

A Way Forward for Reconciliation The Federation of Australia 200x

Ed Oberg – January 2001

The Current Dark Cloud and The Silver Lining

We (all Australians) are facing the prospect that the present well-intentioned approach to reconciliation may founder. We have arrived at this impasse, at time when it could be argued that we need the symbolic and real benefits of reconciliation more than ever.

One of the **silver linings** in the current dark cloud hanging over the reconciliation process is that the process has subtly shifted from the politicians and elites in the reconciliation movement to the people of Australia. Yes, it will be up the ordinary people of Australia to bring about a fair and just solution to this matter.

Unity in Diversity

Our present society has been thrown together during the last 200 years on top of a culture that existed for 40,000 + years previously. In reality, we are a nation that is bound by time (40,000 + years in the case of the first Australians), the features and shoreline of the Australian continent and circumstance.

Rather than focusing on reconciling differences between the indigenous people and non-indigenous people that have resulted from this situation, it might be more productive for us to seek an approach to reconciliation that reflects the positive aspects of our humanity and the settlement and inhabitation of Australia.

There are a number of factors associated with our collective existence, which really haven't been considered in the reconciliation debate. These factors are linked to our spirituality and heritage, the settlement of Australia, Australia's geography and the laws and customs of the people of Australia, and include:

- The spiritual heritage and wisdom of both the indigenous and non-indigenous people of Australia
- The continuous human inhabitation of Australia for the past 40,000+ years
- The settlement of Australia by migrants and their descendants, the first instance being when the first Australian set foot on these shores
- Further to the previous point, the circumstances, that led to the arrival of many of our forbears and present inhabitants, were beyond their control
- We only need to identify and adopt a workable approach to reconciliation which is acceptable to the indigenous people of Australia and the citizens of the Commonwealth of Australia
- Because of our unique geography, ie an island nation/continent, we can focus on this issue without interference from any immediate foreign influence
- The Customary and Traditional Laws of the indigenous people of Australia, which in some circumstances have guided them for tens of thousands of years, would surely hold some benefits for the whole of Australian society
- The citizens of Australians have been governed for the last 100 years by constitution that provides for our Commonwealth of federated states. That very same federal structure could be reconfigured to include first Australians and the Torres Strait Islanders in the federation.

The acknowledgement of these factors could bring a different perspective to our search for a new approach to reconciliation that might enable us to truly define ourselves as Australians.

Given all of the above, this paper proposes a way forward for reconciliation that is based on a reconfigured form of our federal government styled - *The Federation of Australia 200x (Federation 200x)*. The head of power for the new federation is a proposed *Compact of Federation of Australia 200x (Compact)*. The parties to this *Compact* would be the first Australians, Torres Strait Islanders and the citizens of the Commonwealth of Australia.

The following touches briefly on the rationale for such an approach and includes a description of the key elements of the *Compact* and the process to achieve this outcome. Also attached to this proposal are some preliminary drafts of typical documents that would be required to effect this outcome.

The Rationale for Federation 200x

Before considering any approach to reconciliation, it's prudent that we reacquaint ourselves with some observations that are relevant to (1) the principles and values that form the basis of our society and (2) our recent history. A majority of non-indigenous Australians value the democratic principles that support our society and the present form of government in Australia. Non-indigenous Australians also profess that the fundamental ethos of our society is one of fairness and compassion. However, these noble aspects of the non-indigenous Australians' heritage and ethos seemed to have gone 'walk about' during the last 200 years whenever the non-indigenous community interacted with the indigenous people.

A treaty has been suggested as a way to bridge the gap between the indigenous and non-indigenous communities. It would be, because of its very nature, a divisive measure. A treaty, however, would certainly be better than the way we currently deal with the indigenous people of Australia through various government departments and agencies.

Given that a treaty is problematic and current the government departmental approach is inappropriate, we are left with some interesting options regarding reconciliation.

- Accept the present status quo regarding reconciliation, which are essentially two groups at loggerheads at the negotiating table with no resolution in sight and the more powerful group not overly concerned if there is a resolution to the problem.
- Some form of Clayton's reconciliation, where the government attempts to deal with the indigenous people as an ethnic minority or by establishing a super ministry, etc.
- A partnership in government, which includes the first Australians, Torres Strait Islanders and citizens of the Commonwealth of Australia. This alternative isn't a mainstream approach, but it makes a lot of sense. Such a partnership would put the reconciliation process on a very sound and honourable long-term footing.

Thanks to the politicians of a hundred years ago the latter option might have some relevance in the current reconciliation debate. Because of the colonial rivalries that existed last century amongst the politicians of NSW, Victoria et al (has much changed in 100 years), they did not surrender much of the power of the colonies to a central federal government when the Commonwealth of Australia was formed in 1901. As a consequence, Australia is a nation of colonies, which federated into our current Commonwealth government of states and territories. The opportunity exists to utilise this framework to advantage for the purposes of reconciliation by reconfiguring the federation of the Commonwealth of Australia to include the first Australians and Torres Strait Islanders.

The of Compact of The Federation of Australia

The intent of the proposed *Compact* (see attached) is to:

- give effect to a new form federal government which includes the indigenous people of Australia and the non indigenous citizens of the Commonwealth of Australia;
- establish a means at law where the parties to it can function under a new federal structure;
- provide for a unifying form of government that could serve as the first formal link amongst ourselves as we finally move forward together; and
- provide for the seamless transition from our present structure of government to *Federation 200x*.

The attached draft contains provisions that address the major legal issues that would have to be included in such a document. The issues in the proposed draft *Compact* are indicative and would not be limited to the following:

- Acknowledgement of the consent of all parties to the *Compact*
- The legal structure that supports the *Compact*
- Application of the *Compact*
- Establishment the Parliament of *Federation 200x* and the representation in that Parliament of the parties to the *Compact*
- Guidelines for decision makers where differences exist amongst the elements of the legal structure of the *Compact*
- Requirements for amending the *Compact*
- Transition arrangements from our current Constitutional Federation to *Federation 200x*.

Process

An important element in the process of establishing a new form of government under such a *Compact* is the process itself. The process must be transparent, open and ideally, driven by people and organisations with a minimal number of vested interests who are motivated to achieve a just and fair outcome.

Initial Work on the Legal Structure

Before this proposal can be progressed, some legs would have to be put on this structure. The *Compact* can be fleshed out after (1) the current Constitution is amended (see Preliminary Draft Documents Section), only as necessary, to make it consistent with the provisions of the *Compact* and (2) the customary and traditional laws of the indigenous peoples of Australia are codified.

Some further work would also have to be done on a state constitution to make it consistent with the amended national Constitution. That amended state constitution could then be used as template for the other States and Territories, should their constitutions need to be amended in the event that the *Compact* is adopted.

As these documents are being developed it would be prudent to identify and preliminarily address issues that would be of concern during the transitional phase from the current form of government to the *Federation 200x*. This process would enable transitional issues to be included in the proposed Schedule of Transitional Arrangements (which is part of the *Compact*) for consideration during the public debate.

It is important to note that it is unlikely that a government of the day would support non-mainstream approaches to reconciliation, such as this one, with money or in kind.

Public Debate and Plebiscites

Given we are able to settle the intent and wording of these documents, the public debate on this concept, the wording of the documents and the adoption of the ***Compact*** and ***Federation 200x*** can begin. Should this process get to the point, through public opinion, where the public desires to formally express their views on this matter, 3 separate plebiscites of the parties to the ***Compact*** are proposed to be held to determine whether the ***Compact*** (inevitably revised through the public debate) should be adopted. A consensus in the affirmative being a majority vote in each plebiscite in favour of the compact and new federation.

Establishment of Federation 200x

Should we arrive at the point, where this approach is agreed to by the constituents of the parties to the ***Compact***, the final step would be for the government of the day to draft and enact the appropriate legislation in accordance with the will of the people. The legislation would provide for the proclamation of the ***Compact*** and ***Federation 200x*** and transition from the current form of government to the new federation.

The above process is indicative only. It is a process however, that would provide every Australian with the opportunity to participate in the development of and debate on the ***Compact*** and ***Federation 200x***, and commit themselves to the adoption of the ***Compact*** and the establishment of ***Federation 200x***.

Preliminary Drafts of Federation 200x Documents

Listed below is a series of preliminary drafts of the typical documents that would be necessary to support this proposed approach.

1. Declaration of the People of Australia and Proclamation of the ***Compact***
 - ***Declaration of the People of Australia*** – A Preamble
 - Proclamation of the ***Compact of the Federation 200x***
2. ***Compact of the Federation of Australia 200x***
3. Ancillary Supporting Documents
 - Codified Customary and Traditional Laws of the first Australians
 - Codified Customary and Traditional Laws of the Torres Strait Islanders
 - Current Constitution of the Commonwealth of Australia (Amended)
 - State Constitution (Amended to be consistent with amendments to Commonwealth Constitution) - Template for other States and Territories
4. Proclamation of ***Federation 200x***

Apart from putting reconciliation on a formal legal foundation, the adoption of the ***Compact*** and establishment of the ***Federation 200x*** provides us with the opportunity to include a ***Declaration Of The People Of Australia*** or preamble in the ***Proclamation of the Compact*** (see attached).

May 27, 200x has been included as the proclamation date for the ***Compact*** and ***Federation 200x***. The 27th of May is significant to the all Australians, but it is of particular importance to the indigenous people and is proposed as the proclamation date to honour them.

Conclusion

In trying to identify a workable approach to reconciliation that would provide the opportunity for Australia to grow as a united nation and deal appropriately with our past, we must seek a way to include the indigenous people of Australia in the process of governing Australia. The adoption of such an approach can only give short and long-term advantage to the whole community. It would also provide a fair and genuine basis for us to deal with the nagging contentious issues that are currently challenging us.

Make no mistake, the task of establishing **Federation 200x** or similar is daunting. Notwithstanding this observation, the process to achieve this outcome is relatively simple. And the framework for the proposed **Federation 200x** is not complex. So, although we may be able to clearly define and see that objective, the road to it is long and arduous. That does not preclude us (the Australian people) from undertaking this or a similar project. There are people who can develop the legal structure for such an approach and, once developed, there are people who, with the support of the Australian people, can provide the leadership required to facilitate the establishment of **Federation 200x**.

We must not allow the vast amount of work and good will that has gone into the present reconciliation process to dissipate. As we seek a way forward to unite ourselves as Australians, some observations of Johann Wolfgang von Goethe are germane to the successful execution of this task.

Until one is committed there is hesitancy, the chance to draw back, always ineffectiveness.

*Concerning all acts of initiative (and creation) there is one elementary truth, the ignorance of which kills countless ideas and splendid plans: **that the moment one definitely commits oneself, there providence moves too.** All sorts of things occur to help one that would otherwise never have occurred.*

A whole stream of events, issues from the decision, raining in ones favour of all manner of unforeseen incidents and meetings and material assistance, which no man or woman would have dreamed would come their way.

*Whatever you can do, or dream you can do, begin it. Boldness has genius magic and power in it – **begin it now.***

Declaration of the People of Australia and Proclamation of the Compact of The Federation of Australia 200x May 27 200x

Declaration

*Before God, however perceived, **WE**, the people of **Australia**, Declare that **Australia** was founded as a Nation upon the arrival of the first **Australians** on the shores of these distant and vast sacred lands, and that, **WE** honour our forebears and celebrate their achievements.*

*Further, **WE** charge all future generations, as **WE** have done, to acknowledge that these lands and surrounding seas sustain all life in **Australia** and to hold these lands and seas in trust for the generations that follow.*

*And **WE**, as members of a community that embraces the '**Australian Way**', pledge to contribute whatever **WE** are able to ensure that compassion and fairness are maintained as the fundamental elements that bind our society together. A society, which protects, nurtures and challenges us individually and collectively, while fostering a continuing effort on our part to take our rightful place amongst the peoples and nations of the world.*

Proclamation

- I. **WE** the people of Australia in the spirit of the *Declaration of the People of Australia* agree to unite in one indissoluble Nation under the crown of the United Kingdom of Great Britain, and under the *Compact of the Federation of Australia - 200x*.
- II. The *Compact* was agreed to severally by plebiscites of the First People of Australia, the Torres Strait Islanders and the citizens of the Commonwealth of Australia. The results of the plebiscites of the first Australians, Torres Strait Islanders and citizens of the Commonwealth of Australia giving consent to the *Compact* are as follows. (All persons 15 years old or older were eligible to vote in the plebiscites.)

Plebiscites	Date of Poll	Number of Votes	
		In favor	Against
First Australians*	xx xxx 2001	xxx,xxx	xxx,xxx
Torres Strait Islanders*	xx xxx 2001	xxx,xxx	xxx,xxx
Citizens of the Commonwealth of Australia	xx xxx 2001	xx,xxx,xxx	xx,xxx,xxx

* The first Australians and Torres Strait Islanders were also eligible to vote as Citizens of the Commonwealth of Australia.

Compact of the Federation of Australia – 200x

May 27 200x

Imprimatur of the People of Australia

- I. IN ACCORDANCE with the *Proclamation of the Compact of The Federation of Australia 200x* on this day May 27 200x, **WE** the people of Australia agree to unite in one indissoluble Nation under the following provisions of this *Compact of the Federation of Australia - 200x*.

Purpose of the Compact

- II. The purpose of this Compact is to unite the first Australians, Torres Strait Islanders and the citizens of the Commonwealth of Australia under the government of the Federation of Australia 200x.

Legal Framework of this Compact

- III. The legal framework of this Compact rests on:
- (i) Customary and Traditional Laws of the first Australians;
 - (ii) Customary and Traditional Laws of the Torres Strait Islander People; and
 - (iii) *Constitution of the Commonwealth of Australia (Amended)*, amended only as necessary to enable it to form part of the legal structure of this *Compact* and to provide for the transition to the government of the Federation of Australia 200x.

Representation of the Citizens of the Federation of the Australia 200x

- IV. The of citizens of the Federation of Australia 200x shall be represented in the Parliament of the Federation as follows:

<i>Citizens of The Federation of Australia 200x</i>	<i>House of Representatives</i> ¹	<i>Senate</i> ²
First Australians	X	X
Torres Strait Islanders	X	X
Citizens of the Commonwealth of Australia	X	X
Totals	99	48

¹ The number of representatives in the House of Representatives shall be on a basis proportional to the populations of the first Australians, Torres Strait Islanders and the Citizens of the Commonwealth of Australia.

² The number of Senators in the Senate representing first Australians, Torres Strait Islanders and the Citizens of the Commonwealth of Australia is fixed by this *Compact*.

Jurisdictions of the Federation of the Australia 200x

- V. The Jurisdictions of the Federation of Australia 200x consist of the lands, seas and governments and councils of:
- (i) First Australians;
 - (ii) Torres Strait Islanders; and
 - (iii) Commonwealth of Australia as at the date of the proclamation of this Compact.

Application of this Compact

- VI.** The provisions of this Compact and all laws made by the Parliament of the Federation of Australia 200x under this Compact, shall be binding on the citizens of this Federation, the jurisdictions of this Federation and its courts and judges.

Anomalies, Overlaps and Gaps in the Legal Structure of this Compact

- VII.** Where an anomaly, overlap or gap exists between or among the sets of Customary and Traditional Laws and/or the Constitution for the Commonwealth of Australia (Amended) and requires clarification, the person(s) making such a clarification must take into account the following, before making such a clarification, the:
- (i) reasons for the existence such an anomaly, overlap or gap;
 - (ii) principle of equivalence, where appropriate; and
 - (iii) long term effect on citizens of the Federation resulting from the clarification of such an anomaly, overlap or gap being applied to the legal structure of The Federation of Australia.
- VIII.** Any clarification made in accordance with Section VII of this Compact must be ratified by the Parliament of The Federation of Australia 200x.

Amending this Compact

- IX.** This Compact can be amended where a two-thirds majority is reached severally in plebiscites of first Australians, Torres Strait Islanders and the Citizens of the Commonwealth of Australia on the proposed amendment(s) to this Compact.

Transition Arrangements

- X.** The transition arrangements from the government of the Commonwealth of Australia to The Federation of Australia 200x are specified in Schedule 1 of this Compact.
- XI.** The transition arrangements specified in Schedule 1 of this Compact will be deemed to come into effect retrospectively on xx xxx 200x the day after the plebiscites are held, unless otherwise specified.

Schedule 1 - Transition Arrangements

Transition Provision	Expiry Date
1	xx xxx 200x

Proclamation of the Compact of The Federation of Australia
May 27 200x

- I. The Government of the Commonwealth of Australia under the crown of the United Kingdom of Great Britain and in accordance with the will of the first of Australians, the Torres Strait Islanders and the citizens of the Commonwealth of Australia expressed in the plebiscites taken on xx xxx 200x consenting to the adoption of the Compact of the Federation of Australia 200x, hereby proclaims the founding of the Federation of Australia 200x on this day the 27 of May 200x.

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