for Aboriginal Reconciliation, *Sharing History: Key Issues Paper Number 4* (1994); Council for Aboriginal Reconciliation, *Going Forward: Social Justice and the First Australians* (1995).

20 Council for Aboriginal Reconciliation, *The Australian Document Towards Reconciliation* (2000); Council for Aboriginal Reconciliation, *Roadmap for Reconciliation* (2000); Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge* (2000).

21 Some have argued that a treaty, or treaties, would facilitate reconciliation. See Australian Institute of Aboriginal and Torres Strait Islander Studies, *Treaty: Let's Get it Right* (2003); Marcia Langton et al, *Among Nations: Treaties and Agreements with Indigenous People* (2004).

22 See Tim Rowse, *Indigenous Futures* (2002) 2.

23 John Howard, 'Practical Reconciliation' in Michelle Gratton (ed), *Reconciliation: Essays on Australian Reconciliation* (2000) 89–96. My thanks go to an anonymous reviewer, who pointed out that there is an element of *substantive* equality in John Howard's 'practical reconciliation', although it must be acknowledged that the policy is largely developed, applied and measured according to non-Indigenous values. Measuring outcomes on terms that do not reflect the wider context of Indigenous aspirations potentially undermines Indigenous claims to equality.

24 Commonwealth of Australia, *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge* (2002) 2.

of reconciliation is gauged by improvements in outcomes for Indigenous people, 'better health, better education, and a better standard of living'.²⁵

It is important to be practical, to take concrete steps that meet people's needs and improve their lives. However, there is a debate over what means should be pursued to achieve this result. The open-ended nature of the word reconciliation can create disagreement, even as parties appear to be speaking the same language. For instance, there are those who have expressed disagreement with Prime Minister Howard's focus on practical reconciliation. The Social Justice Commissioner William Jonas wrote that practical reconciliation strips Indigenous disadvantage of its historical context and does not seek to transform the relationship between government and Indigenous peoples. He noted the government's focus is based on 'whether one group, Indigenous people, are prepared to conform to the rest of society. If not, then the offer is closed'.²⁶

The debate about the best path to achieve reconciliation is partially being fought on the field of formal versus substantive equality. The Council for Aboriginal Reconciliation and the Social Justice Commissioner appear to take substantive equality as their guide, while Prime Minister Howard and his government largely seem to be saying that reconciliation is best achieved through formal equality. Formal equality focuses on similarity of treatment, while substantive equality highlights differential treatment as a mechanism for achieving equal standards.

There is something to be said for both sides in this debate about reconciliation. In some matters Indigenous peoples must receive the same treatment, and their actions must be judged by the same standards as others. In other circumstances Indigenous peoples must be treated and judged differently.

Ngunawal Country

Nanabush and Dingo race through the land, twisting and turning, chasing after Serpent carrying fire in his mouth. They snake through Goulburn, Queanbeyan, Yass, Wee Jasper, and the Snowy Mountains before plunging through the earth at Yarrangobilly. They arrive in Canberra in the Australian Capital Territory. The surrounding hills are mostly barren, having been washed clean by flames. The only remaining vegetation is fire resistant native gum trees. The pine trees introduced to the area upon colonisation have been burnt beyond regeneration. They will not be planted in the region again. They are an excessive drain on the water table. They are inefficient users of resources compared to the Indigenous trees. Their passing leaves huge black scars on the land. Their corpse like stumps and trunks make the land unusable and impenetrable, a tangled mess of rot and decay.

25 Ibid.

26 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2001) 29.

Neyaashiinigming Indian Reserve

Mishomis focuses his eyes on the nearby shore. A large stump lies on its side, tangled roots wildly grasping the air.

‘So how does this story about the Dingo begin grandson? Where did you hear it?’ Nokomis is reeling in a fish as she asks the question. She has caught another whitefish; it’s her sixth one today.

The man shakes his head at her and smiles in disbelief. ‘Well my trip started out in Canberra; I probably heard the story there. I was the inaugural International Visiting Fellow at AIATSIS (the Australian Institute of Aboriginal and Torres Strait Islander Studies) in Canberra. There’s a lot of people who visit the place, they are all Indigenous or work closely with Indigenous people and their issues. Through their work they tell stories, produce videos, write books, research land claims, record languages and songs, compile genealogies; all sorts of things. They are involved in some really fascinating stuff. It’s a great institution. They should initiate something like AIATSIS in Canada. It was set up under federal statute in the early 1960s to promote understanding of Australian Indigenous cultures, past and present. They have a beautiful new building on the shores of Lake Burley-Griffith right next to the Australian National Museum. Its library and archive house the world’s most extensive collection of information about Australian Aboriginal and Torres Strait Islander peoples. I think there are over one hundred people who work there. They are led by a Council of outstanding Indigenous leaders and they make important contributions to keep Indigenous culture prominent in national life. Anyway, I’m pretty sure that the Dingo story came from someone who presented a seminar there one day. It’s about a Dingo who chases a snake to try and steal fire.’

III RECONCILIATION, EQUALITY AND THE RELEVANCE OF INDIGENOUS DIFFERENCE

Indigenous peoples must find a measured recognition of their difference in political and legal terms if they are going to improve their lives in measurable ways. This is a controversial statement, since the achievement of equality in Australia has largely been seen as premised on an ideal of identical treatment. For example, in the case of *Gerhardy v Brown*²⁷ a majority of the High Court found that it was discriminatory to treat Indigenous groups differently from others in society. Such distinctions could only be upheld as ‘special measures’ under s 8 of the *Racial Discrimination Act 1975* (Cth).²⁸ The Court came to a similar conclusion in *Western Australia v Ward*²⁹ in 2002.

27 (1985) 159 CLR 70. At issue in this case was the validity of s 19 of the *Pitjantjatjara Land Rights Act 1981* (SA), which provided that non-Pitjantjatjara who entered Pitjantjatjara lands without a permit were guilty of an offence. Robert Brown, an Indigenous man who was not Pitjantjatjara, entered Pitjantjatjara land without a permit and was charged as being in breach of the Act.

28 Under s 8 of the *Racial Discrimination Act 1975* (Cth), race-based distinctions will be lawful if they are special measures.

29 (2002) 191 ALR 1, [102]–[103].

Many have expressed the view that the recognition of Indigenous difference amounts to a kind of discrimination. For example, Pauline Hanson enjoyed some political success by attacking the supposed special treatment of Indigenous peoples.³⁰ She said:

We now have a situation where a type of reverse racism is applied to mainstream Australians by those who control the various taxpayer funded 'industries' that flourish in our society servicing Aboriginals ... Along with millions of Australians I am fed up to the back teeth with the inequalities that are being promoted by the government and paid for by the taxpayer under the assumption that Aboriginals are the most disadvantaged people in Australia.³¹

Despite some resistance to the adoption of differential treatment as mechanism for equality, international legal principles support such a principle. As early as 1934 the Permanent Court of Justice tackled the issue of discrimination in its opinion concerning the *Minority Schools in Albania*.³² It held that a 'subtle form of persecution comes from measures which denies any members of a minority the capacity to be different from the majority, namely they are forced, to their disadvantage, to be the same as the majority'. Later, the famous dissenting judgment of Judge Tanaka in the *South West Africa Case*³³ further refined the meaning of discrimination.³⁴ He held that:

To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently.

To treat unequal matters differently according to their inequality is not only permitted but also required.

The principle of equality does not mean absolute equality but recognizes relative equality: namely differential treatment proportionate to concrete individual circumstances. Differential treatment must not be given arbitrarily; it requires reasonableness, or must be in conformity with justice, as in the treatment of minorities, different treatment of the sexes, regarding public conveniences, etc. In these cases, the differentiation is aimed at the protection of those concerned and is not detrimental and therefore not against their will.³⁵

This position, that the principle of non-discrimination requires *both* the equal treatment of equals *and* the consideration of difference in assessing the need for differential treatment, also appears to be accepted in the *International Convention on the Elimination of All Forms of Racial Discrimination*.³⁶

30 See, eg, Gillian Cowlshaw, 'Mabo Breeds a Sinister New Form of Racism', *The Age* (Melbourne) 31 July 1993, 15.

31 Michele Ivanitz, 'The Demise of ATSIC: Public Accountability and the Coalition Government' (2000) 59 *Australian Journal of Public Administration* 3, 10.

32 [1934] PCIJ (ser A/B) No 64, 17.

33 *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (2nd Phase) [1966] ICJ Rep 6.

34 Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (3rd ed, 2003) 443–4.

35 *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (2nd Phase) [1966] ICJ Rep 6, 248.

36 *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969). See also Commonwealth, Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review* (1995) 63–4: 'Equality does not mean equal treatment. Recognition of the distinct cultural identity of minority groups is consistent with the notion of equality. Further, the mere use of race as a classifying criterion does not render a distinction discriminatory, but rather it lies in the invidious purpose or effects of that distinction'.

In counties where Indigenous difference is being legally and politically recognised,³⁷ Indigenous circumstances are improving, although the pace is very slow.³⁸ The problems faced by Indigenous Australians are often referable to negative treatment of their differences from non-Indigenous Australians, and therefore we must affirmatively address these differences. Colonisation has affected Indigenous peoples in a unique way, creating a different set of problems for them than for others in society. These differences are unlikely to go away by treating them the same as others are treated in all circumstances. In fact, many problems can be exacerbated by applying solutions without regard for these differences. You do not make a rich person and a poor person equal by giving them both a hundred dollars. For these reasons, the recommendations regarding the positive recognition of difference from the Council for Reconciliation should be reconsidered and implemented.

Recognising and positively acting upon Indigenous difference would be beneficial for Indigenous peoples and all Australians. A limited recognition of Indigenous difference has occurred at various times in Australian history, but it has not been broad or ambitious enough to achieve its goals. In 1972, Prime Minister Gough Whitlam's Labor Government attempted to replace two centuries of assimilation with a policy of self-determination. This limited recognition of Indigenous difference was an important, if cautious, step in pursuit of equality. In a 1973 speech Prime Minister Whitlam said: 'We will not rest until they have taken up, as a distinctive and honoured component in the Australian society, the position to which their rights as the first Australians entitled them'.³⁹ One of the most important manifestations of this policy was the creation of two national Indigenous institutions: the Aboriginal and Torres Strait Island Commission ('ATSIC') and the Torres Strait Regional Authority ('TRSA').⁴⁰ From 1990 until 2004 ATSIC and TSRA were the peak Indigenous elected bodies, with responsibility for managing and prioritising the funding of Indigenous programs and advising the Federal Government.⁴¹

While Indigenous self-determination was part of official government policy from 1972 until John Howard's Coalition Government came to power in 1996, it is apparent that actions taken under this rhetoric fell far short of the notion of self-determination as articulated at international law. Indigenous peoples did not have many opportunities to govern their own communities on their own lands, according to their own laws. Furthermore, ATSIC and TSRA both experienced great difficulty during their tenure because of excessive governmental political

37 '[T]he jurisprudence of comparable countries such as the United States and Canada and of Australia itself, accepts that "special measures" to overcome disadvantage do not offend equality principles': McRae et al, above n 34, 655.

38 Cf, Commonwealth, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (2004) 167–205.

39 Henry Reynolds, *Dispossession* (1989) 212.

40 ATSIC and TSRA were established under the *Aboriginal and Torres Strait Island Commission Act 1989* (Cth) and began their operations on 5 March 1990. See generally Robert Tickner, *Taking a Stand: Land Rights to Reconciliation* (2001) 48–50; Will Sanders and W S Arthur, *Autonomy Rights in Torres Strait: From Whom, for Whom, for or over What?*, Discussion Paper 215/2001 (2001) 14–16.

41 McRae et al, above n 34, 54.

interference,⁴² under-funding,⁴³ leadership perception problems,⁴⁴ Indigenous legitimacy issues⁴⁵ and the Howard Government's policy of practical reconciliation.⁴⁶ Additionally, the whole raft of programs developed under the policy of self-determination fell far short of a deep entrenchment of positive Indigenous difference in Australia. Former Social Justice Commissioner Mick Dodson wrote that:

The Commonwealth policy of self-determination is not based on the recognition of any inherent right of Aboriginal and Torres Strait Islander peoples to freely determine our political status and economic, social and cultural development. Such decision-making power as is exercised under the policy is based on a delegation of power from the supreme political power of the Australian State ...

Accordingly, self-determination, considered as a component of the Commonwealth social justice policy, is not a matter of right: when finally reduced, it is a welfare measure directed at Aboriginal and Torres Strait Islander peoples.⁴⁷

Since ATSIC fell so far short of self-determination, it is not surprising that it had little effect in changing the lives of Indigenous people and was therefore dismantled.

Despite the uneven and minimal recognition of Indigenous difference in Australia such an approach remains an important component of equality. The recognition of difference can be necessary to achieve equality in certain circumstances. In the Canadian case of *Law v Canada (Minister of Employment and Immigration)*,⁴⁸ Iacobucci J of the Supreme Court of Canada observed:

true equality does not necessarily result from identical treatment. Formal distinctions in treatment will be necessary in some contexts in order to accommodate the differences between individuals and thus to produce equal treatment in a substantive sense. Correspondingly, a law which applies uniformly to all may still violate a claimant's equality rights.⁴⁹

Just because people are subject to differential treatment does not always mean they have been denied the equal benefit and protection of the law. As Iacobucci J observed, the fairness of differential treatment will always be a contextualised determination that depends on the right at issue, the person's socio-economic status, and that of comparative groups.

Applying these principles to the achievement of reconciliation, one could argue that differential treatment of Indigenous and non-Indigenous peoples will not always lead to inequality. A contextualised determination of Indigenous

42 *Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 139 ALR 577.

43 Ivanitz, above n 31, 3.

44 Geoff Clark, elected ATSIC leader, was charged with rape arising from alleged activities taking place 30 years previously. The effect of this charge was to cast doubt on the integrity of ATSIC's leadership.

45 Some felt that ATSIC imposed non-Indigenous structures and values on Indigenous peoples: see Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 4, 9–12.

46 Larissa Behrendt, *Achieving Social Justice* (2002) 34, 67–9.

47 Commonwealth, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1993* (1993) 43.

48 [1999] 1 SCR 497.

49 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, 25.

peoples' socio-economic status in Australia should take into account the fact that the comparator group (non-Indigenous Australians) did not have to suffer through the disadvantage of colonisation in this country. Once this fact is recognised steps can be taken to treat Indigenous peoples differently on this basis, and thereby overcome the disadvantage that stems from colonisation.

Cadigal Country

Nanabush and Dingo follow the serpent down the Hawkesbury, past the Blue Mountains through Katoomba down to Woy Woy. They turn, then wind their way along the coast before pausing at La Perouse. At Botany Bay Nanabush has a word with Dingo. 'I've got an idea; we can't chase this thing all over the countryside. We have to make a plan. We're at a standstill. Let's see if we can work together to get that fire.'

Nanabush and Dingo whisper back and forth between one another for a few minutes. Serpent takes the moment to catch his breath, looking on from the airport near the back of the Bay. When they are finished Nanabush yells across the water, 'Ahnii snake: kin-e-beg, you are pretty fast. Dingo and I are having a hard time catching you. We didn't think you'd be so wily. You are a worthy opponent. You've got something we want – that fire there in your mouth. We want to share it with some people we know; we need it to make the fires of our people brighter. I've got a proposition for you. We could go around and around like this day after day, and all of us could get tired, or we can have a contest. If we just keep chasing you we'll both get exhausted; that seems like a waste of time. Why don't we settle this another way? I propose a challenge, a test of skill, a wager, a bet. That's seems the only thing fair to do, given that we are so evenly matched.'

The serpent does not move. The fire burns brightly from the stick in his mouth.

After a few moments Nanabush calls out, 'Good, I see you're not racing off. I'll take that as agreement to our challenge. Here's what we're going to do. We're going to have a jumping contest. Whoever can leap the farthest wins the fire. We'll jump north and see where we land. But there's just one thing. We need to level the playing field. It's obvious that we're different from one another. We can't act as if these differences don't matter, Dingo and I have legs and you don't. Even though you are so much longer than us and have a great spring in your coils, we think our legs are an advantage. That's not fair because it makes us unequal. Just to show you our good faith we'll jump from here. We'll give you a break; you can get a head start and jump from the Parramatta River.'

The snake looks on with passive black eyes and nods its agreement.

Nanabush and Dingo smile. They transform themselves. Kangaroo legs protrude from their torsos. They jump.

Serpent makes his way to the Parramatta, past Coogee, Bondi, and on to the Opera House and the Quays. He perches on the Harbour Bridge, tightly coils himself, and springs northward.

Neyaashiinigming Indian Reserve

Something drops in the water behind them, shattering its surface. Mishomis concentrates his attention on a spot about fifteen feet off the boat's starboard side, watching the ripples spread outward. A moment passes in silence. Suddenly his fishing pole twitches and then jerks and bends towards the water, line spooling off the reel. The three of them watch with interest. After a few seconds Nokomis says 'let it run' just as Mishomis jams the reel. The line snaps and the rod straightens. Mishomis looks up and Nokomis smiles, 'Glad to see you're feeding the fish'.

Mishomis gives her a friendly scowl and looks at his grandson, 'You were saying something about Dingo chasing a snake and trying to steal fire?'

The man collects his thoughts. 'A long time ago there was a big ceremony going on in the centre of the continent. All the animals were there: kangaroo, lizard, wombat, turtle, crocodile, hawk, echidna, koala, dingo, snake. They were talking about some new white animals on the coast that had been killing them. They were talking about what to do. Some wanted to befriend them, share the land and give them gifts. Others wanted to drive them back into the sea. They talked for days and days. No one slept. Eventually they arrived at a decision; they determined to give the newcomers fire. It was a compromise decision because fire could be a blessing or a curse depending on how it was used.

At the very moment the decision was announced the serpent sprung from the group. He stole the fire around which they had gathered. It was their only fire. The serpent headed towards what is now Canberra and then worked his way to the east coast by the sea. Dingo gave chase. They carved out the rivers and valleys through their journeys. After a while they ended up in the area that became Sydney'.

He felt a small tug on his line and paused for a moment. The action did not repeat itself. Nokomis interjected, 'Isn't Sydney the place you were based when you were in Australia?'

The man continued, 'that's where I was teaching, but I found myself all over the country. Sydney was something of a home base however. We lived in an inner city suburb called Newtown but travelled extensively. I was actually a Visiting Professor at the University of New South Wales ('UNSW'). It's a pretty good institution. I co-taught a course in Australian Indigenous Rights with my friend Garth and got involved with some of the activities around the school. UNSW has focused on Indigenous issues for quite a few years so there was a lot to do. They have a summer pre-law course for Indigenous students, a fledgling academic and cultural support program, an Aboriginal Law Reporter and Indigenous Law Bulletin. They also do some good work out in the communities through clinics, conferences and seminars. For a long time it was probably the best place for Indigenous people to study the law in the country. While it is still an excellent place to learn, I think it might be in the process of being overtaken by another school, University of Technology Sydney ('UTS'), where a bright, young Indigenous woman teaches. UTS has a House of Learning called Jumbunna Indigenous House of Learning, which coordinates research, publications and course activities. They have a lot of good people and resources.

I was very impressed. Like I said though, I used Sydney as a home base, and ended up travelling around the country’.

The man loses himself in his thoughts. A few clouds linger at the edge of the horizon. The water gently ripples in the late autumn breeze. The boat slowly circles its stone anchor resting on the bottom of the Bay. Nokomis and Mishomis let the young man’s thoughts unwind for a few minutes as they drift in place. The sun reflects off the four escarpments lining the peninsula. After a few long, lazy minutes Mishomis asks his grandson. ‘So, where did you find yourself while you were in Australia?’

IV RECONCILIATION, EQUALITY AND THE RELEVANCE OF SIMILARITY OF OPPORTUNITY AND OUTCOME FOR INDIGENOUS PEOPLES

If Indigenous peoples are to bridge the cultural divide in Australia and achieve ‘practical reconciliation’, there are also instances where they will have to be treated and judged in the same manner as others in society, as Prime Minister Howard suggests in his practical reconciliation agenda. Law and policy can be crafted with greater precision to identify when Indigenous similarity and difference should be relevant.⁵⁰ Formal and substantive equality can be pursued at the same time because answers in some contexts will require formal, as opposed to substantive, equality agendas.

Formal equality can be an important process and goal for Indigenous peoples. They should not have fewer opportunities in life because of their First Nations status. They should not experience inferior outcomes because of their ancestry and socio-political community. Indigenous peoples are entitled to enjoy an equality of opportunity and outcome in their levels of health, education and standard of living. To achieve this they are going to have to take practical steps, in concert with others in society, to accomplish these goals. The results of these efforts also must be measured by the same standards that are applied to others. More Indigenous peoples will have to require of the government, and secure for themselves, better housing, improved educational opportunities, higher incomes and stable social lives. This is the course that others must pursue. Through their own initiative, and with the aid of the government, Indigenous peoples are going to have to start acting like others in certain circumstances and engage in practical measures to achieve these results. This is not to deny relevant Indigenous difference in the matter of colonisation, but it is to affirm the importance of societal opportunity and individualised hard work necessary to achieve these goals.

50 See Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (2001).

Individuals and governments must take concrete, measurable steps to eradicate the following socio-economic inequalities Indigenous peoples in Australia experience:⁵¹

- Gross household income for Indigenous peoples in Australia is 62 per cent of that of non-Indigenous Australians;
- The unemployment rate for Indigenous people in Australia is four times the national average;
- Thirty-eight per cent of Indigenous students in Australia complete year 12, compared to 76 per cent of non-Indigenous students;
- Indigenous peoples in Australia are 5.6 times more likely to live in overcrowded houses than non-Indigenous people;
- Indigenous people in Australia constitute 20 per cent of the total prisoner population; yet make up less than one per cent of the total population of Australia as a whole;
- The median age of death for Indigenous people is 24 years lower than for non-Indigenous people in Australia (life expectancy for Indigenous women is 62.8 years, and for Indigenous men is 56.3 years).

Until Indigenous peoples enjoy equal outcomes in the areas of employment income, employment rates, educational rates, housing circumstances, criminal justice system involvement and life expectancy, there will be no reconciliation – practical or otherwise – in Australia.

However, in this analysis, equality can also be stretched one step further. The logic of applying formal equality to *all* aspects of the relationship between Indigenous and non-Indigenous peoples can be explored.

Yuggera/Waka Waka Country

A large shadow darkens and passes over the Brisbane River. Nanabush and Dingo land at the base of Mount Coot-tha, pushing the slope higher with their powerful legs. Serpent lands at the airport, a few miles to the north. Nanabush and Dingo are infuriated, having lost their wager. They scramble down the river to the sea. They find Serpent sunning himself on the runway, fire stick clasped firmly between his jaws. He sleepily basks in its warmth. They look on in jealousy.

'Well, you won that one alright', Nanabush calls out to his opponent in a jaunty tone, trying to hide his annoyance. 'You've got some powerful muscles along that skinny spine of yours; I've got to give you that. I underestimated you. Your difference was probably not the disadvantage we thought it was. We shouldn't have given you that head start, don't you think? I bet you couldn't have beaten us otherwise.'

Dingo and Nanabush confer among themselves for a few moments. A fire truck's siren wails in the distance, drawing closer as they speak. When they are finished Nanabush calls out across the runways.

51 The following statistics are taken from Commonwealth, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004* (2004) 195–226.

'Serpent: Kinebeg, let's try that one more time. Once again we'll see who can jump the farthest north, but this time no one gets a head start. The standards will be the same; there'll be no differences between us. It was probably unfair before, unequal. Let's be equal. What do you say?'

Serpent opens one eye and gazes down the landing strip. He slowly nods his head affirmatively.

Nanabush and Dingo smile. Nanabush transforms himself into a snake and Dingo jumps on his back. They coil, spring and jump; a split second later serpent follows.

Neyaashiinigming Indian Reserve

They float with the currents. The man pushes his fingers through the tackle box searching for his favourite bait, a twisted trickster to fool the fish. He takes a red and white striped lure from the tray and ties it around the end of his line. He looks up at his grandparents and resumes the conversation. 'My first real trip outside the Canberra-Sydney corridor was to Brisbane. I was invited to speak at the University of Queensland ('UQ'). I have a former graduate student who teaches in the law school there. UQ is one of the sandstone schools in Australia, kind of like the Ivy League schools in the US. The entire university is centred on a large quadrangle surrounded by ornately carved sandstone buildings. It rests on the banks of the Brisbane River.

I also visited the Aboriginal and Torres Strait Islanders Studies Unit at UQ when I was in Brisbane. It's part of the University and has been a centre of excellence in Aboriginal and Torres Strait Islander issues for over 20 years. The Unit maintains a committed system of personal and academic support for Indigenous students. They provide over thirty interdisciplinary courses dealing with Indigenous issues. They have an Access Program, a double major in Indigenous studies and they help facilitate student access to the Aboriginal Tutorial Assistance Scheme and ABSTUDY (a government funded Aboriginal and Torres Strait Islander Study Assistance Scheme). They publish the Australian Journal of Indigenous Education and other occasional monographs and papers.

The Unit's Course Coordinator is a wonderful man. He made sure I ate some traditional food while I was there. I think his daughter spent the better part of the day finding some mud crab for me. It was delicious. He also showed me where Rainbow Serpent lay on the University grounds. The Rainbow Serpent created the land in their dreamtime. I also met the Deputy Director of the Unit. She works at the highest levels of the Reconciliation movement in the country. Both the Coordinator and Director are also AIATSIS Council Directors. They are the type of people that really drive Indigenous issues in Australia, and it was great to meet them. I enjoyed their hospitality.

There were some awkward moments in Queensland though. One night, after one of my talks, we went to a private restaurant for a quiet dinner. The evening had attracted an eclectic crowd of judges, lawyers, academics, Indigenous community activities and aboriginal community people. They were great people, all of them. When we gathered to socialise the event was very racially stratified

despite everyone's best intentions. There was a palpable divide, black people visited and sat on one side of the room and white people did the same on the other. It made me very sad; I think others felt it too, but didn't know what to do to change the situation. You could see some of the troubles the country encounters reflected in our little dinner.

It wasn't long again before I was on the road, but the image of that evening has never left me. I was about to encounter even more serious divides.'

A Equality of Opportunity and Outcome: The Right to Colonisation

An argument can be made that Indigenous peoples should enjoy the opportunity and benefits in all areas of life, not just in those outcomes listed above. It may be asked: why should Indigenous peoples be the only group in society not to receive the benefits of colonisation? If equality of opportunity is to be the means by which Indigenous peoples improve their lives, Indigenous peoples should also have an equal opportunity to participate with others in the colonisation of Australia. If equality of result is the outcome by which we judge the provision of opportunity, Indigenous peoples should also participate in colonisation's benefits.

For example, individual Indigenous people removed from their families, in present or past generations, could return home. They could once again use, occupy and own their traditional territories if they were to participate in this movement. Groups that were forcibly removed to other locations outside their country could resettle their ancestral grounds. People could be educated in their own languages, re-acquaint themselves with those who hold ancient laws and stories, and make a living from and off their lands. They could do as other Australians have done in their colonisation of the continent. They could take for their benefit in certain circumstances, to ensure that their ways of life prosper and grow. They could constrain and/or exclude others to assist in this process. The importance of control cannot be over-emphasised in discussing colonisation. Control has certainly been important to non-Indigenous colonisation. Re-establishing connections and control by using rights that non-Indigenous peoples exercise in their colonisation efforts is one potential way for Indigenous peoples to enjoy equality.

Of course, some Indigenous individuals and communities will not have to resettle themselves to participate in colonisation. They may already be located on their traditional lands, even if their land rights are not recognised. In other instances, there may even be a limited recognition of Indigenous peoples' ownership of their traditional territories, through a native title determination or other federal or state law. However, even in cases where Indigenous peoples hold their traditional land, an equal right to colonisation would require much more than land recognition. Colonisation is a complex system that supports other social, political, cultural, economic and symbolic objectives and outcomes. Colonisation is entwined around the very roots of the Australian State.

For example, one legacy of colonisation is non-Indigenous social organisation in Australia. Non-Indigenous people have enjoyed protections as individuals,

families and extended associational groups (veterans lodges, church groups, cricket clubs, and chambers of commerce, for example). Indigenous peoples have often not enjoyed similar rights, such as freedom of speech, opinion, belief, association, due processes and family integrity, which are necessary to healthy social organisation. Non-Indigenous peoples have established rights to participate in political organisations and, following this, the right to have those organisations protected. Non-Indigenous people have formed shires, municipalities, regions and states and a Commonwealth government; Indigenous peoples have not enjoyed these same rights. Colonisation has facilitated and protected the widespread use of non-Indigenous languages, songs, entertainment forms and other forms of culture; Indigenous peoples could enjoy these same rights if colonisation rights were equally extended to them. Colonisation has facilitated the accumulation of land, the management and direction of labour, and the control of capital. Indigenous peoples have not enjoyed this protection in many instances; yet, perhaps they could claim the same entitlements if they were to ask for the equal right to participate in the colonisation of the continent.

Through equally participating in colonisation, Indigenous peoples might exercise rights to colonisation in such a way that their social, political, cultural, economic and symbolic ways and values interact with others and influence the development of many fields of human endeavour. Non-Indigenous norms have had wide and privileged access to many areas of life through colonisation. Formal equality could grant Indigenous peoples this same access. Indigenous peoples could colonise law, medicine, commerce, architecture, environmental and land use planning, the arts, science, the media and other fields and have their views influence – and sometimes lead – opinion in these diverse subject areas. Indigenous traditions could be compared, contrasted, integrated, and disentangled from other ideas to arrive at innovative formulations in diverse domains.

Indigenous traditions in Australia should not be frozen in time, while non-Indigenous traditions are unimpeded in their development. This would be unequal and violate formal equality. The tendency to view Indigenous traditions as primitive and not up to the task of addressing contemporary issues must be discarded. Such a view is racially discriminatory. Aside from racial discrimination, one of the reasons some people do not tend to regard Indigenous traditions and normative views as being relevant to our current affairs is because we have not given Indigenous peoples sufficient access to the educational facilities and resources to be able to analyse and apply them. If formal equality is the measure, Indigenous peoples should be entitled to have their views considered and applied to contemporary circumstances. Of course, not all traditions will be capable of addressing and adapting to current and future circumstances. Certain traditions will be abandoned as inadequate or incapable of nourishing the people who live under them. This goes for both Indigenous and non-Indigenous traditions. However, many Indigenous traditions are capable of speaking to people's present needs.⁵² The principles underlying traditional practices can be analysed and developed to provide original ways to solve

52 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (2002).

problems. This could provide benefits for Indigenous and non-Indigenous peoples. Tradition is most relevant when it looks beyond itself and points its adherents toward the future. If formal respect and equality was given to Indigenous traditions, Indigenous colonisation could change for the better how we conduct our affairs by giving access to a broader range of ideas.

Finally, the right to formal equality in colonisation could extend even further. It may be the case that some Indigenous people cannot, or do not want to, move from where they have been resettled or chosen to live. In some instances, Indigenous peoples have been removed from their traditional territories for close to 200 years. In other instances, they find themselves in good jobs, in settled family circumstances or in other relationships that make it inconvenient or near impossible to move. As a result, their exercise of colonisation rights may be very different from those of their brothers and sisters who return to their ancestral homes. Despite these differences however, there are still formal equality rights to colonisation they could claim that are exercised by other Australians. Most Australians enjoy a home community in another part of the world that continues to reproduce its own culture, language and values. For Indigenous peoples in Australia, there is no other place in the world where their cultures are practiced or their languages spoken. This places Indigenous peoples in an unequal position. Formal equality would require that Indigenous peoples who live away from their ancestral territories be entitled, as are all other Australians, to have a place where their culture can reproduce itself.

The fact that Indigenous peoples could live away from their aboriginal homelands and still participate in colonisation would bring them into a relationship of equality with non-Indigenous people. Ex-patriot Indigenous individuals would be strengthened by having strong Indigenous communities existing on traditional lands. They would draw strength in their colonisation efforts by having a community to refer back to and support them, just as non-Indigenous colonisation has drawn strength and support from its own communities and nations on other continents. In addition, Indigenous communities could also draw strength and support from successful, prosperous Indigenous individuals away from their traditional territories. These individuals could feed ideas and resources back to their home communities and provide great political and social support.

Neyaashiinigming Indian Reserve

The old Indian Agent's house is clearly visible through the trees on one side of the Bay, the leaves long having given up their cover. The men who lived in the house tried to control the reservation for too many years. The remains of his great-grandfather's house are in full view on the other side of the water; he was a former Chief from a long line of Anishinabek leaders. Floating in the divide, caught between their pull, the man looks at his grandparents. He continues his conversation.

'Like I said, when I left Brisbane I encountered even more severe separation and segregation than in Queensland. I went to Darwin in the Northern Territory,

a very humid place with lots of beautiful tropical flowers. They had Aboriginal reserves there, just like we do back here. In Darwin the poor people lived on the reserves and the rich people lived everywhere else. Actually, it's wasn't quite that bad, there are some middle class people in Darwin who are Indigenous. In fact, there seemed to be a decent number of them. But, from what I could see, for every well-off Indigenous person it seemed like there were two or more that were homeless. There were a lot of 'blackfellas', as they call themselves, in the public parks. There were signs on the public lawns from the local Aboriginal council proclaiming Larrikia protocols. These protocols basically asked the park dwellers to move on, saying it wasn't respectful of Larrikia law for them to loiter on their land without permission, which I guess it wasn't. Something felt wrong about the whole thing though, middle class and poor Aboriginal people asking even poorer Aboriginal people to move along, so that the 'whitefellas' could enjoy public spaces in peace.

Well, after walking around downtown, I went up to the University to give a speech. It was a funny place. They were focusing on building a strong business studies program, which is great in and of itself. What was not so great is that this development seemed to be occurring at the same time they were de-emphasising Indigenous Studies. At least that's the impression I got from the people I visited with who taught there. ... It was losing some of the nation's best Indigenous scholars. It seemed like poor institutional vision to me. I think you could develop a good program in business studies while maintaining historic strengths in Indigenous Studies. Anyway I am getting distracted. I was telling you the story about the Dingo.'

The man looked apologetically at his grandmother and grandfather. 'I am getting off on a tangent. Sorry about that, I know you wanted to hear about Dingo.'

His grandmother looked back at him and smiled, 'Don't worry grandson, from what you said it sounds like you are telling us about Dingo. He seems to be every bit as cunning as our trickster Nanabush'.

Larrakia Country

*Lush coastal rainforest gives way to dry bush and scrub. Broken mountains and scattered rocks turn into flat dry plains of red sand and small shrubs. Taroom to Tambo, Mount Isa to Alice Springs, Dingo rides Nanabush bouncing from place to place. Serpent flies before them, over Tennant Creek, Katherine, Batchelor and Darwin, never touching the ground. For him, travelling through country is like travelling through time.*⁵³

Nanabush and Dingo land to the south of Serpent.

Nanabush is furious. Dingo dismounts and they confront their adversary.

'How did you go that? You are not playing fair. There is no way you could jump all that way without touching down. What are you not telling us?'

Serpent wordlessly breathes out in response, the flames in his mouth flickering with each whisper. Nanabush and Dingo strain to hear.

53 Rose et al, above n 1, 45.

'It's obvious that you are faster and stronger than us' Nanabush responds. We are not really equal even if we try to be the same as you. You have tricked us. You can travel over the land and through the air much quicker than we could ever hope, even if we adopt your form. We need true equality. We need to understand your secrets; we need to be like you in more than just form. We need to do exactly what you do. Perhaps you can teach us how you do it; how do you cover the land as you do?'

They listen closely for a response but are only met with silence. Serpent turns from his foes and races west, spreading flames from the stick in his mouth as he slides along the ground. His actions divide, separating the life from the land.

B Objections and Responses to the Right to Colonisation

It might be said that Indigenous peoples cannot colonise Australia because they are its original inhabitants. Yet, this response overlooks the fact that there is an historical precedent for the Indigenous colonisation of the continent. Some time, perhaps 40 000 years in the past, the original ancestors of Indigenous peoples spread over the territory to improve their lives and enjoy the fruits of their labour. They have been moving in their territories, and, in some cases, *between* their territories ever since, particularly in the last 200 years. If there is concern amongst Indigenous peoples about the right to colonisation being delegated, it could even be said that colonisation is an inherent right, exercised since time immemorial. The fact that Indigenous peoples were in possession of the continent when Europeans first arrived should not prevent them from enjoying the ongoing benefits of colonisation practices that are enjoyed by others who live in the same country. If equality is the goal, the fact that Indigenous peoples have voluntarily moved, been relocated, or forced to seek other homes because of colonisation's impact should not prevent them from asserting a more explicit right of colonisation.

Those opposed to the idea of Indigenous colonisation might adopt a related technical line of argument. They could say that since Indigenous peoples had already colonised Australia, their resettlement of the continent in a contemporary setting cannot properly be called 'colonisation'. Critics may ask: how can you colonise land that has already been colonised? Indigenous peoples may have to admit that the point is technically true: they cannot, in the strict sense, colonise Australia, because they have already done so. Having said this, Indigenous peoples could, of course, pose a similar question to non-Indigenous Australians. It may, therefore, be more accurate for Indigenous peoples to label their position as the right to *recolonise* Australia, and receive the equal protection and benefit of law that other colonial actors receive.

There may be some Indigenous people who struggle with the notion of recolonisation if they view themselves as being created on this land, and having occupied it in unbroken succession since that creation. However, even in these circumstances, the idea of recolonisation may be an appropriate objective. As noted earlier, recolonisation is about much more than land. It involves the hearts and minds of peoples and nations. It involves the stories we tell ourselves about

how we live together on the land. Furthermore, the need to ensure that Indigenous occupation is recognised and supported by the full weight of the state makes recolonisation an appropriate goal even in cases where Indigenous peoples have never been separated from their land.

Whatever the technical reference to a colonisation practice, the point Indigenous peoples would be making is that they have not been permitted to recolonise Australia in equality with others, and that this is the right what they want to practice. If Indigenous peoples were to take up this argument, they would be asserting that they should enjoy the same right to occupy land, exercise decision-making power over it and other important matters in their lives, with the full and equal protection, support and backing of the state. Colonisation should not be pursued in a way that advantages non-Indigenous peoples and disadvantages Indigenous peoples, this would be unequal. Indigenous peoples may want to argue for the right to recolonise the country under an equal level of protection that has been enjoyed by others in the past.

In support of this argument, Indigenous peoples could consider invoking s 10 of the *Racial Discrimination Act 1975* (Cth) in support of their position. They could argue that they have been discriminated against by the Australian state because they do not ‘enjoy a right [of recolonisation] that is enjoyed by persons of another race, colour, or national or ethnic origin’. As a result, Indigenous peoples could assert that all governmental acts from 1975 to the present that have extended the benefits of recolonisation to non-Indigenous peoples and not to them are invalid because they are inconsistent with the provisions of the *Racial Discrimination Act*.⁵⁴ They could further rely on s 10 of the Act and argue that they by ‘force of this section, enjoy that right [in this case to recolonisation] to the same extent as persons of that other race, colour or national, or ethnic origin’.

If Indigenous peoples pursued recolonisation, it is important that their participation in this process receive the full weight of approval in law and politics. This is because, in examining Australian history, one can see that settlement of land is a necessary, but not always sufficient, condition for successful colonisation. Settlement must be justified in law and policy – and perhaps morality – to be considered successful. The legal apparatus has consistently been used to structurally reinforce the protection of non-Indigenous rights to the detriment of Indigenous rights:

- Since 1992, the court has legally justified the extinguishment of Indigenous land rights when these rights are inconsistent with Crown grants dated from 1788 to 1975 (the year the *Racial Discrimination Act 1975* (Cth) was passed).⁵⁵
- By enacting the *Native Title Act 1993* (Cth), the Australian Parliament legally justified the extinguishment of Indigenous land rights when these rights are inconsistent with Crown grants dated from 1975 until 1994.⁵⁶

54 See *Mabo v Queensland* (1988) 166 CLR 186.

55 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

56 *Native Title Act 1993* (Cth).

- By enacting the *Native Title Amendment Act 1998* (Cth), the Australian Parliament provided a legal basis for the extinguishment of Indigenous land rights from 1994 until 1998.⁵⁷
- In 2002, the cases of *Western Australia v Ward*,⁵⁸ *Wilson v Anderson*⁵⁹ and *Yorta Yorta Aboriginal Community v Victoria*⁶⁰ established strict tests for the proof of native title in Australian law, thereby initiating a further extinguishment of Indigenous rights, since native title is not recognised by the common law.
- Structures and policies designed to recognise Indigenous difference in Australia have been dismantled or rolled back. The disestablishment of ATSIC and other Indigenous representative bodies and organisations is one example of this process.

As these points indicate, colonisation in Australia is not only an historic process. Colonisation continues today; Indigenous peoples continue to lose their lands and have their governance undermined for the benefit of others. A firestorm of non-Indigenous colonisation continues to sweep the land.

It may be said that Indigenous peoples cannot claim the right to recolonisation because no such right exists in Australian law. If that is the case, Indigenous peoples might rightly wonder what label they should affix to the Parliament and courts' treatment of Aboriginal legal interests in the past. It appears as though non-Indigenous peoples have exercised 'special rights' in Australia during this period. Indigenous peoples have not been able to dispossess non-Indigenous Australians of their land, governance, and other rights, in the same way that they have been dispossessed. They have not enjoyed equality of opportunity or outcome in this regard.

If non-Indigenous Australians are going to continue to recolonise Australia, and at the same time talk about equality of opportunity and outcome, it is only fair that Indigenous peoples should be able to participate on the same footing with other Australians in the recolonisation process. Under this approach, the extension of an equal right to colonisation of the continent would, in one sense, accord with Prime Minister Howard's view about practical reconciliation. If people could only come to a mutual acceptance of the importance of working together and appreciating differences in a way that does not prevent people from sharing their futures together, then both parties participating in the process of colonisation could achieve this end.

However, it must be asked whether people in this country could share a future together if the recolonisation of Australia by Indigenous peoples was protected by the state, in the same way that the continuing colonisation of Australia is protected for non-Indigenous peoples. It may be said that Indigenous peoples and non-Indigenous peoples could not share their futures together under this type of

57 *Native Title Amendment Act 1998* (Cth). See generally Garth Nettheim 'The Search for Certainty and the *Native Title Amendment Act 1998* (Cth)' (1999) 22 *University of New South Wales Law Journal* 564; Richard Bartlett, *Native Title in Australia* (2nd ed, 2004) 52–64.

58 (2002) 191 ALR 1. See generally Bartlett, above n 57, 65–73.

59 (2002) 191 ALR 313.

60 (2002) 194 ALR 538.

equality because the whole enterprise of colonisation is unfair, and will always end up dispossessing people with settled rights. It could be said that Indigenous peoples should know better than to advocate colonisation because they have borne the brunt of its effects for over 200 years. How, it could be asked, could they advocate colonisation when they have first-hand experience with its devastating effects? There are truths in this statement that must be grappled with. Colonisation does result in people being disadvantaged and there is no denying this fact.

In addressing this line of argument it is also important to note that, if Indigenous peoples started claiming the right to participate with others in the colonisation of the continent, some may say this impliedly legitimates non-Indigenous claims to the *necessity*, *practicality* and *justice* of colonisation throughout the last two centuries. However, while it may be true that the *necessity* and *practice* of non-Indigenous colonisation may be conceded, it is not necessarily true that the *justice* of how colonisation has been carried out to this point would be accepted. Much depends on what Indigenous peoples say and do in the proclamation and implementation of their right to colonisation.

Extending the equal right to participate in the colonisation of Australia does not necessarily mean that Indigenous peoples will pursue it in the same manner that other Australians would. Indigenous peoples are likely to pursue the recolonisation of the continent in a somewhat different manner than non-Indigenous people, given their experience and beliefs. They could engage in practices that required the participation and full consent of non-Indigenous peoples to their recolonisation; they could abide by principles of international law; they could commit themselves in law, policy, morality and practice to recolonise Australia in a way that respects the rights and interests of non-Indigenous Australians. If non-Indigenous Australians feel that this is an impossible goal, or have some discomfort in Indigenous peoples undertaking to recolonise the country under these principles, they may want re-examine the basis on which they undertake the same process.

Neyaashiinigming Indian Reserve

The young man casts behind him. Being with his grandparents always reminds him of when he was young. Time seemed so slow back then, as if it would never end. Those long hours have stretched into years, bringing them to this place. He watches while Nokomis adjusts her scarf and Mishomis pulls his jacket more tightly around his neck. He sees the deep lines on their faces and notes their movements are getting slower. Time does not end, it weathers and changes. He feels glad he invited them out here today. Those long slow days of youth have raced away; moments like these suspend its rush.

Nokomis catches his eye, continuing their conversation: 'It's funny how trickster finds his way round the world. Life is full of charm and cunning, wisdom and foolishness, kindness and mean tricks. Australia seems no different'.

'That's true Nokomis. The trickster is alive and well all over the world, continually building and deconstructing the world. Contrasting changes are a part

of life even though they're imperceptible at the time. When I was in Perth I visited an old friend. He went there so full of hope. The *Mabo* case had just been released. It was a breakthrough decision. After 200 years Australian legal institutions finally recognised Indigenous land rights. The High Court held that it was unjust and racially discriminatory to perpetuate the idea the Australia had been terra nullius, empty land, when it was settled from Great Britain. They wrote that native title finds its origins and content in the peoples' traditional laws and could be protected in contemporary law. My friend has now been in Western Australia for over a decade and has become disillusioned with the Australian legal establishment. He finds no equality in their law. Since 1992 things have gone completely backward. He doesn't see much hope for the immediate future. The Commonwealth Parliament has extinguished a broad range of native title interests. The States are recalcitrant and block Native Title at every step. The Courts have made the proof of native title exceedingly difficult. The same judgment that raised such high hopes contained germs of further dispossession for Indigenous peoples.

I also found it interesting to hear him talk about law schools. While he said there are excellent students in many courses, he found others who treated these institutions like country clubs. They were there to make connections and play. He also noted that some teachers devoted too much time to consulting or practicing law off the side of their desks, at the expense of the research and scholarship. He saw many legal minds in the city more interested in golf and going to the beach than trying to solve the tough challenges faced in the world. He doesn't know if his perceptions are right or fair, but he does see great comfort and prosperity in the legal world. All the while, Indigenous rights slowly erode.

Noonygar Country

Serpent twists through the Kimberleys, passing through Fitzroy Crossing to Broom. Winding along the coast, he slips past Dampier and Shark Bay. The Indian Ocean is bright and vast, wave after wave pounds at the beaches, washing sands over near endless shores. Ships become more frequent the further south he travels. He spies Rottnest Island and knows he is near his destination. Spotting Fremantle, he enters the Swan River and meanders along its length. Arriving at Perth, glass and concrete towers mirror the blazing sun. Serpent settles into their reflections.

Nanabush and Dingo arrive exhausted. They are near their wits end. Equality doesn't seem to work. They decide to take another approach.

Nanabush and Dingo transform themselves into lawyers and slither into the central business district. They meet with barristers in their chambers and consult with representatives at the Native Title Tribunal. They find a lot of support for their case, there seems to be a whole industry that will encourage their action. They do some research and sign some documents and march down St Georges Terrace. They launch a Native Title Claim at the registry office, claiming the fire in Serpent's mouth. Their argument is that fire belongs to Dingo and his people because he is part of a recognizable group that had associations with the fire in

the territory of Australia prior to the arrival of others. Dingo further claims that he has traditional laws and customs relative to fire in Australia that give rise to his claim, and that he has continued to hold native title to fire in Australia in accordance with these traditional laws and customs.

Serpent is compelled to stay in Perth while the matter is brought to trial.

When the matter comes before Federal Court Dingo loses his case. The Judge rules that Australia's territory is too large an area for him to make a recognizable claim. Dingo needs to be more precise and prove his rights over a particular bounded area. Without such precision there is the risk that he could usurp the rights of other potential claimants. The Court also found that while Dingo may have had traditional laws about fire in the past, he was unable to show that he still continued to hold fire in accordance with those traditional laws and customs. In particular, the Court found that Dingo lost legal connection with fire in accordance with traditional laws when fire was stolen by Serpent.

Dingo and Nanabush understand the act they are complaining about, the stolen fire, is the very act which defeats their claim. They have to admit the cleverness of this logic. It goes round and round in circles, they couldn't have done a better job themselves.

With the judgment rendered, Serpent flees the witness box.

Casting off wigs and black robes Nanabush and Dingo follow in hot pursuit.

V PRACTICAL RECOLONISATION

Once it is established that equality requires that Indigenous peoples have the right to engage in the recolonisation of Australia, with the same level of protection that non-Indigenous Australians enjoy, the practical aspects of this process could then be explored.

One guide for identifying what may be practical for Indigenous peoples to pursue in their quest for recolonisation comes from an examination of what Australian governments have done in the colonisation of Australia in the past 12 years (though for the reasons given above Indigenous peoples would probably choose otherwise). Despite its drawbacks, this approach has the advantage of diminishing fears that Indigenous peoples would pursue something different from non-Indigenous Australians. This should be more comforting to those who tend to regard similarity in treatment as equality. Following the government's example could also provide a guide about what may be 'practical'. Under the assumption that an undertaking must be 'practical' if governments have taken action, in either law or policy, to accomplish an objective, Indigenous peoples can take guidance from these examples to take steps to achieve 'practical recolonisation'.

- Practical recolonisation could permit Indigenous peoples to extinguish inconsistent non-Indigenous titles prior to 1975 and this could be confirmed by federal legislation.
- Practical recolonisation could permit Indigenous peoples to be able to extinguish, through federal legislation, any non-Indigenous titles issued

since 1975 where such titles are incompatible with the continued existence of Indigenous titles. For example, in cases where Indigenous peoples can show that the security of their title is necessary for their development, they should have the same rights as pastoralists, miners, lease-holders, fee-holders and others to deny activities on their land.

- Practical recolonisation could permit legislative amendments to be passed by the federal government to make it technically difficult and financially expensive for non-Indigenous peoples to defend their titles.
- Practical recolonisation could leave the interpretation for the proof and extinguishment of non-Native title in the hands of a court appointed by Indigenous peoples. Members of this court could be chosen for their expertise in Indigenous law when examining concepts of non-Indigenous law relevant to non-Native title. They could also apply Indigenous law to judge non-Indigenous law.
- Practical recolonisation could allow for the disestablishment of elected non-Indigenous political structures and the mainstreaming of non-Indigenous services within general Indigenous governmental service delivery.
- If more non-Indigenous people ended up dying in custody, having their children removed, losing their rights to governance, or having any other disadvantage befall them during the Indigenous recolonisation of the continent, practicality could require that these not be considered as requiring any legal remedy, legislative response, or political apology.

Some may argue that the steps described above are not 'practical' for Indigenous peoples in the recolonisation of the continent. It may be argued that they are too divisive, expensive, unrealistic or unjust. Of course, if one asks these questions they may also ponder why these steps are considered practical when non-Indigenous people have taken similar steps in the past few years.

Is it possible that questions of equality and practicality do not take us far enough in the debate about reconciliation in Australia? Would the practical recolonisation of Australia by Indigenous peoples lead to practical reconciliation? Does the continued colonisation of Australia by non-Indigenous peoples lead to reconciliation? In considering these questions it is possible to identify the fact that practicality should not be the measure of all things when dealing with issues of reconciliation and colonisation. What may be practical can be in the eye of the beholder.

Having identified this approach to the Indigenous recolonisation of Australia, it is important to re-emphasise that it is unlikely that this would be the preferred approach of Indigenous peoples. It is both possible and preferable to develop strategies for the recolonisation of Australia that do not follow the federal government's example. What these strategies might look like depends on Indigenous peoples' aspirations and what Indigenous and non-Indigenous peoples regard as desirable and possible. It is insightful, for the future of Indigenous peoples living in recolonised countries, to explore if others have any interest in the process of Indigenous recolonisation. This paper has attempted to initiate this conversation and invite others to take it up.

Kaurna Country

The wind is hot off the Indian Ocean. Dust rises in clouds and sweeps over the Nullarbor Plain. A broad, treeless expanse. Through Albany, Esperance, Eyre and Ceduna, Serpent, Nanabush and Dingo chase across the Great Australian Bight. Nanabush clips the serpent. A rough wound opens on his back and washes blood of red, black and yellow over his entire body. Serpent loses strength and his long form crashes into the Spencer Gulf, washing the land to Lake Eyre. Serpent is injured and crawls over the Flinders Range. Weakened, he lays down in Adelaide at Encounter Bay, his body twisting behind the hills across the Murray-Darling watershed.

Nanabush and Dingo approach the Serpent with caution. They stand in the water off the shore.

Nanabush calls out, 'Kinebeg. I see I hurt you. I hope you are OK. I didn't mean to hurt you. It looks like you need some help'. Nanabush turns from the Serpent and searches through his backpack. Pulling out a string of bois blanc, twisted cedar rope, he holds it up to the snake. 'See this, it can help you. I once had a great cut across my backside and I sewed it up with this.' Nanabush pulls it by the yard through his fingers to demonstrate its length. 'It was made by my grandmother and will hold anything. Let me sew you up.'

The Serpent watches Nanabush and Dingo. Uncontrollably his body wreathes through the pain of the rough cut.

Nanabush comes closer.

'I will help you, just let me grab this stick you're holding to thread the rope. I promise you will feel better once you're sewn up.'

The Serpent thrashes in place without strength to move further.

Nanabush touches the snake's tongue.

'There, it's alright, you'll see.'

Nanabush grabs the stick from the snake's mouth. The fire burns brightly on one end. With one deft move Nanabush threads the rope and lifts the stick in the air. Then, plunging it through the Serpent's back, he knits the skin together with a great pull. He repeats this action across the length of the gash, closing the wound.

When he is finished, he tosses the stick to Dingo, who takes off along the coast.

Neyaashiinigming Indian Reserve

The boat lands with a thud. The young man kills the motor and jumps into shallow waters pulling it onto the shore. Nokomis throws him a rope and he ties it to a small sapling just off the beach. He returns to steady the boat as his grandparents disembark. When they are safely ashore he reaches into the craft and gathers an armful of fishing tackle. He makes a pile on the shore before returning for the fish. Eight *addikmaegoosuk*, all caught by his grandmother, are hauled out of the vessel. He hands them to his grandfather to prepare while he cleans out the boat.

Mishomis looks at the fish, holding one at arm's length as he considers the catch. 'These are very beautiful creatures: long body, large silver-white scales,

dark fins and a greenish-blue back. Addikmeg, caribou of the sea, whitefish. They have fed our people for generations. We should be very grateful they have chosen to feed us tonight.' Mishomis takes out his knife and splits its belly open. Separating flesh from the bone, he throws its guts in the water as the seagulls circle, screech and dive.

'Did you eat any good fish when you were in Australia grandson?' Mishomis asks.

'They had something called Barramundi, which I enjoyed. In fact there was a number of fish that I really liked which I had never heard of before. I can't remember their names though.'

Nokomis walks along the shore gathering sticks to prepare a fire. When she is finished a stack of old driftwood, snags and twigs lay piled in a circle of stones.

'I do remember that we had this great dinner in Adelaide one evening, in South Australia', he goes on. 'They served all kinds of kinds of fish. It was a feast. We were gathered at a Hotel in a place called Glenelg on the beach. I remember the place's name because Lord Glenelg was partly responsible for one of the treaties signed by great-great grandpa. Glenelg was the Secretary of State for the Colonies at the time and had responsibility for Aboriginal affairs in the colonies. He also wanted South Australia to be different from other parts of the continent by recognising Indigenous Rights.⁶¹ He was the same man who wanted to ensure that Canada did not remove its Indigenous populations from their homelands.⁶² The world seemed like a smaller place when I was there on that beach, two groups of Indigenous peoples so far apart, on the opposite sides of the world, joined by a common historical figure.'

Nokomis looks up from her work, 'What were you doing in Adelaide? Did you just travel the country to eat fish?'

'I was invited to give the Eddie Mabo Memorial Lecture at the Annual Native Title Conference. It was organised by AIATSIS and the Aboriginal Land Rights Movement in South Australia. I got to meet Eddie Mabo's wife; her husband was the one who brought the case.⁶³ He passed away a few years ago but she is still going strong. She is a very warm and dignified person. The Torres Strait Islander people have much to be proud of. I also met Aboriginal people from all over the continent at the conference. Each year it is held in a different part of the country and someone gives a keynote speech to introduce the theme. That was my role. The conference is an important institution for land councils, communities, activists, governments, lawyers, academics and others interested in Indigenous rights.

The title of my talk was 'Practical Recolonisation'. It was a twist on the government's attempt to force 'practical reconciliation' with Indigenous peoples in Australia. I wanted to show how I thought the government's proposals for practical reconciliation really amounted to continued non-Indigenous colonisation. I hope they caught the gist of my speech. It can sometimes be

61 Henry Reynolds, *The Law of the Land* (2003) 99–125.

62 John Borrows, *Treaties, Traditions and Settlement: A Legal History of the Manitoulin Island* (D Jur Thesis, Osgoode Hall Law School of York University, 1994).

63 See generally Nonie Sharp, *No Ordinary Judgment: Mabo, the Murray Islanders' Land Case* (1996).

difficult working in another country like Australia. There are enough similarities to enjoy a level of comfort, but enough differences to prompt questions about your assumptions. You can't take things for granted. I always said speaking in Australia was a little like driving on the other side of the road there. You feel confident until you come to a corner and have to consciously remember which lane you should turn into. Your intuition sometimes fails you. It's like that when you try to take your experiences with Indigenous issues into another country. It can be hard to work in a cultural context.

Anyway, the idea behind my talk was that Indigenous peoples should consider whether they wanted to resettle their country and re-inscribe their values over the socio-political landscape. Indigenous Australians actually own 18 per cent of the land base and are only one per cent of the population.⁶⁴ This seems like a good result unless you remember that their land is probably the most economically unproductive in the nation and that they used to comprise 100 per cent of the population and own 100 per cent of the land base. The separation from their homelands and their loss of resources has had dramatic consequences for their ways of life, languages and culture. I know what it feels like to have a strong connection to home here at the Cape. I can't imagine how devastating it must be for some of those people not to enjoy that connection.

I don't think native title cases and legislation will re-establish their connections from what I read and experienced. So, my talk was meant to prompt some discussion about whether Indigenous peoples in Australia could undertake some kind of process of recolonisation. Practically speaking: whether they could take focused action to re-ignite their laws. Colonisation has worked for non-Indigenous people as they have created powerful systems and re-settled on Indigenous lands to justify their lifestyles. I wondered if Indigenous peoples were interested in appropriating the language of equality in that country, or showing its hypocrisy, by arguing that they have a right to physically and intellectually recolonise the country, just like non-Indigenous people have tried to do and are doing. There were lots of twists and turns in my argument and it's hard to remember the details. In the final analysis my biggest goal was to try and bring a different perspective to their situation as an Indigenous person from another country. Sometimes another perspective can give you a fresh view on an issue. I'm not sure what people thought about the process I was advocating, though I was serious about the result.

It's like that story about the Dingo I was telling you about. Dingo wanted to steal fire for a purpose. I think Indigenous people should seek for places where small, controlled, cultural fires can be set to regenerate our lands and peoples. Properly set fires can cause a long dormant idea to germinate and take root in its original habitat. Proper burning requires detailed knowledge of the terrain and a range of local factors, such as prevailing winds, communities and the history of particular places. I think we should use that knowledge before we lose it.'

64 David Pollack, 'Indigenous Land Use in Australia: A Quantitative Assessment of Indigenous Landholdings in 2000', Discussion Paper 221/2001, Centre for Aboriginal Economic Policy Research <<http://www.anu.edu.au/caepr/discussion2.php>> at 9 November 2005.

Mishomis guts the last fish and hauls them over the rocks. He places them on a makeshift rack Nokomis has built in the stone circle. Nokomis reaches down and helps her husband arrange them on the green wood. When they are nearly finished she turns to her husband and says, 'I think we should cook and eat the fish before we lose it. We better hurry up. Our grandson is speechifying again and those seagulls out there are getting awfully bold now they're finishing their meal. They might claim these fish for themselves if we're not careful. Discovery can be awfully hard to dispute, even if you were there first.'

VI PRACTICALLY FINISHED

In 1985 the Premier of Western Australia, Sir Charles Court, wrote:

it is now time that we brought the land rights nightmare to an end. ... Dangerous resentment has been aroused by the unfairness of it, by the divisiveness it creates in the community and by the opportunities destroyed through the keep-out policies imposed by Aborigines under white activist guidance. All of us own Australia together – Aborigines included. All of us share the rights to acquire land under the law made for all Australians.⁶⁵

It is interesting to follow this line of argument to its logical conclusion.

The land rights nightmare should be brought to an end. Dangerous resentment has been caused through the unequal application of law. Just as some non-Indigenous peoples have felt resentment about the so-called unfairness of native title, Indigenous peoples have felt resentment over the so-called unfairness of non-Indigenous recolonisation. Opportunities have been destroyed by the keep-out attitude imposed by non-Indigenous peoples under white activist guidance (such as the miners in 1993, and pastoralists from 1996–98). All should share the right to acquire land under the law made for all Australians. Indigenous peoples should be extended the same protections in law as non-Indigenous peoples. They should be able to recolonise their lands with the same benefits and resources the state has given to other groups in this land.

Colonialism actually works on a certain level, for a select group of people. It also works for some insects, birds, fish and animals too. Those who critique colonialism do not address these benefits in enough detail to be persuasive in changing how people live and respond to it. Steps should be taken to address colonialism's advantages and explore its almost invisible hold on people's views about the subject. Until this is done, the debate about the utility of the continued colonisation of certain countries is not fully engaged; people will tend to speak past one another and never fully address one another's concerns. While very few would openly defend colonialism, many more would be loathe to dismantle the benefits they receive from it. Colonisation hangs like a shadow in the background of discussions about its continuing existence in Australia, practically speaking. If its benefits and unequal application were more thoroughly acknowledged, the implications of practical reconciliation would be more fully apparent.

65 Charles Court, 'The Tragedy of Land Rights', *The Australian* (Sydney), 30 April 1985, 9.

Neyaashiinigming Indian Reserve

A fragile tendril of smoke curls over the wood, smudging the area before it. Dried leaves and needles mesh in a smouldering heap in the circle's centre. Mishomis leans over the glowing embers and cups his hands around his mouth. With short, focused puffs he breathes life into the fire. As he steps back flames burst from the mound and begin to consume the twisted wood. Nokomis, Mishomis and their grandson sit around the fire, on the reserve, watching the blaze grow stronger.

Nokomis looks through the flames at her grandson, 'so, how did that story about Dingo end? You never finished it. You told us about how all the animals had agreed to give fire to the newcomers to see how it would be used. Serpent stole the fire just as they made their decision and placed it in his mouth and went chasing across the land. You told us about them chasing through the land. How does the story finish?'

'Oh yeah, I forgot to let you know how it turned out.'

Wurundjeri Country

Dingo passes through Kangaroo Island, Mildura, Swan Hills, the Twelve Apostles, and Geelong. He stops in Melbourne. Panting in great gasps along the shores of the Yarra River, trying to catch his breath. Nanabush is nowhere to be seen. Rainbow Serpent is not around; he lay dreaming, somewhere back on the land.

Dingo is mesmerised by the fire stick burning brightly in his paws. It is very hot, there is no smoke. You can tell it is a powerful fire by the height of the flames, and the way its little wings break away from the main blaze.

He wonders what to do next.

He could fulfil the wishes of the council and give fire to the newcomers. Knowing what they know, would they renew or devastate the country?

He could return the fire to his people. They could convene another council and decide a new course of action. Would they still be capable of gathering and making decisions? It was a long time since Serpent stole fire.

He could place the torch against the hills to the north of the city. He knows the prevailing winds, communities and fire history in this place. He is a traditional owner and has a responsibility to take care of the land.

Should he ruin or restore?

He takes the fire and watches it run. He can tell it's running toward the west from that little thing on the right. He can see it's leaning toward the left; that flame, lying down and running.