and the challenge of reconciliation

That the High Court's decision offers the best opportunity so far for us to build reconciliation between Aboriginal and non-Aboriginal Australians is something on which both the Prime Minister and Aboriginal groups agree **Noel Pearson, Director of the Cape York Land Council,** ***explains.***

Late last year the Prime Minister instituted a consultation process to consider the views of all groups with an interest in the decision. He has undertaken to continue this process until September, when the Commonwealth will spell out its position. As an initial step, an interdepartmental committee (IDC) of Canberra bureaucrats was put together to prepare a report on the implications of the decision. From this report the Government extracted a set of principles and took them to the Council of Australian Governments meeting in Melbourne.

A broadly based group of Aboriginal land councils and legal services had drawn up its guiding principles for responding to the decision. Known as the 'peace plan', these principles were put to the Prime Minister at a meeting on April 27.

The IDC's principles have approached Mabo from a very different philosophical perspective to Aboriginal groups.

Aboriginal people see Mabo as essentially about the recognition of indigenous human rights. The IDC sees it as primarily a land management problem. The IDC has approached the issue not from the perspective of building a new Australian identity separated from the country's British colonial past, but has reinforced that traditional colonial outlook by making the issue of secure access by strangers to another's resources the overriding concern.

The IDC's principles offer a continuation of the colonial legacy with whites free to take from blacks as they please and without regard to the relationship to the land developed over millennia that is at the heart of Aboriginal title.

By characterising Mabo as primarily a problem of land management, the IDC not surprisingly sees the Commonwealth's task as helping the States deal with a vexing land and resource question. If, however, Mabo is treated as a question of indigenous human rights, which has been the approach adopted by courts and governments in Canada, the United States and New Zealand, the Commonwealth's obligation to take primary responsibility is unavoidable.

This is required by its international treaty obligations and the responsibility it assumed with the 1967 constitutional referendum to make laws with respect to Aboriginal people.

> ***'So much has been lost that Aboriginal people are entitled to expect special protection for what remains.'***

The treatment of Mabo should be located within concepts of indigenous human rights being developed internationally. Principles governing the treatment of aboriginal title elsewhere, particularly Canada, the US and New Zealand, cannot be disregarded. Indeed, Aboriginal people will take significant account of the standards applied to indigenous people in those countries where recognition of aboriginal title has a much stronger history when assessing the Commonwealth's response. The Commonwealth cannot justifiably adopt principles which establish *lesser* positions than those prevailing elsewhere.

Mabo inevitably raises questions of land management. We do not believe that this is an accurate or just characterisation of our challenge. To

treat Aboriginal title as a land management issue also ignores the question of the right to self-determination in accordance with the laws and customs the court has explicitly said gives the title its particular form. This form can naturally vary from place to place and over time as laws and customs change.

The IDC has pushed the principle of non-discrimination as an appropriate way to treat Aboriginal title. By 'non-discrimination' the IDC means treating Aboriginal title as analogous to a freehold or other interest derived from the Crown.

Yet to compare Aboriginal rights to the rights of others not discriminated against in the past 200 years is not appropriate. So much has been lost that Aboriginal people are entitled to expect special protection for what remains. There needs to be positive acknowledgment of *different treatment* of Aboriginal title which reflects the fact that Aboriginal culture is inseparable from the land to which Aboriginal title attaches. The loss or impairment of that title is not simply a loss of real estate. It is a loss of culture.

The IDC has assumed that to treat Aboriginal title equally and 'no less favourably' than other titles means Aboriginal title must be treated like 'normal' titles. The fallacy of this approach is that strict adherence to the notions of formal equality compounds inequality because it fails to acknowledge the legitimacy of difference, particularly of culturally distinct minorities.

The High Court exposed this fallacy in the case of *Gerhardy v Brown*, where Justice Brennan said

> *Human rights and fundamental freedoms may be nullified or impaired by political, economic, social, cultural or religious influences in a society as well as by the formal operation of its laws. Formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities.*

The equating of Aboriginal titles with normal titles obscures the very nature of Aboriginal title. Aboriginal title arises out of the customs and laws of the Aboriginal titleholders. Nothing in mainstream titles is comparable. The High Court in Mabo clearly stated that indigenous title is *sui generis* (of its own kind) and that it is misleading to attempt to define the title by resort to English property law concepts.

There are clearly no titles under the real property law of Australia which have their origin in laws and customs of a particular cultural group. Being a cultural title, interference with Aboriginal title not only has a legal consequence but also has a cultural consequence. It must be remembered that, while Parliament may legislate to save or revive titles where it allows interference, there will still be a real detriment to culture. You can technically save Aboriginal title at Coronation Hill but you can't save culture when the hill is flattened.

> ***'You can technically save Aboriginal title at Coronation Hill but you can't save culture when the hill is flattened.'***

There should be no statutory attempt to define Aboriginal title as a title comparable to other forms and we believe that the very nature of Aboriginal title precludes any correlation being drawn with other titles as a matter of policy. Aboriginal people should not be made to suffer for the conceptual failings of the IDC.

There are titles issued from 1975 to 1992 which may be invalid or for which compensation is due to Aboriginal titleholders owing to the Racial Discrimination Act. The Commonwealth Government has apparently assured people who obtained grants during this period that their titles will be protected and they will not be liable to any additional costs. The underlying rationale is that, because Aboriginal title was not recognised then, their conduct was innocent.

To say the takers of title were 'innocent' obscures the truth. Many of these titles were obtained in extremely unconscionable circumstances and were the subject of legal appeals (which, before Mabo, were mostly unsuccessful).

The title takers frequently knew of traditional Aboriginal interests. In many cases, they rode roughshod over Aboriginal objections.

The onus is on the Prime Minister to translate his vision for a new national identity for Australia into a principled and just resolution of indigenous claims. Paul Keating has publicly accepted the challenge presented by Mabo. If he is to meet this challenge, he must reconcile the IDC's approach with the expectations of Aboriginal people.

The process of reconciliation will be determined by the extent to which government responses to Mabo can come to terms with the peace plan. You cannot force reconciliation, nor can you impose solutions. The content of commonwealth legislation must receive the endorsement of Aboriginal groups if the historic opportunity of Mabo is to be seized.