THE LOWITJA O'DONOGHUE ORATIONS

2007-2019















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DON DUNSTAN FOUNDATION
inspiring action for a fairer world

Flinders UNIVERSITY

THE UNIVERSITY of ADELAIDE

Contents

Foreword

Don Dunstan was a man of strong convictions, none more profound than his dedication to the cause of social justice. His exposure to bigotry and the injustices experienced by the Indigenous Fijians during his childhood, and the treatment and dislocation of the Narungga peoples in Point Pearce, solidified his desire to fight for a more just society for all peoples.

Throughout his years as a lawyer, and his tenure as a parliamentarian, his almost zealot-like determination to fight for justice was recognised through his embrace of multiculturalism, and the steering of the Whitlam Government to remove references to White Australia in Australia's immigration policy.

His relationship with the Indigenous communities in South Australia was unparalleled – his attitudes toward Indigenous affairs causing a seismic shift in the way government policy was conducted in this country. He built strong, lifelong friendships with many Indigenous Elders including Lowitja O'Donoghue. Don became the third and last, non-Aboriginal President of the Federal Council for the Advancement of Aboriginal and Torres Strait Islanders (FCAATSI), which was responsible for the 1967 Referendum. This democratic choice represented a fundamental change in the way Australians thought of the Aboriginal community, as well as opening the door to dynamic new initiatives to help advance Aboriginal peoples within colonial Australia.

The Don Dunstan Foundation is currently working on a number of collaborative projects to inspire action for a fairer world. Building on the legacy of the late Premier, the Foundation has five main priority areas, including an unwavering focus on Aboriginal Economic Empowerment and Reconciliation.

Jointly, we present the yearly Lowitja O'Donoghue Oration in Bonython Hall at the University of Adelaide – taking place during Reconciliation Week. Interestingly, the very first Oration was presented by Lowitja herself on the 40th anniversary of the 1967 Australian Referendum.

Throughout Lowitja's extensive career, she has had the opportunity to work with incredible people, whose passion and life-long work have been to promote Reconciliation. With an extensive knowledge of those around her, Lowitja selects each year's Orator, drawing on topics that are timely and relevant to the audience.

Lowitja has chosen many great speakers, including Noel Pearson, Paul Keating and Marcia Langton. All of the Orators have contributed passionately to the conversation, often leaving the audience with a sense of ambition to build on the necessary steps

towards Reconciliation. The Orations have featured a wide array of topics from Aboriginal health through to storytelling and the preservation of artefacts.

Filled with truth-telling, spirit and prosperity for the future, we hope that by reading these emotive orations, you are inspired to take action for a fairer world through the Reconciliation process.

Hon. Rev. Dr Lynn Arnold, AO
Chairperson
Board of Directors

A National Living Treasure

Each year, the Don Dunstan Foundation and Reconciliation SA present the Lowitja O'Donoghue Oration, named in honour of Dr O'Donoghue AC CEB DSG. Now in its 13th year and held annually in Reconciliation Week, the Lowitja O'Donoghue Oration originally marked the 40th anniversary of the historic Australian Referendum in 1967.

The Oration brings together leaders in their field to discuss prominent reconciliation issues that still need to be addressed within today's society.

Lowitja is an Aboriginal woman of the Yankuntjatjara peoples of Central Australia, who has dedicated her life to improving the welfare of Aboriginal and Torres Strait Islander peoples.

Lowitja was born in 1932 to an Aboriginal woman, Lily, and an Irish man, Tom, whom she never met. Lowitja became part of the Stolen Generation at just 2 years old, and was sent to a children's home in the Flinders Ranges. Fortunately an Auntie and Uncle later recognised Lowitja and she became reunited with her mother.

After a long struggle with the Royal Adelaide Hospital, Lowitja became the first Aboriginal nurse in South Australia in 1954.

Lowitja has had an extraordinary career advancing the rights of Aboriginal and Torres Strait Islander Peoples, becoming a member of the Aboriginal Legal Rights Movement between 1970-72, then becoming the Regional Director of the Australian Department of Aboriginal Affairs.

Lowitja is the first Aboriginal woman to be awarded an Order of Australia (AO) in 1976. In 1977, Lowitja was appointed the foundation Chair of the National Aboriginal Conference, and Chair of the Aboriginal Development Commission.

1990 saw Lowitja appointed as the founding Chairperson of the Aboriginal and Torres Strait Islander Commission (ATSIC), where she played a key role in drafting the Native Title legislation which arose from the historic *Mabo* decision.

Following stepping down from the ATSIC, Lowitja became the inaugural Chair of the Co-operative Research Centre for Aboriginal and Tropical Health (1996-2003), which led into the Co-operative Research Centre for Aboriginal Health (2003-2009), and later the Lowitja Institute Aboriginal and Torres Strait Islander Health Co-operative Research Centre (2014-2019).

Lowitja's work has been widely recognised through numerous awards and accolades. Lowitja became a Commander of the Order of the British Empire (CBE) in 1983, then Australian of the Year in 1984, and in the same year, she became the first Aboriginal person to address the United Nations General Assembly. Lowitja also received the Advance Australia Award in 1982, was named a National Living Treasure in 1998, and

awarded Companion of the Order of Australia (AC) in 1999. Lowitja is also a Dame of the Order of St Gregory the Great (DSG), a Papal honour, awarded in 2005.

Alongside all these achievements, Lowitja has also been recognised by Universities and Colleges across the country, holding an Honorary Doctorate of Law from the Australian National University and the Notre Dame University, as well as an Honorary Doctorate from Flinders University, the Australian National University, the University of South Australia and the Queensland University of Technology. Lowitja also is an Honorary Fellow of both the Royal Australian College of Physicians and the Royal College of Nursing, as well as a Professional Fellow at Flinders University since 2000.

Lowitja is a Patron of the Don Dunstan Foundation and each year selects who the speaker will be for the Lowitja O'Donoghue Oration.

We share the following Orations to help advance the cause of reconciliation in Australia, and in memory of the friendship between Don Dunstan and Lowitja O'Donoghue.

Laura Hughson

Don was a man whose life was marked by great achievements, accolades and the holding of high office. Yet he was a man of the people. He had the common touch. And he touched the lives of all South Australians regardless of their race or class.

In both his friendships and his public life Don was unwavering. His vision of a good and just society motivated everything he worked for and determined the way he dealt with people – with respect, gentleness and compassion.

Lowitja O'Donoghue,
12 February 1999

2007

Black and White together, ‘we shall overcome, some day’

Presented by Dr Lowitja O’Donoghue AC CBE DSG

I acknowledge the Kaurna people, the traditional owners of this country on which we sit. I pay my respects to them, to their elders past and present, and acknowledge their special place as the first nation of this place.

It is a very great honour to be here tonight, in Reconciliation Week, to mark with you the 40th anniversary of the 1967 Referendum.

I feel humbled that the Don Dunstan Foundation has seen fit to name an annual oration in my name. I am proud to have my name linked with his in this ongoing way. I just hope that I can kick it off with the style and gutsiness Don would approve of. I know one thing – I'll be much more relaxed during the 2008 Lowitja O'Donoghue Oration, when someone else will be giving it!

I miss Don Dunstan. In so many ways. I regarded Don as a personal friend and as a great champion of Aboriginal causes. Many of my people knew him well and loved him, as I did.

At his Memorial celebration on 12 February 1999, I said:

> Don was man whose life was marked by great achievements, accolades and the holding of high office. Yet he was a man of the people. He had the common touch. And he touched the lives of all South Australians regardless of their race or class.
>
> In both his friendships and his public life Don was unwavering. His vision of a good and just society motivated everything he worked for and determined the way he dealt with people – with respect, gentleness and compassion.

In revisiting those words when preparing for this Oration, it struck me again just how unique he was. No one in the Labor party or in politics today can 'hold a candle' to Don. His courage and determination, his wit, his dignity and the breadth of his vision, set him apart. One of the things that distinguished him from other political leaders is that he was a man of honour and acted from principles not from cynicism.

Many of you know of Don's achievements in Aboriginal Affairs while he was Premier. But you may not be aware of his efforts before then. In the 1950s and early 1960s he worked tirelessly within the Labor Party's federal executive, alongside Gough Whitlam, to remove references to White Australia from the Party's immigration policy. And, of special relevance to tonight's occasion, he was an active member of the Federal Council for the Advancement of Aboriginal and Torres Strait Islanders (FCAATSI). Don was, in fact, elected as FCAATSI's last non-Aboriginal President in 1960.

FCAATSI was the national lobby group which successfully campaigned for a number of Aboriginal reforms, including the watershed 1967 Referendum which removed discriminatory sections from the Constitution, and which was passed by an overwhelming 90% of the population. This change empowered the Commonwealth to legislate directly for Aboriginal Australians, with the potential to override state laws, many of which were discriminatory. It didn't, as is widely thought, give Aboriginal

people citizenship rights or the right to vote … we already had those. But it was, nonetheless, seen by many as a recognition of Aboriginal people as full Australian citizens.

In the early 1960s Don was instrumental in the passing of South Australia's *Aboriginal Affairs Act*, which repealed a number of highly offensive regulations which curtailed the civic liberties of Aboriginal people – including the right to consort with non-Aboriginal people. In 1965 he authored the *Prohibition of Discrimination Act* which was designed to prohibit all forms of discrimination on the grounds of race, colour or country of origin. It applied to things like employment and legal contracts. Its very existence markedly lessened overt discrimination.

In 1966 Don introduced Australia's first Aboriginal Lands Trust and secured title to a large amount of what had previously been Crown Land. He also set in place separate legislation for a Pitjantjatjara Land Rights Bill, which was finally passed several years after his retirement by the Tonkin government. This legislation gave freehold title to over 100,000 square kilometres of land to the Pitjantjatjara and Yankuntjara peoples. With his commitment to policies of integration rather than assimilation – and the respect for cultural identity which that entails – Don's legacy to Aboriginal people has been immense.

I remember with great fondness an occasion in 1997, almost exactly ten years ago to this day. It was the Reconciliation Convention in Melbourne where we marked the 30th Anniversary of the 1967 Referendum. Even though quite ill, Don made the trip to Melbourne and celebrated joyously with us. His capacity for enjoyment was inspiring. Don was unstinting in expressing his support for our people. He had fire in his belly … he wanted to change the world to make it a better place … and he succeeded. That fire, that determination, that optimism, is sadly lacking today. But I will return to that theme shortly.

The title of tonight's oration is 'Black and White together, we shall overcome, some day.' I want to tell you a little about why I have chosen that title and the history of those words.

At Easter 1967 the 10th Annual Conference on Aboriginal Affairs was held in Albert Hall, Canberra. Aboriginal and non-Aboriginal activists – including Don Dunstan – gathered together. We joined hands and sang to the tune of *We Shall Overcome*, these lyrics:

Black and white together

Black and white together

Black and white together some day

Deep in my heart

I do believe

We shall overcome some day.

They were sung in both English and a Thursday Island language. As Sue Taffe writes in her history of FCAATSI – *Black and White together* – this gesture demonstrated: 'An inclusiveness of spirit and a hope that they would indeed overcome legislative and social discrimination against Aboriginal Australians.'

The 1967 Canberra Conference was the culmination of a decade-long campaign which had begun in 1958 with the establishment of a Federal Council for Aboriginal Advancement (later to become FCAATSI) at a meeting in Adelaide's Willard Hall. This was attended by Aboriginal delegates such as Pastor Doug Nicholls and Jeff Barnes and a diverse group of peace activists, feminists, communists and Christians.

In May 1967 this campaign would deliver a massive 90.77% YES vote to amend the Constitution. The campaign for constitutional reform was remarkable, really. Not only was it sustained over a decade, but it was energetic and creative. Over 103,000 signatures were collected nationally on petitions at footy grounds and shopping centres and churches. There was a huge amount of radio, television and newspaper coverage. Every kind of political, social, cultural and sporting organisation was approached to sign the petitions and donate money. The campaign had the support of churches, Aboriginal organisations, service clubs, women's organisations, sporting clubs, elderly citizens' clubs, schools, unions … you name it. The campaign succeeded in capturing the public's imagination.

Doug Nicholls used to grab people outside the Collingwood football ground on home matches and lead them to the table to sign the petition. Can you imagine stopping a one-eyed Collingwood supporter from getting into the ground for his pie and beer? Maybe it had something to do with the team's black and white colours! Maybe it also had something to do with Doug Nicholls' enormous popularity and public profile as a former football star himself.

FCAATSI's role was not limited to amending the Constitution, although they did put an enormous effort into this.

But their sights were also on issues such as equal wages and employment opportunities and owning the remaining tribal lands – all things that were seen to be connected with Aboriginal people's inferior legal status compared with other citizens of the Commonwealth. The constitutional amendments were seen as 'one step' along the road towards the ultimate goal of legal equality.

As Sue Taffe documents so thoroughly in her book, the petition campaign which led ultimately to the Referendum was a broader public education campaign about social justice. To quote Sue:

> Perhaps the most important immediate effect of the petition campaign was the publicity it gave to both Aboriginal disadvantage and government failure to rectify it.

It is important tonight to recognise this anniversary of FCAATSI and the 1967 Referendum. It is important to celebrate that it was a wonderful example of black and

white working together. There were people like Gordon Bryant, the Victorian Labor MP and Minister for Aboriginal Affairs, and Don Dunstan, working alongside Aboriginal people like Joe McGinness, Winnie Branson and Kath Walker. It was a genuine example of reconciliation in action. And there was a groundswell of popular support for the reforms.

But we shouldn't get too carried away with the warm fuzzy feeling that celebrating anniversaries can bring. I hate to be a party pooper. But I think we do need to ask the hard questions of:

- With the exception of the Mabo legislation how often has the Commonwealth ever used its constitutional powers to override state laws to benefit Aboriginal people?
- To what extent has Aboriginal disadvantage been redressed?
- To what extent has there been any kind of genuine reconciliation in Australia?
- Is the Australian public still concerned about Aboriginal issues?
- Do either of the major political parties see Aboriginal issues as worthy of a high profile in their election campaigns?

And a hard one for us all here tonight, both me and you:

- How can we change hearts and minds on these issues, and not just stay in the comfort zone of talking to the converted?

This is a tough question I know, because it goes the heart of what we do with our ideals. It goes to the heart of how we live our politics and our ethics in our daily lives.

Please don't get me wrong on this. I'm not trying to promote guilt. I see guilt as a very destructive emotion. But so is its converse – complacency.

I was intrigued to read last week in *The Australian* that the History Teachers' Association of NSW has called for a rethink of how history is being taught in schools because 'High school students resent being made to feel guilty during their study of Australia's Indigenous past'. Their executive officer was quoted as saying: 'They don't like the Indigenous part of history … the feedback I get is that they're not prepared **to** wear the guilt.'

Well, I have a couple of thoughts about this. I have many, actually, but I'll confine myself to just a few. Firstly, I think the history of Aboriginal/white relations in Australia can be taught accurately without promoting guilt. By all means promote sorrow, empathy, sympathy, outrage … but not guilt. Today's students should not feel guilt about what happened 200 years ago, and neither should you. Our Prime Minister, Mr Howard, introduced the guilt trip when he talked of the 'black armband view' of history. And of course, he did this quite deliberately to distract attention from the real issues – the failure of his government to take any meaningful measures to redress the appalling legacy of the white invasion of this country, and the need for a formal government apology.

Trudy Bray, a wonderful woman whose work convening an email list called 'Recoznet' typifies the spirit of Reconciliation, summed up the guilt diversionary tactics beautifully, when she wrote last week:

> Guilt discourages understanding, empathy and wanting to change things. Guilt encourages justification, defensiveness and can lead to hatred. If the teaching of history induces guilt then the method is wrong.

So, no, I'm not here to promote guilt. But, just a few days after the 10th Anniversary of Sorry Day, I do think it is appropriate to promote sorrow and empathy. And if the Prime Minister were here tonight (heaven forbid!) I wouldn't mind promoting a bit of guilt in him about his failure to ever say 'Sorry'. But that's another story.

It is easy to look back on the heady days of FCAATSI and the Referendum and to focus on what was achieved. It is easy to hear those lyrics – *Deep in my heart/ I do believe/ we shall overcome some day* – and get all misty-eyed. But I don't think I can any longer say that 'deep in my heart I *do* believe'. Yes, I'll sing along, but it will be with a heavy heart and a deep sense of doubt. Because, despite all the euphoria of the constitutional change, it is sadly the case that these powers have *not* been used to benefit Aboriginal people. In fact, in South Australia during the Hindmarsh Island struggle, it looked for a while as if the Commonwealth might use its powers to override state legislation – not for the benefit of Aboriginal people, but to *undermine* Aboriginal people's rights. There have been other relevant examples.

In the year 2000 there was the famous case of Lorna Cubillo and Peter Gunner, in the Northern Territory, claiming that they were taken illegally from their families, and seeking damages. The Federal Court sitting in Darwin accepted the truth of their evidence, and Justice O'Loughlin was clearly moved and distressed by their stories. He accepted the abuse they had suffered at the hands of the white institutions in whose care they were placed. He accepted the evidence that as the children were taken; the mothers howled and beat their heads with sticks, until blood was drawn. He regarded it as certain that these children were removed without consent. And that the lives of everyone involved were devastated by these events. He acknowledged the existence of the stolen generation. Nevertheless, their case was lost.

The dismissal of both claims was a big disappointment for the 700 claimants who had filed similar cases and for the Aboriginal community in general. It constituted yet another setback in the important process of Aboriginal reconciliation and healing. Justice O'Loughlin's judgement overlooked the fact that these children (and thousands of others like them, including myself) were taken, *not* because we were in need of care and protection – but rather, to attempt to turn us into white people.

I'm telling you these stories to make the point that the Constitution may have been changed 40 years ago to enable the Commonwealth to legislate for greater Aboriginal

rights, but this does not mean that the law, as it is practised, delivers justice. In the Cubillo and Gunner case the Commonwealth government, in fact, spent millions on lawyers and private detectives to ***ensure*** that justice was **not** delivered.

I believe that the healing process for the people removed from their families will not begin until the Federal Government establishes a formal procedure for acknowledging the injustices of past assimilation practices. This means implementing the recommendations of the *Bringing Them Home* Report – a report which was tabled in Parliament ten years ago. Of the 54 recommendations of this 1997 report of the National Inquiry into Aboriginal and Torres Strait Islander children forcibly removed from their families, 35 have been ignored. That's 65%. That is not good enough. The bulk of Federal funds have gone to 'Link Up' family reunion services and counselling (both excellent services, by the way.) But the Government's response was directed essentially to 17 recommendations – mainly those dealing with rehabilitation, mental health and family reunion, with a few small gestures towards records, storytelling and languages. And the funds that were allocated to these 17 recommendations were grossly inadequate to meet the need.

One of the hard questions I posed earlier was 'to what extent has Aboriginal disadvantage been redressed?' To use an Australian vernacular expression I think the answer is: 'Bugger all!' Indigenous people continue to be the most disadvantaged group within Australia in terms of basic rights like adequate housing, good health, and employment opportunities. Let me give you some examples:

Aboriginal people are still dying seventeen years younger than their non-indigenous counterparts. Far too many suffer illness and death from completely preventable diseases. Just last week the AMA's annual Indigenous Health Report Card said that this 17-year discrepancy exists because of institutionalised racism, and that Indigenous Australians face both *financial and cultural barriers* to getting adequate health care. The AMA president said that $460 million a year is needed to improve basic GP and health services to even the odds. The Report Card gave Indigenous health a grade of 'at the very best a D minus, but probably an E.'

- We still have a situation where our children are dying as babies at the same rate as in developing countries.
- Most Aboriginal people live below the poverty line.
- Many are struggling with the symptoms of despair, such as substance misuse, violence, and high levels of self-harming behaviour – including suicide.

If we look at education, Indigenous Australians:

- are well behind mainstream rates in literacy and numeracy skills
- leave school much younger. For instance only about 32% are remaining at school to Year 12. This figure is less than half that of non-indigenous students.

- are likely to be *absent from school* two to three times as often as non-indigenous students
- obtain fewer educational qualifications
- earn less income
- experience a much higher rate of unemployment than their non-indigenous counterparts.
- there are fewer Aboriginal people at university now than there were five years ago.
- 60 % of Australian youth in care or custody or other forms of detention are Aboriginal.
- 21% of adult male prisoners and 80% of female prisoners are Aboriginal. Over 6% of all Indigenous males aged 25-29 years were in prison at 30 June 2004.[1] This compares with less than 1% of *all* males in this age group in the general population.

This in a society where we make up only 2% of the population! And, of course, these problems are all linked, and their effects are compounding. You cannot be healthy without adequate housing. You cannot gain employment without education … and so on. You cannot take a meaningful part in society unless you are connected to its resources, decisions, services and structures.

The reasons for this systematic disadvantage are complex, and connected to a whole history of dispossession and subsequent life on the margins of society. It seems obvious doesn't it, that if you:

- destroy a people's way of life
- take away their children
- dislocate communities
- take away lands
- fracture connections, values and traditions ...

then treat people as less than human in terms of dignity and respect … then of course, you will have mental, physical and social health problems and all the other things that flow from these. It is a perfect recipe to create an outcome of despair and dysfunction.

There are no quick fixes for these patterns of inequity. But it is obvious that it is time for some genuine bipartisan commitment to job creation, education, and improved housing and health for Aboriginal people. It is these fundamental systemic issues that need to be addressed. And of course it is not simple. But neither is it rocket science! It requires a re-allocation of resources and a greater commitment of resources to Aboriginal disadvantage … not tokenism or drip-feeding which is set up to fail.

Do you realise the Government has budgeted for $123 million on its very silly and totally unnecessary citizenship test which is supposed to test Australian values (whatever they are)? Compare that with $135 million over four years on Aboriginal

health. What is more important I ask you?

I know the citizenship test is supposed to be a failsafe method of screening out potential terrorists and creating cohesion and integration in the community. But when you look at examples of some of the questions that will apparently be included, it is a joke surely! Isn't it?

One question is:

Which is a popular sport in Australia?

a. Ice hockey

b. Water polo

c. Cricket

d. Table tennis

And the answer is, of course? I don't need to tell you … it is John Howard's favourite sport.

If I were 60 years younger, I think I'd say 'Well … Duh!' Another one is:

Which of the following are Australian values?

a. Men and women are equal

b. A fair go

c. Mateship

d. All of the above

Well, as an Aboriginal woman who was sent into domestic service at the age of 16, I think I might be tempted to answer, that from my own experience the answer is:

e. None of the above!

With a government wasting its time and resources in setting up such ridiculous hoops to jump through, it seems to me that we're going backwards to the days of the White Australia Policy.

Just imagine if Aboriginal people had had a test like this 200 years ago! None of those crims from England would have been allowed in! We could have said 'No boat people allowed! We are protecting our borders from terrorists!' I reckon Australia should clean up its own act, and sort out some of its own values about equality and basic human rights and a fair go for all, before asking others to prove that they're worthy to come here and become citizens. Have you also noticed that while John Howard is very happy to claim the heroes of the past as his own, he is totally unwilling to accept that any of the wrongs of the past are anything to do with him?

One challenge that we are presented with as a community of existing and concerned citizens, is how to change popular attitudes about the circumstances of Aboriginal people. This matters for two clear reasons. One is that governments are not leading the people on issues of ethics, rights or justice – and so this work has to be taken up by others.

The second is that governments respond to (and *only* to) what they think will win votes. Therefore, the voices of people who care about Australia's record in the human rights arena must be heard more broadly and more forcefully. The Prime Minister either doesn't 'get it' or he doesn't care, and I am not sure which is worse.

What I *do* know is that:

- There has been a failure of moral authority and ethical leadership in Australia over the last ten years.
- This country is in a position to be a world leader in human rights and social justice. Instead, it is, as Aboriginal people would say, 'a shame job'.
- When initiatives are taken, they are too small and mean-spirited to bring about significant and long-term change.
- And, most importantly, the colonial attitudes of two hundred years ago are still alive and well in the corridors of power today.

We know that popular opinion can be formed by the information that is presented in the media, regardless of the facts of an issue. And this is certainly evident in Aboriginal affairs.

Since 1990, Newspolls have been canvassing public opinion about spending on Aboriginal welfare. They have consistently revealed a steady majority of respondents who say that the Government has gone 'too far' or 'much too far'. Fewer than one in five people have answered 'not far enough' or 'not nearly far enough'.[2] Yet, on a per head of population basis, spending on Aboriginal people in Australia is far less than on other citizens. The whole issue of how public opinion is formed, and the various media and public relations tactics that are employed, is too complicated for the time we have tonight. But, it is interesting to note that many of the ultra-conservative and simplistic sound bites of Pauline Hanson have been adopted by the current Federal Government. And (in so far as people are interested at all) these are ideas that carry popular support.

You may remember that one of Pauline's views, that attracted early support for her Party, was that Aboriginal people were getting it too easy. In her maiden speech she said:

> We now have a situation where a type of reverse racism is applied to mainstream Australians by those who promote political correctness and those who control the various taxpayer funded 'industries' that flourish in our society, servicing Aboriginals, multiculturalists and a host of other minority groups.

I can't quite believe I'm quoting Pauline Hanson! But I have an ulterior motive! And that is, that John Howard has taken Pauline's theme and elaborated on it. He has rejected the idea of a human rights-based approach to social justice. In fact, he has been named in various United Nations Committees for his failure to meet human rights obligations to which Australia is a signatory. Instead, he has adopted the rhetoric of

'practical reconciliation'. And he has abandoned the idea of Aboriginal services, in favour of 'mainstreaming'. And I'd like to talk now about some of the implications of both of these positions.

Mainstreaming is a position that says that all government departments should take into account and address the needs of Aboriginal people, rather than having designated services for Aboriginal needs. Now, I would never claim that ATSIC was without problems – or without some problem people. But disbanding it in favour of mainstreaming has meant that many experienced staff of the former organisation have become lost within public service bureaucracies. The new workplace environments they are located in, are not likely to be attuned to the debates and issues that built up over the years within ATSIC. And ex-ATSIC staff may well find the 'rules of engagement' required in government departments, to be incomprehensible.

In this way, the stock of knowledge built up over the years in ATSIC has become diluted, if not flushed down the drain entirely.

Aboriginal people are less likely to use mainstream services because of the way that they are often made to feel within them. Like many disenfranchised groups, Aboriginal people often say that dealing with people's attitudes towards them, is more difficult than dealing with the problems that they would like to have fixed. It is for this reason that they may not attend medical and welfare appointments – even though they have great need for assistance. And, perhaps of even greater significance on the world stage, Aboriginal Australians no longer have an official base from which they can contribute and participate internationally about Indigenous issues.

Spending within the mainstreaming arrangements is also problematic. Aboriginal funding is often subject to shared responsibility arrangements. Now, I am all for shared responsibility and mutual negotiation. But for this to be effective, it must involve dialogue and adequate resources – human and financial – on the ground, to work with Aboriginal communities. Aboriginal people need to have the major say in defining the problems that they face and the solutions that are required to address them.

- It will not work to simply have the occasional consultation with government hand-picked representatives.
- It will not work to introduce specific programs that are one-off and not sustainable.
- It will *not* bring fundamental change to offer bribes, such as a swimming pool for school attendance or a petrol bowser in return for children's faces being washed.

What is required is an approach that is prepared to tackle the problems at a systemic level. An approach that will deal with setting up workable infrastructures, so that Aboriginal people can have equitable access to housing, employment, education and services.

- All of the things that are necessary for survival.
- All of the things that non-Aboriginal people take for granted.
- Shared responsibility sounds good in that 'sound bite' way – but it is not as easy as that.

Firstly, the power is not shared. And secondly, there is not an equal responsibility imposed upon non-Aboriginal people to undertake questionable promises before they receive certain services. Can you imagine the response in the wider Australian community if it were announced that in a shared responsibility agreement, citizens would no longer receive health services if they were overweight, or consumed too much alcohol, or that they could not receive dental services unless they had abstained from eating anything sweet? One response to these questions of Aboriginal health and wellbeing is to say that the problems are so bad that anything that helps is a good thing. And I suppose that is difficult to argue against. But my call is that we take a courageous step to *seriously* address the future of Aboriginal Australians – rather than tinkering around the edges. This is the challenge for Australia in the 21st century.

If the Federal Government is serious about practical reconciliation, it has to invest enough to achieve comparable outcomes for Aboriginal people as for their non-indigenous counterparts.

And so far, this is nowhere near the case:

- We need to stop vulnerable people falling through the great divide between State and Commonwealth responsibility.
- We need to stop using the excuse of self-determination to allow people to self-destruct.
- And we need to explode the myth that achievement and success is the choice of individuals to make.

No-one can succeed if they are not given the basic building blocks to work with. And this brings me to the question of what people of good heart – people like yourselves as you have made the effort to come out on this chilly night – can actually *do* to make a difference.

I do not pretend to have magic answers, but I have thought hard and observed closely the sorts of things that seem to have a positive effect. So I have developed my own 10-point plan. And I would like to offer it to you for your consideration and further thinking. Ten is an arbitrary number. It could have been 7 or 20. But there are some good precedents for the number 10, I'm sure you'll agree!

1. **Accept personal responsibility for change**, no matter how small. Don't assume that someone else will do it. Don't be complacent. Even small things like refusing to laugh at a racist joke can make a difference. And don't be daunted by the size of the problem. As Margaret Mead once said: 'Never doubt that a small group of thoughtful

committed citizens can change the world. Indeed, it is the only thing that ever has.'

2. **Reflect on your own behaviour**. Reflect on the cultural practices or beliefs that you find confronting or difficult. It is healthy to talk about these issues, rather than blaming people for behaviour you don't like – or blaming yourself for not being more tolerant.

3. **Identify what you have got to give.** When I think of different groups of people whom I have worked with in Australia, they encompass police officers, health workers of all kinds, educators, lawyers, retired people, students, and many community groups too numerous to mention. You all have something different to offer.

4. **Act in your own context.** For example, ask whether your school or workplace or community group has a code of values and ethics. If not, perhaps you could get together a team of people to devise one. Once people have discussed desirable ways to treat one another in their context, it is a short step to raising human rights more broadly.

5. **Collaborate.** There is strength in partnerships and strategic alliances. Don't allow 'divide and rule' strategies to undermine you. By the way, collaboration may mean having some strange bedfellows at times! You'll sometimes be surprised at who may be on side.

6. **Join. Network – Lobby – Advocate**

Refuse to slip into apathy or cynicism. Enjoy life of course, but also act in ways that are motivated by that idea of the common good. And importantly – notice when you haven't.

7. **Treat everyone with respect.** It might sound like a cliché, I know. But respect is so important. More so than compassion or sympathy, because respect is based on familiarity and understanding. If we only take the time to get to know people, we can avoid the limitations of stereotyping and labelling. And respect ensures that people retain their dignity.

8. **Be inclusive.** Notice and then analyse the various contacts and communications in your daily life. For example, at work or in your community, are there some people who only feature on the sidelines? Do they feel included? Do their views matter? Once you have a good relationship with people, it becomes easier to talk to them about issues that are important.

9. **Maintain your passion.** Also maintain your hope, your optimism and, wherever possible, your sense of humour, because you'll need it at times.

10. And finally, **celebrate your successes.** Not only does this make you feel good but it also energises you for more work.

Finally, I would like to say that no country is better positioned than Australia to take a leading role on the human rights agenda. As citizens and voters I would urge all of you to insist that our political leaders take on this commitment. It is time for us as a nation to face up to the history of this country. As we sang 40 years ago: 'The truth will make us free!'

It is time, it is right and it is necessary, if we are to be genuinely proud Australians in a global context.

Thank you.

2008

The Journey is Healing: How we go forward after 'Sorry'

Presented by Rev. Tim Costello AO

I acknowledge the Kaurna people, the traditional owners of this country on which we sit. I pay my respects to them, to their elders past and present, and acknowledge their special place as the first nation of this place. As well, I would like to acknowledge the eponymous Lowitja O'Donoghue, Bill Cosey, Chair of the Don Dunstan Foundation, Vice Chancellor Michael Barber, Deputy Vice Chancellor Fred McDougal, The Hon. John von Doussa, Chancellor of the University of Adelaide, The Hon. Jay Weatherill, representing the Premier, and Robert Lawson, representing Martin Hamilton-Smith, leader of the Opposition, distinguished guests, men and women of Australia.

It is a very great honour to be here tonight, in Reconciliation Week, to mark, with you, the 41st Anniversary of the 1967 Referendum – and of course the first Anniversary of the Lowitja O'Donoghue Oration. I feel great joy that the Don Dunstan Foundation has named an annual oration in the name of Lowitja O'Donoghue. Lowitja said at the first Oration that she would be 'much more relaxed during the 2008 Lowitja O'Donoghue Oration [knowing that] someone else will be giving it!'

Well – now I am the recipient of this handball, and I will do my best to, as it were, to kick some goals for a remarkable duo of Australians: Don Dunstan, one of our most remarkable Premiers who so diligently sought just policy for those on the margins of society; and Lowitja, one of our most inspiring Australians who has enriched both Indigenous and mainstream Australia immeasurably with her wisdom, compassion and her commitment to the three policy pillars of justice, respect and social inclusion.

As anyone knows who speaks on Indigenous affairs, we are all the poorer for being left with a simplistic spectrum on which one lines up. Either one believes that Indigenous rights is the core of dignity on one end, or that personal responsibility is at the core on the other end. In this dogmatic world of varying orthodoxy, once we know where to place someone on the spectrum, we have done our due diligence of box-ticking and placing others within a box. So now we know who is left or right, progressive or regressive, symbolic or practical, pro-dogma or post-dogma.

But I want to look at things differently tonight. The two dimensional spectrum many of us have been using is in fact a multi-coloured prism through which one can use many lenses to appreciate the Indigenous whole. Rights and responsibilities are deeply entwined, and those who seek to separate them are inevitably left with a 'glass half empty', or perhaps worse. Reconciliation produces a wholeness and dignity, and those who think this can be achieved easily or from some simple dogmatic space have impoverished themselves and those whose good they work towards.

For over three decades, World Vision Australia (WVA) has sought to engage with Australia's Indigenous people. Since 1973, when a group of Indigenous Church leaders brought the plight of Indigenous people to our attention, we have been establishing networks of relationships with individuals and community leaders, seeking their advice on how we can work best with Indigenous communities in Australia.

In recent years, following communities' requests, we have been working across a wide cross-section of Indigenous Australians, from the people of Wetenngerr, a remote community in the Northern Territory, to groups from the urban Armadale Noongar community in Western Australia; from artists across Central Australia to members of the Koori community in metropolitan Sydney. Our programs with these communities have focused around areas such as capacity building, reconciliation, social enterprise, youth, health, governance and leadership.

We are committed to a long-term development approach, working together with communities, using participatory methodologies to identify the issues, repairing or rebuilding a local Indigenous sense of community and leadership and encouraging a greater level of involvement in the development process. But at the same time, with a lack of ambiguity or sentimentality that this development process is fundamentally about employment, education and empowerment in the mainstream.

As a result of sitting down and listening to Indigenous voices, we found what most of you here tonight already know yourself that past injustices have impacted heavily on Indigenous families. Much of the dire poverty, poor health, high unemployment, poor education, domestic violence, imprisonment rates and lack of self-esteem can be attributed in a significant part to unjust policies. But we are also continually drawn to the strengths that exist in communities and the leaders who have risen above this history to move through Australian society with dignity and grace.

We understand that issues affecting Indigenous communities are complex and that there are no 'quick-fixes'—but if any of you have discovered some, please see me after this Oration. We believe addressing any one issue in isolation is not going to solve the problems; indeed we have learnt to be suspicious of the ubiquitous 'magic bullets' of Indigenous affairs policy. Everyone, it seems, has an opinion when it comes to Indigenous affairs, but few are prepared to hang-in there at the local level for the long haul.

The post-'Sorry' environment

It has been a little over three months since Prime Minister Rudd apologised to the stolen generation, with the words 'that this apology be received in the spirit in which it is offered as part of the healing of the nation.' Since the apology, the Government has focused on the priority of us all to help 'close the gap' in health inequality.

I arrived back from the south of Myanmar recently and, apart from the tragedy of the victims of the cyclone becoming pawns in a political play by Burmese generals, a similar shock was that the average male life expectancy in Myanmar is 60 years, while for Indigenous Australian males it is even less at 58 years. To think we have a patch of Myanmar in our backyard brings to me a brutal reality that this simply cannot be tolerated in a developed nation.

As in Myanmar, the way forward for NGOs is through socio-economic development. Education and employment is key, but so too, in our context, is home ownership and governance. Of course, Indigenous people need and want help, but not the type of help that is dogmatic or prescribed from afar. I have found that the door is open to people with the necessary expertise who are prepared to commit for the long haul, and to build the necessary trust and familiarity that has driven effective practice in the past.

Perhaps this may be counter-intuitive to some, but this was a key characteristic of the productive relationships that formed during the mission and station times, and they will be fundamental to the journey of healing in the future. NGOs have a crucial role to play in creating this enabling local space, through the stability and relationships that come with long-term engagement, as do all of those who are otherwise engaged in the 'business' of Indigenous Affairs.

The national apology has helped immeasurably to create this enabling local space. On 13 February this year, from the crowded galleries of Parliament house and the packed lawns outside, from Federation Square to Martin Place, and from schools and workplaces across the nation, Australians listened to the Prime Minister Kevin Rudd say these words:

> The time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future.

Prime Minister Rudd's resolution received tremendous public support; it was greeted with gratitude, pride, relief and tears. And it was so much more than symbolic; it was a day of national historic significance and healing. Prime Minister Rudd captured the spirit of the occasion:

> [The] Parliament is today here assembled … to deal with this unfinished business of the nation, to remove a great stain from the nation's soul and, in a true spirit of reconciliation, to open a new chapter in the history of this great land, Australia.

These are bold and momentous words, so it is with some trepidation that I now contemplate this new chapter in the history and healing of our nation.

Closing the Gap

There is growing public awareness of the need to 'close the gap' in life expectancy between Indigenous and non-indigenous Australians, due largely to an excellent campaign spearheaded by Oxfam and other non-government organisations. When Prime Minister Rudd spoke of 'closing of the gap between Indigenous and non-indigenous Australians on life expectancy', he included 'educational achievement and employment opportunities' as dimensions to that gap. This is an important distinction to highlight, lest the policy response be dominated by health interventions only, when fundamentally much of the 'gap' is beyond their reach.

There is a well-established link in the public health literature between health and well-being. Socio-economic conditions are a crude measure of well-being, but it the best available from statistics. International development experience has demonstrated to us that you have to view socio-economic status in relative terms.

It's been more than 10 years now since Richard Wilkinson published his book *Unhealthy Societies – the Afflictions of Inequality*. Through an international comparison of population health, he concluded that life expectancy is higher where differences in income are smaller and where societies are more socially cohesive.

Wilkinson showed that the key is not poverty in absolute terms, but relative terms. Social inclusion is of course an issue that affects all Australians, but the income differentials between Redfern and the eastern suburbs of Sydney, or the Parnpajinya town camp and the adjacent mining town of Newman in the Pilbara, are acute to the extreme.

If we are to bridge the gap in life expectancy, we have to bridge the gap in socio-economic status, especially with education and employment levels.

If we look outside our nation, the life expectancy of Indigenous people in Australia is also much lower than that of the Native American population of the US (the order of 10 years). While we can explain away the difference in health between Indigenous and non-indigenous Australians in terms of historical and political disadvantage, the differences in health between Indigenous Australians and Native Americans are less obvious. Both groups are marginalised minorities in their own land, and both have endured a history of dispossession of land, loss of culture, and forced separation of families.

When you compare the statistics between the Native Americans and Indigenous Australians, what stands out is the difference between employment and education. The level of employment among Native Americans in the US is twice as high, and three times as high if Community Development Employment Projects are excluded. Three times as many Indigenous people in Australia have either not attended school or have not finished Year 10. The percentage of university graduates is one eighth as great. The level of home ownership is less than one third. Clearly the relative socio-economic disadvantage of Indigenous people in Australia is considerably greater in comparison with the US.

Property rights and home ownership

Let's for now focus on the important socio-economic indicator of home ownership. As you might know, I played a role in the 2020 Summit (held in April 2008), on the panel titled 'Strengthening communities, supporting families and social inclusion'. In the lead-up to the summit, I spoke publicly about Federal Government assistance to help renters become buyers, motivated largely by the obstacles that my own children

face. Home ownership is such a powerful determinant of economic prosperity in this country, but it is also much more. Taken from a perspective of social inclusion of marginalised groups, the interesting thing about home ownership is the extent to which it determines socio-economic status in the mainstream.

The 'great Australia dream' is a powerful thing, especially if you are the first in your family's history to be included in it.

For instance, Mapoon is located on the West Coast of Cape York Peninsula. It is a discrete Indigenous settlement of approximately 200 people. It was established by Moravian missionaries at the end of the 19th century, for the Presbyterian Church. It was at first occupied by people from Indigenous groups from the immediate area, including the Tjungundji people on whose land the settlement is occupied. Later Aboriginal children from across Queensland who had been removed from their parents were brought to Mapoon, as well as some Torres Strait Islander and South Sea Islander people. Mapoon people, including those not presently living in the community, possess a strong collective identity across their traditional, historical and ethnic diversity.

During the first 27 years of the operation of the Mission, the Reverend J.N. Hey adopted an unusual approach to community development. Newly-wed couples were encouraged to settle several kilometres south of the Mission Station along a strip of estuary and river foreshore known as the 'Outstation'. Small cottages were self-built on plots of about five acres, with subsistence farming lots and plantations of coconuts. 'Outstation' was spatially separate from the 'village', with its own church and graveyard. Rather than being absorbed into the Mission 'coffers', wages earned by men working away in the fishing and pastoral industries were used to purchase corrugated iron and other building materials for their house. Reverend Hey went so far as to petition the Queensland Government to grant secure title over the blocks of land to the resident families.

Through the 1950s, the Queensland Government began to question the viability of the Mapoon settlement, for reasons that are highly contested. People were relocated to other settlements, including New Mapoon on the tip of Cape York, but some refused to leave. In 1963, the Queensland Police removed a small party of people identified as the leaders of 'the resistance' to New Mapoon. Some houses were burnt down during the removal, and all except one were demolished the following year. The removal incident has become well-known as a watershed political event in the Indigenous history of Queensland.

Mapoon people were actively discouraged from returning to their lands and thus important spiritual connections which had been continued during the Mission were severed for a generation. With the relaxation of government controls through the 1970s, people began to re-establish contact with their country, constructing self-built humpies on their original Mission blocks. As the return to Mapoon was not supported

by government funding, families relied on their own skills and ingenuity, and on the building materials they could salvage.

The 'sweat' of building their homes during the Mission period, and their subsequent demolition by the Queensland Government, is remembered with a mixture of both pride and resentment. With the return to Mapoon in the 1970s, people immediately camped on the same block where their homes were located during the Mission, before building new dwellings from bush timbers and second-hand materials, often salvaged from the Comalco dump in Weipa (and I have it on good authority that rubber conveyor belts make good flooring material). The humpies were often elaborate in their construction and they dominated housing in Mapoon until the mid-1990s, when people gradually moved into new rental houses.

Recent policy moves towards home ownership in remote settlements have captured the attention of media and the Australia public, but home ownership has long been a reality for Mapoon people, and this occurred with the active facilitation of the Church.

We do not propose home ownership as a blanket policy solution, and we doubt that it will be feasible in many communities, especially for many traditional communities found in Central Australia. But in Mapoon, there is a strong history and existing aspiration by people to own their own homes, and this deserves support. The level of home ownership on communal title lands on reservations in the USA are of the order of 70%. It is hard to understand why home ownership should be so readily available elsewhere in Australia and overseas, but not available to the people of Mapoon. Whatever the tenure and bureaucratic obstacles, they should be overcome. Less complexity, more stability.

We have been served another reminder recently on the deplorable state of child welfare in remote settlements, this time on the Anangu Pitjantjatjara Yankunytjatjara Lands by Commissioner Ted Mulighan. In the preface to the report, he asserts that:

> … prior to the mid-1970s, the life of Anangu on the Lands was generally healthy, peaceful, safe and content. There was an effective system of social order, law and governance and mutual responsibility. During the 1980s and 1990s, life changed drastically for the people and sadly for the children.

Mulighan thereby states that life was better during the Mission period, prior to self-determination policies in the 1970s. This statement has recently been publicly supported by my learned colleague Lowitja O'Donoghue. This is remarkable commentary of the lack of progress in governance over the past 30 years of good intentions and massive investments from the State and Federal Governments.

For the past 15 years, a member of the WVA team has been working and visiting the remote settlement of Doomadgee, in the Gulf of Carpentaria. Many people in Doomadgee echo the views of Lowitja, that life was better during the Mission time.

This is a major shift from the 1990s, when the Mission was the blame for all ills. Life under the Mission was not necessarily good, just better. Of all of the Mission regimes in Australia, none was stricter than the one that occurred at Doomadgee. The Christian Brethren deployed a particularly strict doctrine, symbolic in the ankle length frocks worn by women. But also important during this time, was the links that operated with the outside world through the pastoral industry.

The Mission was established considerably later than other Missions in Queensland and by this time Doomadgee people had long contact with the region's cattle stations and towns. The Mission was quick to capitalise on this pre-existing local expertise, and Doomadgee became a labour pool to the pastoral industry. In 1965, close to 300 employment agreements were signed for Doomadgee workers in 74 pastoral properties across Queensland.

The Doomadgee Mission itself was divided into a number of fenced paddocks which were stocked with small herds of cattle, mainly for self-sufficiency purposes, but also to provide a useful training opportunity for young men before being sent out to work. When people talk about this time of the Mission and Stations, two common elements emerge: a daily routine and structure around meaningful work, and important long-term relationships they formed with 'trusted outsiders', who were mostly non-indigenous workers employed by the Mission and Stations. Thus employment and governance relationships provided important entry points for people to participate with dignity into the Australian society.

Contrast this to the current situation found on remote settlements, with high levels of unemployment, the meaninglessness of many CDEP activities, the high turnover of outside staff, and the fly-in fly-out visits of government workers.

Trusted outsiders are essential to the workings of local governance in remote Indigenous settlements, much more so than in international development settings, because the external system which collectively constitutes Indigenous affairs is exceedingly complex.

It is not uncommon for 20 different bureaucrats from 20 different government departments to visit a remote Indigenous settlement in one week – believe me, there is nothing like this occurring in villages in Myanmar. Pragmatically, in order to deal with this quantity of administration in practice you need to employ outsiders with the knowledge and networks to navigate the complexities and externalities involved. The nature of the problems faced in local governance are such that neither Indigenous nor non-indigenous groups can fundamentally find solutions on their own. WVA understands this first hand, because we are brokering this space in multiple places across Australia.

Therefore, to increase governance capacity, there is a need to reduce the administrative workload, and for less complexity and more stability in the external

service system. In the words of one Aboriginal leader: 'we are climbing the ladder, but the ladder's growing faster than we can climb'. We would, therefore, contend that participation in governance is also an important socio-economic indicator, which, like home ownership, is an important and under-valued means to 'close the gap'.

We have to challenge the *status quo* in Indigenous affairs, and from our experience, that is largely about the way that problems are conceptualised and solutions proffered. There have always been many experts in Indigenous Affairs, but the solutions they offer inevitably lead to another program which in turn exacerbates this complexity. Whatever the pros and cons of different policy solutions, the reality is that in remote Indigenous settlements, meanings take shape through relationships that form locally. It is important to start with the practical realities at the coalface of Indigenous affairs, otherwise policy solutions are fired into administrative vacuums: ideas without the capacity to implement them, and with little engagement of intended beneficiaries, are dumb ideas.

If we can go beyond blaming individuals, religion, politics, culture, and so on, then maybe it is time to say that there is no solution, the system has become so overwhelmingly and hopelessly complex in its pursuit of finding the solution that it itself has become the problem. To the extent that the system is workable, it is in the capacity, innovation and adaptations that exist locally.

Yet trusted outsiders are universally dismissed as gatekeepers, and Aboriginal leaders as corrupt elites; the guardians of a culture that must change. If policy-makers ignore the local practitioners of their policy, then on what basis can they hope to measure the efficacy of intended outcomes? There is an urgent need to understand the conditions of successful practice at the implementation coalface. This is the engine room of Indigenous affairs, not the rooms full of well-meaning people in Alice Springs and Canberra.

Stolen Wages

While I have gone to some lengths to emphasise the need for socio-economic development, I do not wish to gloss over the injustices of the past. These are real and must be addressed.

Between 1909 and the 1940s the Commonwealth introduced a range of benefits including the invalid and old age pension, maternity allowance, war veterans' pension, child endowment, widow's pension and unemployment and sickness benefits.

Initially Aborigines were excluded from such benefits unless they were 'exempt' (deemed to be honorary whites by the issuing of a certificate often referred to as the 'dog licence') or considered to be of 'good character' and having 'an acceptable standard of intelligence'. However, even when they *were* eligible, the Queensland Government had such benefits paid to itself, using the funds for the 'general welfare of Aborigines'.

There is also evidence that Indigenous servicemen who returned from WWII, had their war service pensions confiscated by the government.

At a time when there are loud voices calling for Aboriginal people to be more responsible and to abandon the 'victimhood' mentality of the past and become less welfare-dependent, it is instructive to reflect on how *irresponsible* governments were in the past in denying Indigenous people their wages. Archival records show that even when young Aboriginal men applied for their own wages in order to be independent of the government, such requests were invariably refused. One can only speculate how much less dependency there might be today if Indigenous workers had been able to be part of the 'real' economy.

It is a matter of justice and significant healing for the Indigenous community that the issue of stolen wages is treated as the theft that it was.

Time for a Treaty!

Australia is the only major former British colony in the world never to have negotiated a treaty with its Indigenous inhabitants. As a result, Indigenous Australians have never had a binding legal document to fall back on in order to assert their rights or to challenge the actions of governments. I believe that:

- a treaty between the Federal Government and Indigenous Australians needs to be negotiated to prevent Indigenous rights being eroded;
- a treaty would bring Australia into line with other countries such as New Zealand, Canada and the United States;
- the process would encourage open and honest debate that would lead to a better understanding of the need for a treaty between Indigenous Australians and the Federal Government;
- a treaty would succeed under circumstances where a basic framework agreement is proposed by a broad section of Indigenous Australians and where Australians see it as a natural flow-on from the apology.

Which brings me to one of my favourite topics: the role of Christians and churches in the abolition of slavery. What has this to do with a treaty? Well, William Wilberforce and what became known as the Clapham Sect were a devoted and very optimistic group of Christians. And their efforts at reform in society didn't stop with the slave trade. Wilberforce was also a founding member of the Church Missionary Society, as well as the Royal Society for the Prevention of Cruelty to Animals, and the Sect championed other causes such as prison and child labour reform among many others.

The Clapham Sect comprised clergy and business men, Christian politicians and governors. Those from the group elected to Parliament were known as the Saints. And their name stuck from the suburb of Clapham where they met regularly for fellowship. One of the group was the barrister James Stephen. Wilberforce had rescued him from suicidal depression, and Stephen's son, also called James, became the Permanent

Under-Secretary for the Colonies from 1836 to 1847. He was possibly the greatest civil servant of the 19th century. In fact it was he who drafted the legislation outlawing the slave trade. He was so influential that he was referred to as 'Mr Over-Secretary Stephen', 'King Stephen' and 'Mr Mother Country'.

In the English Colonies, he decreed that the Indigenous people were to be protected and the principle of racial equality maintained. Stephen's ideas on the protection of the Maori of New Zealand were incorporated in the Treaty of Waitangi in 1840. And one is forced to wonder what would have happened were a man of the calibre of James Stephen to have served in the Civil Service a generation earlier, when Australia was determined to be *terra nullius*?

Ideally, whatever framework agreement is reached would need to be enshrined in a legal instrument to ensure its safety. It could be in a Bill of Rights, or a constitutional amendment. Either way it is likely that a Referendum or plebiscite would be required. Given the failure of most past referenda, it could be lengthy process. A major obstacle to public support for a treaty was the insistence of the previous government that treaties can only be negotiated between 'nations'. But it is obvious that Indigenous gains made overseas – whether in relation to land rights, or reparations for 'stolen children' and 'stolen wages' – has most often been a result of treaties.

When delivering the inaugural 2005 *Mabo* Oration in Brisbane, Noel Pearson said the principles established by *Mabo* were 'the best opportunity for resolution of the colonial grievance between Indigenous and non-indigenous Australians.' He declared it the 'cornerstone for reconciliation – legally, politically, historically and morally' not 'simply a legal doctrine relating to real estate.' *Mabo*, he said, established an 'over-arching moral framework for reconciliation.'

While I agree that native title is critical to reconciliation and economic development, the processes in place to resolve outstanding native title claims are overly complex and exceedingly slow. However, a treaty could build on this and potentially codify and enshrine property rights and the rights of Australia's first peoples.

Addressing the past injustices of stolen wages and the signing of a treaty are important aspects to creating an enabling framework for socio-economic development to occur, but we are under no disillusionment that the 'hard yards' will continue to occur at the 'coalface' of communities, largely on the strength of relationships between leaders and trusted outsiders. Such long-term relationships were critical during the days of the early missionaries and station workers, and they continue to be with the present-day employees of Indigenous organisations, NGOs and government departments.

In the 1960s, Aboriginal stockmen went on strike at the NT Wave Hill station, led by Gurindji man Vincent Lingiari, they walked off the job and set up a camp at a place called Wattie Creek. The dispute over wages and conditions turned into a demand for land rights. The words 'from little things, big things grow' are now immortalised in a

Paul Kelly and Kev Carmody song, and for the purposes of today, I use them to remind us what can happen in small ways from grass roots innovation. And if we are to close the gap in health inequality, then we have to tackle the gap in education, employment, home ownership and governance capacity, and there are no easy policy solutions here, just what gets worked out locally in practice.

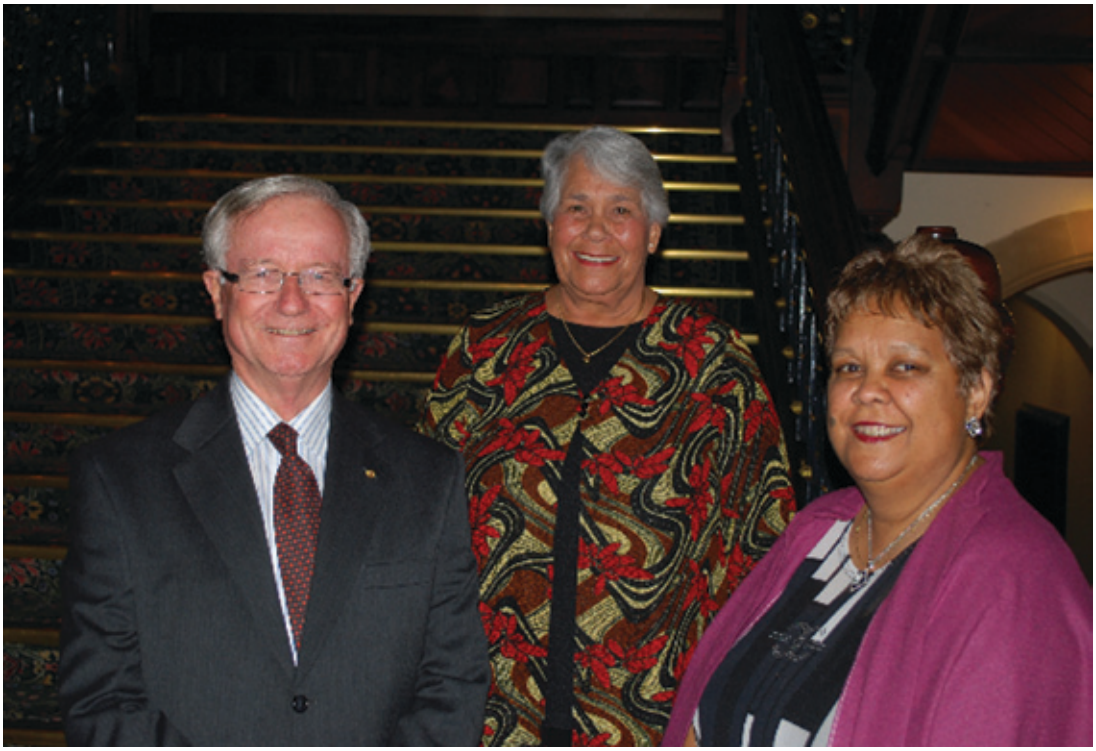
As you can all see, there is much to be done post the apology, but the apology has turned the rudder on the ship of state, and given Australians a desire to bind up the wounds which the apology was in part responding to. It is as if we have started out afresh on a journey of healing and I commend us all to take that journey in so much as we can. Even if we start with the 'little things', some of the 'big' challenges I have outlined will be sure to follow.

Thank you

2009

Bringing Black and White Australians Together

Presented by Dr Jackie Huggins AM and The Hon. Fred Chaney AO



DR JACKIE HUGGINS AM

I wish to acknowledge the country of the Kaurna peoples of this land and thank them for the welcome and allowing me to speak on their country at the prestigious Lowitja O'Donoghue Oration alongside my good friend Fred Chaney. I pay my respects to Elders past and present, and to all Aboriginal people within these boundaries.

In delivering this lecture 'Bringing Black and White Australians Together' I am reminded that I am often asked what does 'Reconciliation' mean to me. It means three things to me – Recognition, Justice and Healing.

Recognition – as the First peoples of this land, recognition that the First Australians should be included in the preamble of the Constitution and within the Constitution itself, and of course, to be respected as such.

We have existed here over 70,000 years and have maintained and cared for the land and for people. There are moves to progress this understanding from kindergarten level in the teaching of Aboriginal culture, which can only be hailed as a positive move. For far too long have we been asking our country to learn its true history.

Justice – is about overcoming all the social disadvantages that can be summed up in one stunning statistic which says our children can expect to die, on average, 11.8 years earlier than the children of other Australians. It has become a reality that when statistics are given about Aboriginal lives it numbs, and does not record in the psyche of most average Australians, because the statistics are still so bad. However, I have absolutely no doubt that we can only meet this enormous challenge if we work together as Australians who care about it. And that we work together with trust and with respect.

Healing – because that really is our fundamental goal as human beings. And we will only achieve it in this country if we achieve reconciliation. But that will never be achieved if governments concentrate on 'practical reconciliation' and ignore the spiritual or symbolic side of reconciliation. By the symbolic, I mean all the many things that have to do with building respectful relationships. The balance needs to be right.

How can we share in this country's vast opportunity and prosperity if we don't understand the basic principle of respect in working together? It was something Australians understood in 1967 at the time of the Referendum, if only for a moment, but it has driven and inspired many people since, more and more people all the time. And not just a certain type of person, left-leaning, religious, or just people who like 'stirring the pot'.

Lots of different kinds of Australians support reconciliation. They are people who understand when something is not fair, and know that something should be done about it. People in business, in government, in media, all different professions and political persuasions. People you meet in supermarkets.

People get involved because they feel something should be done about the disadvantage – and maybe something can be done about it. They hear the good and the bad stuff and try to chip away at the misconceptions.

But getting there is going to require of us, First Peoples and others, that we shift out of our entrenched positions. We need to see and learn about what is actually working in improving Indigenous people's lives, and think about how we can reasonably apply it in different contexts. We need to be prepared to listen to one another.

Reconciliation started because enough Australian people wanted it.

There are many stories about Aboriginal and non-Aboriginal people working together. Perhaps too many than we are prepared to realise. Thousands upon thousands upon thousands throughout our history. And when it got so hard these people would still stand shoulder to shoulder. People in the audience too such as yourselves – you've all got a story for sure.

People like you who have heard about various campaigns in your churches, women's groups, trade unions, and that you'd tell your families, friends and workmates, who then told their neighbours. It is still there but for most of you, you decided to do something about it. You need the accolades for getting involved. Even just coming here and listening to this Oration is indeed itself involvement. It was many, many conversations that joined in a spirit of reconciliation and became a national determination. I know that kind of determination is still around today.

Seeing Blackfellas and Whitefellas working together to make a difference – it sounds so clichéd but it's such a heart-warming sight. Whitefellas don't need to do this work like we do. They choose to get involved in reconciliation, and in making a difference for us they realise they get something special in return. And it makes a difference for them too.

My own natural optimism only wavers when I experience racism, and when I sense the low expectations of my people, from others and from ourselves, particularly our young – the escalating violence and recession in the world and in our communities. Inaction still by so many, or action that is disrespectful and manipulative, so therefore destined to generate failure.

Sad things, and there are many, sharpen my conviction that for things to really change in this country, Whitefellas have to come to terms with the racism that too many of them will accept and excuse, even if they don't feel it themselves.

Being involved in reconciliation has brought me into contact with the best and worst of people – the highs and the lows, walking three paces forward and two back, the magnificent, and horrible people met along the way. But somehow they bring out the best in the individual.

Australians need to know about these networks of change-makers who brought out the best in us. Because the best is always there waiting to be tapped by true leaders in

our communities – true leaders like Lowitja O'Donoghue. No one knows the struggle better than Lowitija.

Then there is the leadership which has to happen at all levels of government and within our own communities. Throughout my time there have been so many influential leaders who have shone the light for First Australians. And then again there have been some who have done the opposite by obstructing and denying a rightful place for Aboriginal and Torres Strait Islander peoples.

The work I currently do around leadership these days tells me that there is a great thirst out there among our people who want to do good things in their lives to get themselves and their communities into better shape. Research in other countries shows that leaders who got rid of their addictive behaviour, and reliance on alcohol or drugs, achieved outstanding results in their communities, because their people wanted to follow them.

Great role models have paved the way for us and in my earlier life I was able to sit at the same table as people like Lowitja, Charles Perkins, and many others whom I observed at close range and learned the way they handled every type of situation. Their honesty and integrity in dealing with matters inspired me to do the same. And even my non-Aboriginal peers like Fred Chaney became the role models that I could borrow certain characteristics from to develop my unique style of leadership.

Nor is it easy being a woman either as Lowitja suggests:

> I am always inspired by examples of people having the courage to act on what they know to be right. It sounds simple – but I believe that it is a rare quality in the contemporary economic and political landscape. It is difficult enough in any sphere for a woman to succeed in positions of leadership. I believe it is even more difficult for a woman in a leadership position. If she challenges the status quo and the values that drive and protect it. If she takes this role, she challenges both male power, and the systems that support and maintain it (By definition she will be regarded as mad or bad – and sometimes both!)

Leaders need to be brave and have a vision. For Aboriginal people we are dictated to by our past, and the legacy we carry on for our ancestors. The struggle is constant, and burnout is a usual condition. For many of us we do so without thinking because this is our family which is at stake. The strategies applied after can have improved or drastic results.

Governments must listen to the solutions derived at the local level by Aboriginal and Torres Strait Islander people. There are many locally driven programs and other initiatives across the country which enable effective and creative solutions to be produced at the grassroots level.

A few weeks ago I attended the Indigenous Family Violence Prevention Forum held every year in Mackay for the Queensland Centre for Domestic and Family Violence Research which aims to:

- highlight and celebrate the good work that is being done by Aboriginal and Torres Strait Islander people to end family violence;
- share information and knowledge about strategies and programs that could be used effectively by others;
- promote opportunities for networking between workers in the field of family violence prevention; and
- identify issues to be addressed and recommend strategies to do so.

Each year, over 150 Aboriginal and Torres Strait Islander people from across the state, and more increasingly from interstate, come to tropical Mackay in Central Queensland for the Forum, and to share their knowledge and expertise.

Like all of the published research on family violence in communities, forum participants consistently put forward their strongly held views, based on their experience, that effective responses to domestic and family violence must be holistic, and locally developed, driven and owned. Policies and programs that are imposed on Aboriginal and Torres Island people are doomed to fail.

One of the ideas which came out of an early Forum was the one at Woorabinda in Central Queensland – whereby footballers would be suspended from games if they engaged in any form of domestic or family violence. And further they would have to talk to school classes about why violence is not acceptable. DV orders were reduced dramatically. Recently I have seen the same ideas meted out in some areas of New South Wales where football is popular in communities. Locally-based solutions do actually work.

I take my hat off to the workers who work tirelessly at the coalface of such tragic areas. They do so with dedication and strength.

This year I have been involved with Tom Calma and others on the work of the National Representative Body Steering Committee to give our people a voice in national affairs and policy development. The Adelaide workshop saw a great deal of commitment from all participants who were keen on a positive direction for the future after a long hiatus in Aboriginal affairs – to have a self-determining and independent body, which does not deliver services, and has equal representation of men and women is among the consensus points reached.

There was strong support for the representative body to primarily be an advocacy body and to focus on holding government to account for its performance in programs, service delivery, and policy development. There was also a strong support for the

body to have a direct relationship at a regional level so that its advocacy work is fully informed. Also the new body would play a leading role in working to achieve constitutional recognition for Aboriginal and Torres Strait Islander peoples, and help to close the gap in health status within a generation.

There was consensus that the representative body should play a unifying role among communities, and contribute to Aboriginal and Torres Strait Islander people controlling their own destiny and being economically independent.

Workshop participants agreed that the new body should have mechanisms in place to ensure the participation of people who are generally marginalised in representative processes, such as young people, people with disability, members of the Stolen Generation, and mainland Torres Strait Islanders. It would also represent the diversity of peoples in terms of geographical locations, relations to country and cultural diversity.

There have been many key issues for me in reconciliation overall; however, it has been about how we build a respectful relationship between everyone. How do we accomplish that in our continuing journey? The issue was how to get across what a dignified race of people we actually are – to look at the rich culture that we come from – the old and ancient culture, and how to encompass that in the fabric of Australian society, how to make it fundamentally the focus, the basis of why we are all here today. So it's about understanding and knowing, coming to terms with the beautiful culture we have in our country.

One of the ways we can stay positive is to look at the workable and successful programs we have around the country which concentrate on the positives, and derive their existence from the good and not the bad. Starting off where people are at rather than seeing them as hapless victims who don't deserve a second chance. We just never hear enough good stories, but we know there are so many.

I am privileged in that I work with the cream of the crop at Queensland University. Our students who are not without their struggles too, sit in classes day in and day out to achieve qualifications which can get them a better future, and perhaps one which their grandparents and parents could never imagine. I see our young women studying engineering, our young men aerodynamics and physics, and it is truly astounding. Perhaps I do work in an environment that doesn't lend itself to too many failures, but nevertheless these student are there at university.

A researcher asked me recently if reconciliation had 'lost its hour'. I am still not sure what she meant by that, but I responded by saying that I am a Leo and by nature very optimistic and showy. I don't know where I would be or where this country would be if we had never had a reconciliation plan in place. I fear a place without it – no

matter how tangible it is. There has been change, and when you have been a part of that change it is very hard to go back to thinking there has been little change. We've all worked so hard for it that hopefully our lives have been for something. So by no means has it vanished, I told her, except we just need some oxygen masks from time to time, boosters to help us get to the next level, and some soothers when we fall and get up again and keep trying.

I will always think of reconciliation as a fine and noble cause to be involved in. The art of Black and White working together is something which I saw as a child when my Mother was politically active, and the good people we associated with, who saw our treatment was shameful, and who were prepared to do something about it. That is seen today and I can never give up on it. It's part of my DNA. I feel very lucky to have been so closely involved with it for such a long time.

But this is a movement of today and the future, just as much as it is of the past. More than ever we need Black and White working together in unison. It is only then can we really make the difference.

THE HON. FRED CHANEY AO

I acknowledge the Kaurna people, the traditional owners of this country on which we sit. I pay my respects to them, to their elders past and present, and acknowledge their special place as the first nation of this place. I thank Karl Telfer for his gracious and generous welcome to country.

It is a great honour for me to be delivering this Oration in honour of Lowitja O'Donoghue in conjunction with Jackie Huggins. Both are Aboriginal women of great distinction who in their varied careers have shown national leadership to the Aboriginal and Torres Strait Islander communities, our first nations. I will hereafter refer to those communities and people as Aboriginal using that term as inclusive of all the Indigenous people of Australia.

I was deeply touched when Lowitja personally issued the initiating invitation, and relieved at her idea that Jackie and I should share the oration. My relief flowed from my belief that now, as in the past, if we are to bring black and white Australians together it is essential that we of the settler society are able to hear black voices above the din of debate, whether of the history wars variety or the often subtle re-assertion of assimilation as the answer to all Aboriginal issues. That is why the work Jackie, with Tom Calma and others, is doing now on how to constitute a national Aboriginal voice is so important. How are white Australians (and I adopt the terminology of the given Oration title) to come together with black Australians unless we can hear clearly black voices so we can know where we should be attempting to engage? As I add another white voice to the debate this evening I do so in the context of trying to respond to black voices and demands for justice of the sort we have heard so often from Lowitja over her extraordinary career.

For much of my working life Lowitja O'Donoghue has been one of those clear voices to whom I tried to listen to determine my own direction. We all know much of her life and work so I will not repeat her whole history. She has the highest formal honours the nation can bestow, has been recognised as Australian of the Year and designated a National Living Treasure. Her unique status in the national consciousness was captured at the opening of the National Portrait Gallery in Canberra last year. In an audience containing a large number of the prominent Australians memorialised in that gallery only one person was singled out for mentioned by name by the officiating Prime Minister, Kevin Rudd. That person was Lowitja. On all I know of her from personal acquaintance, and I hope friendship, she deserves every honour and accolade heaped upon her. It is lucky for another great South Australian woman, Blessed Mary McKillop, that Lowitja is still alive, otherwise Lowitja might be 'pipping her' for being the first Australian canonised.

One of Lowitja's distinctions is that she worked for much of her life in public

administration. In a field where grand declarations of good policy intentions are common and conversion of those good intentions into concrete results less common, she has not shirked the burden of trying to achieve results on the ground. As a nurse, then later working for the Aboriginal Legal Rights Movement, as a regional director of the Commonwealth Department of Aboriginal Affairs, as the first chair of ATSIC, she has worked where rhetoric runs up against reality, she has worked where the rubber hits the road. It is this area of public administration, to which Lowitja has contributed so much, that I want to address tonight, it is where a great deal needs to be done to bring black and white together.

In the year 2000 celebrations which attended the end of the decade of reconciliation, as we marched across bridges and partied together, the Aboriginal voices I heard consistently asked the question, 'But when will things be different?' I think it was Charles Perkins who said long ago that we could not be reconciled while Aboriginal disadvantage persists. At this time, when we have made such great strides at the symbolic level through the apology, and there are unprecedented positives in terms of good intentions about ending disadvantage, a critical difficulty we face is not in winning new policy concessions from governments but in ensuring governments can deliver on their policy commitments. The fundamental challenge for governments today is no different from the fundamental challenge we have faced over the last 30 years, how do we deliver on our good intentions?

In so many ways we are in the best of times. The opportunities have never appeared greater. The breadth of engagement across the Australian community is unprecedented. Reconciliation Australia's Reconciliation Action Plans are being embraced across the spectrum of Australian institutions. The banks, the miners, universities, schools, hospitals, government departments, the national airline, and many others are engaged, not in unilateral declarations of good intentions but in engagement with Aboriginal stakeholders in measurable plans for on the ground action. At their best Reconciliation Action Plans build engagement with Aboriginals into the business plans of organisations in a way which is directly connected with and driven by Aboriginal aspirations.

But no matter how powerful and positive the contribution of the commercial and non-government sector, and at its best it is positive and powerful, governments remain the critical players. That is because governments provide and will continue to provide most of the basic services including:

- the bulk of the schools in which Aboriginal children will be educated,
- the universities and technical colleges that will provide more advanced education,
- the child health services and the hospitals which deal with the serious problems of Aboriginal health, and

- the police the courts and the jails which have such a significant impact on Aboriginal lives.

I am not one of those who, impatient with the difficulties of dealing with governments and their bureaucracies, turn away to the consolation of dealing with the non-government sector with its commitment to outcomes rather than process, flexibility and management expertise. While I cherish, for example, the productive engagement of the Graham (Polly) Farmer Foundation with the mining industry in assisting Aboriginal students to finish high school and can admire others sending a minority of students off to boarding schools, I know that if the broad mass of government schools are not educating Aboriginal children, in 30 years time we will still be puzzling about how to bring black and white together. If government institutions do not work for Aboriginal people we will never close the gap.

The past is a land full of good intentions. As we look at the dedicated work of the Council of Australian Governments in 2008 and 2009 it is salutary to remember that as long ago as 1992 the State and Commonwealth Governments combined in a Statement of National Commitment to work together and to deliver citizenship entitlements to Aboriginal people. It is worth remembering the more recent well-intentioned COAG trials which produced such limited outcomes notwithstanding valiant bureaucratic attempts to make the system work for Aboriginal people. It is worth remembering these things; not to be cynical or dismissive about the worth and *bona fides* of present commitments, but rather to understand the reasons for past failure and to ensure that the current commitments to real and measurable progress, the current commitments of substantial new funding, result in the closing the gap targets being met. Lowitja, like me, knows that the hard part is delivery against good intentions.

What are the present ambitions of governments? There are six ambitious targets put on the table by the Council of Australian governments. They are:

- To close the gap in life expectancy between Indigenous and non-indigenous Australians within a generation.
- To halve the mortality gap between Indigenous children and other children under age 5 within a decade.
- To provide access to early childhood education for all Indigenous four-year-olds in remote communities within five years.
- To halve the gap in literacy and numeracy achievement between Aboriginal and Torres Strait Islander students and other students within a decade.
- To halve the gap between Indigenous and non-indigenous students in rates of year 12 attainment or an equivalent attainment by 2020.
- To close the gap in employment outcomes between Indigenous and non-indigenous Australians within a decade.

According to the head of the Department of Prime Minister and Cabinet, Mr Terry

Moran, in November last year, COAG committed joint funding of $4.6 billion, most of it new money towards meeting these targets. These targets and the commitment of largely new funds mean that we should give high marks to the governments of Australia for their current good intentions.

It is also important that considerable thought and effort has gone into the difficult issue of remote service delivery and that the governments have entered into a national partnership agreement on that subject. It appears to me that they are trying to learn the lessons of the past. This is apparent in Schedule C. to the National Partnership Agreement on Remote Service Delivery which sets out the service delivery principles for services to Indigenous Australians.

These principles, which are to guide design and delivery of both Indigenous specific and mainstream government programs include among other things:

- Engagement with Indigenous men, women and children and communities should be central to the design and delivery of programs and services
- Programs should be physically and culturally accessible to Indigenous people
- Engagement with Indigenous men women and children and communities should be central to the design and delivery of programs and services
- Recognise that strong relationships/partnerships between government, community and service providers increase the capacity to achieve identified outcomes
- Ensure Indigenous representation is appropriate, having regard to local representation as required
- Use evidence to develop and re-designed programme services and set priorities
- Include strategies that increase independence empowerment and self management
- Flexibility in program design to meet local needs
- Recognise that programs and services should not erode capacity or capability of clients or impact negatively on the outcomes of other programs and services.

All of this suggests to me a careful attempt to avoid the mistakes of the past. But the comfort I get from this is diminished by the contrast between the deep concerns about what is actually happening on the ground which are passed on to me and the admirable principles I have just outlined. Time does not permit me to detail all of the concerns that have been raised with me from across remote Australia, and which I have raised with government, but they lie in the following areas:

High-level policy changes that substantially impact on local activities with limited or no consultation with the affected communities about the changes and, perhaps even more important, about their implementation. For example the Community Development Employment Project changes will impact differently across the wide

range of circumstances in different communities. In some remote communities such as the Ngaanyatjarra Lands this will significantly disrupt what is currently working unless it is a managed process with real community input.

Lack of contact between local communities and government authorities caused I suspect by limited government resources for meaningful field engagement. Fly-in fly-out teams telling people what is going to happen does not comply with any of the so-called principles.

Policy changes which are driven by ideological positions without regard to pragmatic considerations such as the imposition of individual power meters in the interests of encouraging greater personal responsibility in communities, which until now have successfully paid their power costs through a bulk process. The more likely outcome will be arrears, collection processes and presumably a final sanction of having the power cut-off. This is scarcely flexibility in program delivery and more like an erosion of capacity.

But of greatest concern is the tight timetabling of the various plans meant to drive progress. It is good for governments to set targets, it is good for them to put pressure on themselves to deliver. But there is real tension between the desire to deliver quickly and what we know about what is required to produce results. The principles set out above are a reflection of one of the most powerful lessons of the past, namely that in the absence of the application of these principles permanent positive change will not be achieved.

The proposition that Aboriginal engagement and involvement is a core requirement for success is no longer contentious. For example, a previous Minister for Indigenous Affairs for the Commonwealth, Senator the Hon. Amanda Vanstone made comments on the principles underlying the administration of Commonwealth programs at a workshop organised by Reconciliation Australia in May 2005. She stressed:

- the centrality of Aboriginal voices to the new conversation saying what they want and what they think will work
- empowering the locals
- think Canberra funded not Canberra run
- sound governance arrangements and leadership in local communities
- governments getting their act together.

There are many statements to like effect but Terry Moran put it succinctly in an address in April when he talked about: 'the vital importance of engaging Indigenous Australians in the strategy, because we can be sure that without their engagement, this enterprise will fail.'

That is why we should be concerned that in the same agreement which captures the service delivery principles for the COAG program as it relates to remote communities we also find that:

- Bilateral plans, with identified locations, milestones, performance benchmarks and indicators are to be agreed within three months of signing the agreement
- The integrated service delivery mechanism is to be established within six months of the bilateral plan is being signed
- Baseline mapping is to be completed within one month of the mechanism being established, and
- Drafting of detailed local implementation plans for each location is to commence upon completion of baseline mapping and is to be progressed in consultation with local Indigenous people.

So the local Indigenous people do get a look in at the point of drafting details of local implementation plans, but what about before that, and why are they talking about bilateral plans, that is between State and Commonwealth, and not trilateral plans between State Commonwealth and Aboriginals?

The truth is that in the entirely laudable desire to show that real change has been achieved, there are real outcomes post-apology to demonstrate the *bona fides* of government, we may well be putting the whole admirable exercise at risk by repeating the errors of the past and precluding the Aboriginal participation which we know is essential to the success of the project.

Last week I spent some time with members of the Katherine West Health Board. That Board is responsible for all medical services across a substantial part of the Northern Territory in the region of Katherine. The service is a successful example of Commonwealth/Territory/Aboriginal co-operation. It is a benchmark in a number of respects. It involves the pooling of Commonwealth and Territory programme monies to enable services to be delivered by a single agency, and there is real community involvement and indeed control. The story of the development and evolution of the service has been captured a small book entitled *Something Special* published by the Aboriginal Studies Press. The relevance of this history is that it clearly demonstrates that Aboriginal community engagement is not achieved overnight. It records 'the differing perspectives held and tactics employed by all the various players ... came close to exploding on more than one occasion. Without the ability of all stakeholders to get together and compromise, without a committed person with good political judgement in the middle, the chances of getting such a radical initiative off the ground would have been slim.'

The timetable for the government parties was a constant problem. Describing pressure from Canberra to get started it records: 'It seems that almost everyone involved – and especially those Office of Aboriginal and Torres Strait Islander Health (0ATSIH) people situated in the remote city of Canberra – hugely under-estimated the amount of work that had yet to be done.'

The struggle over years to achieve real community involvement and control was vindicated by the outcomes. I quote from the evaluation of the service:

> The trial has demonstrated that the effectiveness of good clinical, public health, administrative and financial practice can be realised if the reform agenda is driven through community organizations are adequately resourced and supported. Irrespective of the amount of (additional) resources the trials also demonstrated that account must be taken of the time required for organizations to build a capacity.

Something Special illustrates the time and resource implications if governments are genuinely committed to the principles they espouse in Schedule C.

The national evaluation also offered confirmation of some other important experiences which the board had been through over the course of the Trial. In particular, the emphasis on the need to *build capacity* had been seen as vital. In the case of Katharine West, this has taken two main forms:

> A long lead up the period to allow for extensive community consultations, discussion and debate. This goes beyond the usual way in which governments define 'consultations' – such as just having one or two meetings and talking to half a dozen people or local councils. Instead, in the Katharine West experience 'consulting' meant that virtually every adult in each of the communities concerned had to be made aware of the proposal – through face-to-face discussions – then given time to reflect on the implications, their opinions sought, the original proposal revised in light of this, and so on. It required nothing less than detailed individual dialogue, which was ongoing throughout all phases of the trial and could not be fitted into timetables dictated by the program funding cycles which emanated from Canberra.

There are at least two trip wires which could limit the sustainability of changes being pursued through the COAG process. The first is whether governments with their timetables and bilateral agreements will permit the time required for real community engagement and ensure that communities have the resources and capacity to partner with governments to achieve shared aims. The second is whether the agencies of government are staffed with the skilled personnel required for consultation across the great variety of communities with which governments are seeking to engage. There are people available with such skills and government could look to the mining industry for example in this regard. It is a task for skilled intermediaries who have experience in achieving results as well as in cross-cultural communication, not attributes necessarily attached to people whose skills are essentially bureaucratic. To some extent in dealing with disadvantaged communities you are asking centralised bureaucracies to act against the order of their nature, and unless they are clearly tasked to behave in the way required by Schedule C the old command and control ways will persist to disastrous effect.

Closing the gap or at least substantially reducing it within a generation is clearly

possible. It is unlikely to happen unless governments learn new ways of working. It could be useful for them to think about the way in which the mining industry has, since 1995 in Australia, re-engineered its approach to dealing with Aboriginal communities. I have commended to governments the Rio Tinto publication entitled 'Aboriginal Engagement in the Resource Development – Industry Leading Practices' published in October 2008. This publication records that 'a mutually beneficial, working relationship through positive engagement with Aboriginal groups has become a pre-requisite for advancing a project'.

It records four key elements of Aboriginal engagement in project development:

- Place the decision to move forward … in the hands of Aboriginal participants
- Partner with Aboriginal participants in project decision-making
- Work with the Aboriginal participants to ensure concerns are understood, discussed and incorporated, and obtain feedback
- Provide information to Aboriginal participants to facilitate their understanding of the project and its benefits

Then, as you would expect in an industry where a financial bottom line is clear and clarity of management is essential to commercial success there is great emphasis on implementation. In this respect they point out that a well-developed and supported approach to implementation is a common characteristic of leading practices in Aboriginal engagement. Surely we can expect no less from governments? But if history is any guide we know that the skilful writing of a fine policy tends to take precedence over the boring business of implementation, and indeed the pedestrian matter of implementation can be delegated to the lesser bureaucratic orders.

The miners on the other hand stress having functional personnel across the operation retaining close ties to the specific project and local Aboriginal communities. They stress community-wide engagement and structured institutionalised relationships and continuity of relationships. They stress superior leadership on the part of both the project proponent and Aboriginal group, with key aspects including senior corporate commitment, a high degree of respect for Aboriginal people and culture, and willingness to engage in open dialogue. They stress adequate staff and financial resources to enable effective implementation and to allow Aboriginal groups to be fully and fairly engaged. They stress ongoing monitoring to ensure agreements are fulfilled that there be transparency and accountability. Then, as you would expect, they expect a business planning approach, a move towards joint business planning approaches with attention being paid to the scope of activities, responsibilities and consequences, timeframes and resources.

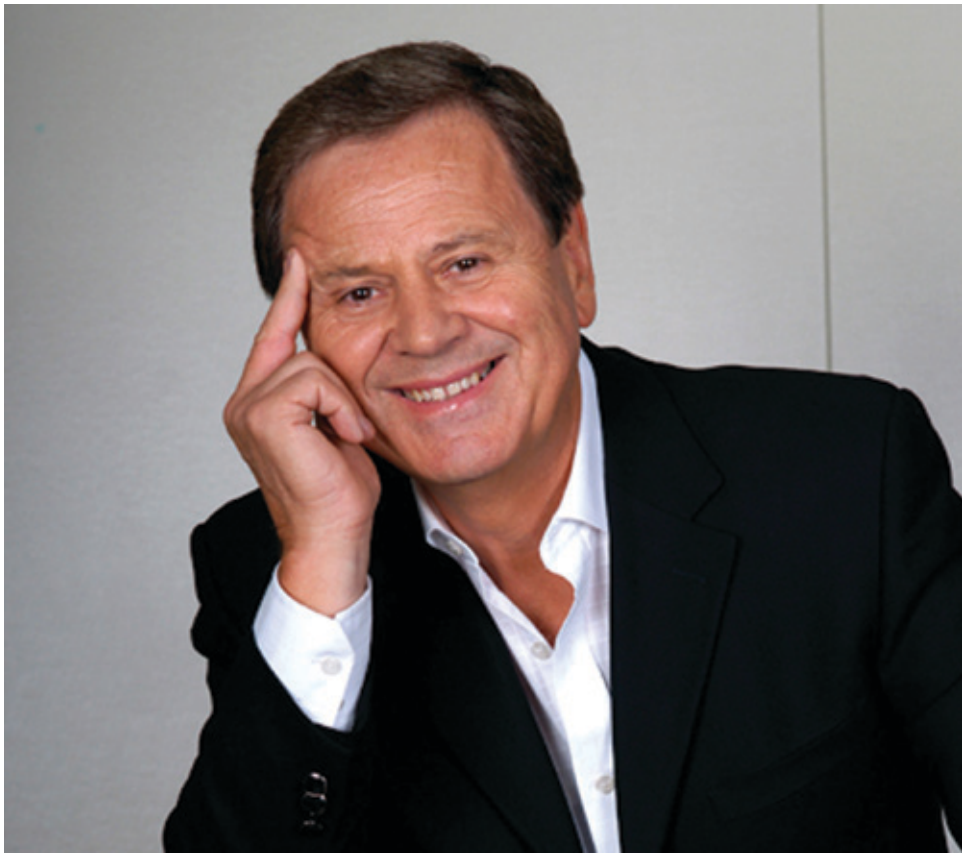
None of this describes what I have seen as common government practice in the past. Yet it should be and if Schedule C represents the new order – it will be. Surely government can match the private sector. There is a lot of work and capacity building

in the bureaucracies to be done to deliver on the promise of COAG. We must hope that it will be forthcoming. The best reward for the lifetime of devoted public service of Lowitja O'Donoghue would be for the governments of Australia to ensure that Aboriginal engagement in their public administration becomes the standard way of doing business.

2010

Walking Together on the Journey of Healing

Presented by Ray Martin AM



'Walking Together on the Journey of Healing'. That's the topic of this, the third Lowitja O'Donoghue Oration for the Don Dunstan Foundation. I have to say I'm deeply honored to be invited to be here with you.

Don Dunstan was an old, treasured friend of mine whom I admired – as did everyone who met him. I got to interview him many times over the years – for both the ABC and Channel 9. I can't tell you the number of times that I'd come to Adelaide to do a story – for A Current Affair or Sixty Minutes – we'd catch the last plane in from Sydney and go straight to the restaurant that he shared with Stephen, his partner. There, we'd get to share some of his latest favourite cheese and wine. Always the best – South Australian, of course. And I'd also seek some wise words or inspiration – which Don gave freely just about every time he spoke.

I fell into Lowitja's 'circle of wisdom' more than 20 years ago, when she was the Chairperson of ATSIC and also Deputy Chair of the Council for Aboriginal Reconciliation – of which I was a member for ten, rollicking years. As the Council moved its sessions around the country I'd always try and stay in Lowitja's 'slip-stream'. Close at hand, in the bus, at dinner … community meetings … whatever. I long ago learnt that if you stand next to compassionate, wise, smart people – and nod a lot – you can get away with anything!

So, 'Walking Together on the Journey of Healing' – that's what I want you to think about tonight. It's called an 'Oration'. But, I'm a story-teller. That's what journalists really are. So, I'm going to tell you some stories … about some of my experiences over the last 45 years. I hope that, like pieces in a colourful jigsaw puzzle, they'll all come together in a bigger picture of 'Walking Together on the Journey of Healing'.

Of course, to visualise where we're going on this journey we must always have a glimpse in the rear vision mirror – at where we've been. Briefly. As Anton Checkov, the great Russian dramatist, once said 'To begin to live in the present, we must first atone for our past and be finished with it.' (Mind you, I think it was the American poet Carl Sandberg who wrote – 'the past is just a bucket of ashes'). Either way … I was thinking, flying over here today, that the Don Dunstan Foundation couldn't have chosen this topic during the John Howard era. Because the Howard era wasn't 'A journey of healing'. I don't want to get into party politics tonight, but it simply wasn't!

It was a time when 'an apology' was categorically rejected. When Government Ministers almost choked at the thought of acknowledging the Traditional Owners of this great land. When the 'Bringing Them Home' Report was summarily dismissed. And 'victims' of the Stolen Generation policies were insulted inside court by Government lawyers. When ATSIC was encouraged to self-implode. When Pauline Hanson was allowed to speak her divisive ramblings and go unchallenged by the Federal Government. And finally – for some inexplicable, political reason in the last weeks of the 2007 Federal Election – the army intervened in the Northern Territory. I happen

to be believe that it was a justifiable intervention – but it was too late and too heavy-handed … It was misdirected and mismanaged.

Ten years ago last Friday – with Lowitja and others – I walked across the Sydney Harbour Bridge. (And, probably with a few people who are here tonight.) One of the reasons that walk, that happy march, that political event was so successful was that it was 'a genuine people's movement – as we'd never seen before. It was a 'special' walk for me, because I'd been given the task – as a member of the Council for Aboriginal Reconciliation – of organising that grand, symbolic walk 'bridging' black and white Australians! That was my job, for the best part of a year.

Still, coming forward ten years to tonight, I believe *that* historic walk – with about 300 thousand mostly white fellas – was almost as momentous as the 1967 Referendum – Symbolically!

Of course, it didn't change the Constitution or the legal status of Aboriginal people. But, it marked the climax of 10 years' work by the Reconciliation Council. And, it started to change attitudes. And that's important. In some cases, it helped change entrenched, racist attitudes. It certainly made Australians think again about what ' a fair go' really means – where our Indigenous people are concerned.

Over the last few days, some reviews and public comments on radio and TV have even suggested that the Bridge Walk kick-started' this new phase that we're talking about tonight … A new beginning – which now embraces big business, banks, mining conglomerates, sporting organisations and the best high schools – beyond governments. And, it embraces ordinary Australians – especially school kids and young people.

That bridge walk kick-started this 'Walk Together, on the Journey of Healing' that I truly believe is underway. Certainly amongst white Australians. For Indigenous Australians it may still be, as somebody suggested to me here earlier tonight, still 'A Journey of Hurting'. I certainly hope not.

Kevin Rudd's deeply-moving 'Apology' on 13 February 2007 was not just long-overdue. It was another essential step in our 'healing' process. It had to happen before we could begin 'the healing journey'.

I recently read a newsletter about that February day – in an 'as yet unpublished book' called 'Encounter – the Past and Future of Remote Kimberley'. It's a fascinating, local Western Australia history sent to me by its author, Sister Brigida Nailon. The newsletter was written by Father Ray Hevern who is the Regional Leader of a Catholic order – the Pallotines – based in WA for over a century. Father Hevern wrote poignantly about standing alone in the crowd on the Perth Esplanade lawn, watching Mr Rudd speaking from Canberra on the giant screen. It was a little after 7am in Perth. The priest spoke of 'the crowd near him quietly crying'. And he goes on:

> I felt glad that I belonged to a country that was no longer in denial, but whose populace – as a whole – could admit the immeasurable harm that had been done. And respectfully and

> graciously apologise to the Aboriginal people sitting in front of them. We've come a long way. And it's been a long time in coming.

In my journalism career I've interviewed every Prime Minister since Sir Robert Menzies. I don't know, but history may well decide that Malcolm Fraser was arguably the most pro-active of our Prime Ministers when it came to Indigenous rights. Fraser was horrified by the assimilationist policies of the past; he favoured land rights; he personally had no trouble with the idea of a treaty, as he pushed his reluctant Cabinet to accept the idea of 'a Makarrata'. Malcolm Fraser believed in the right of self-determination. He also doubled the Federal monies spent on Aboriginal affairs. He set up the Aboriginal Development Commission with Charlie Perkins as its boss, which sparked – amongst other initiatives – the Community Development Employment Projects.

We can all probably remember those photos of 'Big Mal', sitting in the empty Todd River in his tweed suit, talking to ordinary black fellas for an hour or so. And the time he went fishing (in a tinny) with Gallaruy Yunipingu wearing a safari suit and a slouch hat – holding up a 'barra' as long as his arm.

At the time, in the late 1970s, early '80s, Fraser's policies were radical – especially for the Liberal and National Country Parties. Yet, in his memoirs just published in April – the former Prime Minister speaks of being ashamed of the suffering and the inequalities, the lack of human rights for Indigenous Australians.

'I think we were too timid … we didn't go nearly far enough', he says, even suggesting his Government should have instituted a policy of 'positive discrimination' – to ensure Aboriginal jobs in the Commonwealth Public service. 'How else are you going to get change?' he asks rhetorically. 'We should probably have gone ahead and done it. And today there might be a real difference as a result.' We'll never know.

Still, such impassioned statements – public apologies if you like – from former Prime Ministers undoubtedly help the 'healing' process. So, let me offer a brief final quote from Malcolm Fraser again, from his latest political memoirs. The book's co-author, journalist Margaret Simon writes about a speech Fraser researched and delivered in the 1990s:

Let me read it to you …

> He (Mr Fraser) quoted health experts who said that an extra three hundred million dollars per year in Aboriginal health would increase life expectancy by 30% within a decade. But neither Labor nor the Coalition was prepared to commit these resources. The notion that more was spent on Aboriginal health than on the health of other Australians was a complete fiction, said Fraser. The idea that there is something uniquely intractable about despair and dysfunction in Aboriginal Australia was wrong, and implicitly racist.

It's commendable stuff, which I have no doubt he now honestly believes. The only trouble is that Malcolm Fraser – like so many of our well-intentioned political leaders –

seems to have acquired his wisdom and certain solutions a*fter* he left power and office. It's the 'wisdom of hindsight' once again.

Now, I wasn't going to even mention Indigenous health tonight. I figured we all know how outrageously bad, how shameful, it really is. Still. It's the horrific detail that makes you stop. That sometimes takes your breath away. That may yet force Governments to fix it – in this time of healing.

Did you see the medical report in last weekend's *Australian* newspaper? It was a new study of diabetes in Western Australia. We learn that Indigenous Australians are *seven* times more likely to suffer from diabetes.

That's not surprising. It rolls off the tongue easily. We shake our heads in the certain knowledge that it's always been bad. The knowledge that, for whatever reason, Indigenous people are 'pre-disposed' to getting diabetes in Australia, the Pacific Islands and other places. But, then you move on to the gory details. My wife didn't want me to read them aloud to her. But, we must!

This new report says that those people in the age group 25-49 (the back half of their lives) these Indigenous men and women are *twenty-seven* times more likely to have their toes or feet amputated than white fellas. Twenty-seven times more feet or toes chopped off! And – wait for it – *thirty-eight* times more likely to receive *major* leg amputations i.e. above or below the knee. And, if that isn't reprehensible and disgusting enough – the new report says that five years after amputation (because of diabetes remember) – half those same people are dead. Or need the *other* leg amputated!

To say that Indigenous people get diabetes seven times more often than white fellas isn't enough. Visit an aboriginal camp or settlement and see just how many people have their feet and legs amputated. Imagine for one moment … if it was happening in white Australia. Imagine how quickly the problem would be fixed.

We must tell these shocking stories. And then tell them again and again to ordinary Australians, at barbecues and at dinner tables and at public meetings. Because I think it's truly part of the 'healing' process. And I believe we must especially tell these stories to women. And mothers.

Early on in the work of the Council for Aboriginal Reconciliation we deliberately aimed our messages at Australian women – through the *Women's Weekly*, the glossy magazines, the Country Women's Association, clubs and school parents' committees. Unashamedly. And, anecdotally, I think it worked. Because women are ultimately the ones in our society who finally decide our attitudes and our morality. They set the parameters of what's decent and what's acceptable. And, conversely, what is *unacceptable*.

I tell Lowitja O'Donoghue's own story to women – and women's groups – often. Probably more than she does herself these days. Because Lowitja comes across to Australians on television and in life as an intelligent, caring, compassionate, capable,

well-educated, role model. For black and white women everywhere. Of course, she has all those qualities and more.

But, then I tell them about how she and her sister and brother were taken away as babes and toddlers, down here to Adelaide. And, her work here as a domestic and then as a nurse. And how, some 30 odd years later, she ended up at the Oodnadatta District Hospital – as the Senior Nurse. (Was that right, Auntie?). And how when she arrived at the Oodnadatta airport one Saturday a couple of local aboriginal women recognised her as the daughter of Mary … or Agnes … or whatever her mum's white name was. And a couple of weeks later her mother walked through the hospital door, fell into Lowitja's arms and cried a bucket of tears. Her mother spoke no English but she'd pined for her 'stolen daughter' (and children) for 30 years.

That's a much better story – more real – than saying that 10,000 aboriginal boys and girls made up 'The Stolen Generation'. White women understand what that kind of trauma and heartache must have been like. Even though they may never have known it themselves. Lowitja first told me that story about twenty years ago, in a restaurant here in Adelaide. But, only after I'd asked!

And then, later that night, she left her colleagues from the Council for Aboriginal Reconciliation to go down to the Adelaide train station. In a cotton frock – without a coat or cardigan – in the cold, I remember. Like a kelpie sheep dog, she was rounding up the aboriginal kids who were hanging around the station – kids who were waiting to get into trouble. She barked at them and herded them onto their trains, to at least get them out of the clutches of the city predators.

Lowitja O'Donoghue was the boss of ATSIC at the time – one of the most senior public servants in Australia – but, caring (and healing) is in her blood. She doesn't know how to stop. And thank God for that!

There are two other quick stories I like to tell. I call them part of my 'healing process'.

Forty-three years ago, when I first got graded as a journalist I was dispatched to the ABC's Perth bureau – on one radio assignment I ended up in Meekatharra – at the end of the railway line. This was 1967 – just weeks before the famous 1967 Referendum – but, Meekatharra was an apartheid town. Segregated, divided, racist. South Africa in outback Australia.

I got talking to an old aboriginal man, who'd been thrown out – physically – of the 'Whites Only' main street pub. 'Old'? He was probably 55, but he seemed 'ancient' to me. He told me about being arrested as a kid outside of the Pilbara town of Roebourne. 'It was the year the first T-model Ford hit town', he recalled, with a laugh. He laughed a lot. Although he reckoned he was only about ten, he was arrested as a suspect in 'the spearing of two cattle'. He told the police which blackfellas he thought had done it, but before they headed off in hot pursuit they chained him to a Boab tree, in the hot, tropical sun. They left him a pannikin of water, which he accidently knocked over. He

says it was three days before the coppers returned with the guilty culprits, and set him free. There was no angst. No bitterness. He just thought and knew, that's what whites did to blacks. That was life.

Forty odd years later – here in Meekatharra – they threw him out of the pub. Not because he was drunk, but because he had black skin. He wasn't upset at all. But, I was. I was really angry. I couldn't believe such racist, outrageous things could happen in my country.

In the years ahead I would learn that things were much, much worse. The final story happened in the late 1990s. Bryce Courtney, the best-selling author, asked me to launch his latest novel – a book called *Jessica*. Set in the prosperous Riverina town of Narrandera, it tells the story of a white woman who goes mad and is saved by the local Aboriginal people.

After the book launch, a lady – who happened to be the Narrandera librarian – told me of an incident a year or so earlier. It was Nadoc Week, so in the library foyer she'd posted a number of old, black and white photos of the local Waradjuri people, taken in the 1930s. While she stamped the books that were being borrowed by a local white man, she was intrigued to see him shaking his head – as he examined the photos. When she asked him why, he explained that one Sunday morning, as a six-year-old boy, his father had taken him down to an island in the Murrumbidgee River, with a shooting party. They were 'going out to shoot some blacks' his father told him. And they did.

What shocked him now, was not only that they had shot innocent women and old people – but, that his father had taken him along. As if 'shooting blacks' was part of his transition to manhood. Part of the culture. The librarian figured, given the old man's age at the time, that he must have been talking about Narrandera in the 1930s. The 1930s *not* the 1830s.

I tell these stories – and many others – to remind white Australians … to inform them of life as it really is and has been for black Australians for 200 years – beyond the colonial massacres and poisoned waterholes, the contagious diseases and forced separation of families.

Before white fellas start talking absurdly like Pauline Hanson about 'special deals' for blackfellas and priority treatment, and AbStudy and free buses and lunches for kids. I remind them of the reality. The stigmata. The racist attacks on Indigenous Australians just because they're black. (Or even mildly brown!). That's before I tell them proudly that my great, great grandmother was a Kamilaroi woman from Keepit Station in North East NSW. That usually slows them down.

Stories like that, are always better than making white Australians feel guilty. Or 'Poor bugger me' stories about black fellas.

Indeed, I like to tell white Australians how leaders like Lowitja and Noel Pearson and Charlie Perkins (when he was around) used to harangue and harass and

tongue-lash blackfellas for not picking up their garbage. For not sending their kids to school. For not getting off 'their black asses' and getting a job. For living off welfare. For not setting an example to their kids.

They're powerful messages. More powerful when they come from black leaders. And they resonate amongst whites. And remember – in this 'healing process' – we don't have to win over the blackfellas. We have to win over the whitefellas. The 98% of the population. They're the ones who truly have to be reconciled.

Let me underline this. It's clearly time for a change in the message being sent out to white Australia. This is a two-way street. Indigenous leaders have to get much smarter in bringing about change, in capitalising on this positive mood, this 'Healing process'.

The days of endlessly bashing up white fellas for being racist, insensitive and not caring are over. That knee-jerk reaction is clearly out of step with modern, multi-cultural Australia. That's not to deny for one second that racism exists – especially in regional Australia. It certainly does. We have to be vigilant and stamp it out. But, it's no good trying to make Australians still take the blame for policies that go back fifty or a hundred years. And attitudes. And it's too late for blackfella excuses.

Clearly, blackfellas have to show strong, new leadership. More than ever before. And get fair dinkum about the raging problems in their communities. The new leaders have to start taking responsibility for the chronic and widespread abuse and violence. No excuses. And stop denying that it exists. That gives them no credibility at all.

Parents and community leaders must get kids to school. No excuses. Men have to get off welfare and booze and gunja. No excuses. And get into jobs that are clearly available, and stick at them. Young Indigenous men have to be encouraged to take up training for the countless jobs, in mining especially, that need special skills. No more excuses.

If we're talking honesty … it's time for a bit of honesty about all the tens of billions of taxpayer's dollars that has gone into Aboriginal affairs over recent years *without* any real sign of improvement. Money that's clearly been wasted by Governments.

It's a question I get asked all the time. And it makes me smile. Because it's the same question I asked Charlie Perkins 25 years ago. 'What happens to the billion dollars a year that goes into so-called 'Aboriginal Affairs'? Back then, Charlie threw his head back and laughed out loud. And said he bloody wished he knew what had happened to it.

Well, today taxpayers are slugged over *two* billion dollars a year to help close the ' gap' of disadvantage. It's still the same answer. Nobody can properly explain where all this money ends up. One thing's for certain. They're aren't any blackfellas living with George Cluney in Switzerland, or sitting back in sunny, Spanish tax havens like Christopher Skase.

You may remember that in the Oscar-winning movie *All The President's Men*,

Robert Redford's character Bob Woodward of the *Washington Post*. He asks 'Deep Throat' – down in the darkness of the garage – how he can get to the bottom of the Watergate puzzle? Deep Throat tells him obliquely to 'follow the money'.

Well, if you somehow follow 'the aboriginal money trail', you'll quickly find that it bypasses the shanty towns, the camp dogs and Diabetes Row … to white consultants and white contractors and white public servants. It ends up in the deep pockets of the 'Aboriginal Industry'.

These days, I tell people about the 90 very nice – but very basic – houses for blackfellas I saw being built up on the Tiwi Islands last week, costing almost one million dollars each. *Almost One million dollars each. Paid for by the Australian taxpayer.*

I met a couple of white workers on the housing project – good, hard-working blokes – who've passed-up the fishing season down at Port Lincoln this year, because there's much more money to be made contracting houses for blackfellas. I tell people that while 2,000 Indigenous folk sit around the Tiwi Islands without a job to be had – there's not one young, blackfella tradesman being trained by the Government, for when the contractors go home.

So, your guess is as good as mine as to what happens when the toilets break, or the electricity fails or a few tiles come loose – as they do in every new house. Who's left to fix them? And what shape are these million dollars houses going to be in ten years time, if there are no local tradesmen to look after them? Again, your guess is good as mine!

I've spent a lot of time tonight talking about the failure of Governments in 'Walking Together on the Journey of Healing'. I want to finally spend a moment talking about a couple of the success stories. And, there are a growing number of them. Some are small and more symbolic, seemingly trivial? I don't think they are.

Some are large and very exciting – all adding, we can hope, to greater tolerance and understanding. All part of the 'healing process'.

For example, still up on Bathurst and Melville – the Tiwi Islands off Darwin – I saw some terrific things being done by the Australian Football League. The AFL. I think their work in Indigenous communities – respecting families, culture and tradition – is easily the most enlightened and professional of any sport in Australia. Easily. If you think this is just about football, well think again. This is about life.

Remember, it wasn't so long ago that black Aussie Rules players like Nicky Winmar and Michael Long were pulling their club jerseys up and pointing to their black skin. It was their way of responding to ugly racist taunts from white crowds. And even other players. Racism was rampant in sport. Especially football. That's now stopped.

Today, as part of the AFL's genuine role in the 'healing process' they pump huge piles of money into coaching Indigenous kids. – offering an alternate lifestyle to booze, drugs and indolence. They organise interstate excursions and promotional tournaments,

while they deploy squads of senior players to work with Indigenous kids – boys *and* girls. By the thousands. And it's not only about finding the next fleet-footed, high-flying black superstar. It's not about teaching kids to kick with both left and right foot either. Nobody has to teach them. They do that automatically – almost from birth. (Incidentally, I found it astonishing to see boys – five and six years old – kicking an empty, plastic Coke bottle if they didn't have a ball. And, bouncing it on the ground and back up into their hands like a proper, pumped-up football).

The AFL now realises the power that the shiny, red Sherrin footy has over Indigenous communities. It's a power for good. It's a magnet, for kids in particular. So now, if you're a footy-mad Indigenous primary school kid you can't be part of the OZkick program – which means you don't get to kick a ball – if you don't turn up to class. That's the rule. If you can get primary school kids into the habit of school, then you're half-way there.

On Melville Island teachers told me they're now getting 80/85% attendance rates. That's unheard of.

Let's stay at school for the moment. But way down south from the Tiwi Islands – at West Penrith High School, in Sydney's outer west. I was there recently, as part of that highly-controversial *60 Minutes* debate about changing the Australian flag. (I won't go anywhere near that tonight for fear of getting a few more threats from homicidal flag lovers.) I found that many of these Year Ten, sixteen year-old kids – most of them from working-class homes – were happy to keep the flag the way it is.

But, what's most pertinent to tonight's topic was that every child in that class agreed that IF the Australian flag was changed then it must include 'recognition' of Indigenous Australians. That was an amazing sentiment – given that the kids came from about fifteen different nationalities, and only *one* was an aboriginal girl. Yet, they all agreed that any change in the flag must recognise the First Australians.

That simply wouldn't have happened ten years ago. These are little things, but together they add up to a significant shift in Australia – for the better! As 'we walk together on the journey of healing'. Don't tell me that nothing positive is happening in Indigenous Australia. On a much broader front than footy and flags … there's a revolution outside, and as Bob Dylan said:

'Get out of the way, if you can't lend a hand, 'Cos the times they are a changing'.

The Business Council of Australia represents a combined workforce of over one million workers. Last year, in it's first annual report on its Indigenous program, the President of the BCA, Greg Gailey said that the failure to significantly improve the education prospects and provide jobs for Indigenous people is 'our greatest national shame.' And he promised to do something about it.

Joining with the Federal Government, BCA members – which include Australia's biggest companies – have committed themselves to Indigenous jobs, traineeships,

mentoring schemes and cultural awareness programs. In tandem with this BCA pledge – the likes of which Australia has never seen before – is the Australian Employment Covenant, which promises to find 50,000 jobs for Indigenous Australians – especially in the mining industry.

The AEC is 'the brainchild' of Andrew Forrest, with the backing of the Federal Government, along with the public endorsement of other billionaires like James Packer, Kerry Stokes, the Lowy family and Lindsay Fox. So, in essence, Australia's richest men have made an unequivocal commitment of time, energy and money to Australia's poorest people. Nothing like this has ever happened in Australia before.

Andrew Forest – who grew up with Aboriginal people in the WA Pilbara region – is on record as saying he regards this '50 thousand jobs commitment' as more important to him than his lucrative iron ore business.

If the AEC even comes close to achieving this jobs target, individual lives and communities will be improved beyond their wildest dreams. But, the scale of the Indigenous jobs problem is alarming. Over the next decade, 140,000 Indigenous young people will enter the working population. These students are leaving school with low literacy and numeracy skills, lower levels of school achievement than non-indigenous kids and, therefore, poor prospects of finding a job.

There are two remarkable and innovative programs, that are already making a small but significant mark on the problem. One's about jobs, the other is about education.

I want to finish tonight by briefly telling you about their achievements. They are outstanding success stories.

Sixteen years ago, a prosperous cotton farmer up in the Northern NSW town of Moree named Dick Estens, started up something called the Aboriginal Employment Strategy. 'Doomed to fail' in the eyes of local know-alls, it was a bold initiative to give jobs, pride and self-esteem to local Aborigines. Moree was a sullen, angry place with a well-earned reputation from the Black Freedom Rides of the 1960s as 'the most racist town in Australia'.

Apart from giving young aborigines a new life and a future with achievable dreams, Dick Estens thought his AES – if it worked – might save Moree from wasting away, like the other wild towns of the NSW west. Towns like Brewarina, Bourke and Walgett. Run almost entirely by Indigenous staff, the Aboriginal Employment Strategy has been a spectacular, runaway success – spreading its jobs and school-based traineeship program through every state, except strangely enough here in South Australia. That's about to change they tell me.

With the backing initially of only the ANZ Bank – but now all the major banks, Australia Post, Woolworths and a host of our biggest employers – the AES will this year provide 1,550 full-time jobs to Indigenous workers and 500 traineeships to high-school students. These students, many of whom come from families where no one works, are

all promised full-time employment upon completion of their school traineeships.

Ironically, Dick Estens says, the biggest rival to his Aboriginal Employment Scheme in most towns and suburbs is Centre Link – the government-funded, dole scheme. At the moment, Estens says – with understandable pride – where they go head to head the AES has more blackfellas on its books than Centre Link.

The last element in our 'Walk Together on the Journey of Healing' tonight is the Australian Indigenous Education Foundation. Upfront, I have to declare a certain attachment to this Foundation. I'm the voluntary, unpaid Chairman of the AIEF. Mind you, I had the same role in the Fred Hollows Foundation, where in a decade we fixed the cataract blindness of more than a million people. For free.

So, having an attachment to a good cause isn't necessarily a bad thing. There's no 'silver bullet' when it comes to fixing Indigenous disadvantage. We all know that. If it were 'easy' governments would have done it years ago!

But, in the words of our distinguished patron, Sir William Deane, 'to overcome the appalling problems of Indigenous disadvantage education is the key.' The Prime Minister, Kevin Rudd, echoed similar sentiments in his maiden speech to parliament a decade ago. 'If equality of opportunity does not begin in the school system', Mr Rudd said 'then it begins nowhere at all.' Get a good education – again we all know – and jobs, housing, health and self-esteem will normally follow – *ipso facto*.

The concept of giving 2,000 full-time scholarships, at some of the best high schools in Australia, to disadvantaged Indigenous boys and girls – which is what the AIEF is doing – is an absolute 'no brainer'. Which is why the Federal Government has given us twenty million dollars, which we have to match – dollar for dollar – with funds from corporates, families and philanthropic Australians. We're already well on the way to doing it, in just one year. By the end of this year, there'll be close to 200 children on scholarships, boarding at our partner schools in NSW and Queensland. In the years ahead the scheme will spread across Australia, as I said, with a target of 2,000 full-time scholarships. Imagine for a moment hundreds of young, well-educated Indigenous leaders.

It's an educational initiative that has been successfully tested on a local level for almost a decade – most especially at St. Josephs Boys College in Hunters Hill, Sydney. There are forty Aboriginal boys, from a range of suburban and country homes, now boarding at Joey's. Over the last five years, out of 149 Indigenous boys and girls enrolled at the AIEF partner schools, 85 per cent of them have completed Year 12. That's double the rate in the wider Indigenous school population.

There are endless, extraordinary stories of students who have already beaten the odds – because of the opportunities provided to them by this scholarship. Graduates so far include teachers, lawyers, doctors, bankers, accountants, tradesmen and sporting stars. Let me just mention two of those unbelievable success stories.

Craig Ashby was 16, and illiterate, when he arrived at Joey's. Raised in Walgett by his elderly grandmother, his life prospects were grim. Today, a University of Sydney graduate Craig is about to embark on a career as a high-school History teacher. He's already had lunch with the Pope and been the official youth delegate chosen to meet Prince William – the heir to the British throne – early this year.

Ricky McCourt is a kid from Nambucca Heads – a fishing town, half way between Sydney and Brisbane. His mother told Ricky that she didn't want him to go to the 'big school' in Sydney – St. Joseph's – when he first won his scholarship. She feared she'd miss him too much. 'But', she said 'if you don't get an education, you'll be ordinary – like all the other black kids in town. And I don't want you to be ordinary.' So, he went, his mum cried a lot and so did he, even though the College gave him a mobile phone to call home whenever he needed to.

This year, Ricky finishes his Law Degree at Bond University. He's anything but ordinary, with an outspoken ambition to be Australia's first Aboriginal Prime Minister. Anyone who knows Ricky McCourt would *not* rule that out.

So, let me finish our 'Journey of Healing' with that story. An outstanding example of what can be achieved … with a little help from your friends. At school, or the AFL footy players or Andrew 'Twiggy' Forest.

I said a moment ago that the problems facing Indigenous Australians are enormous. Governments of all political persuasions – all of them well-intentioned – have failed to close the so-called 'gap of disadvantage'. But, there are changes underway. One senses real progress and real reason to hope. And even dream.

As Professor Hollows used to say – despite the long-term heartaches … 'The alternative is to do nothing. And that is *not* an alternative.'

Thank you so much for inviting me and for listening.

2011

Lowitja O'Donoghue and Native Title: Leadership Pointing the way to Identity, Inclusion and Justice

PRESENTED BY THE HON. PAUL KEATING

I knew Don Dunstan though not well. But I admired him for his ability to see through the conservative social orthodoxy which had developed as part and parcel of Australia.

Don Dunstan used the premiership of South Australia to challenge elements of that orthodoxy, so I am pleased to be associated with his spirit and this Foundation in his name. And well may it be the case that Don Dunstan's progressive instincts, reflected in the Foundation's remit, should sponsor an Oration in the name of another South Australian progressive – Lowitja O'Donoghue.

I have accepted the opportunity of delivering the Lowitja O'Donoghue Oration for one primary reason: out of respect for Lowitja O'Donoghue as a remarkable Australian leader. A leader whose unfailing instinct for enlargement marks her out as unique.

And unique for this reason: when a great opportunity in history; the history of the Aboriginal people and the largely European population of Australia presented itself, Lowitja O'Donoghue saw that opportunity with great clarity and unilaterally moved to seize it. The opportunity was the willingness of the Labor government I led to legislatively validate and develop the decision of the High Court of Australia in *Queensland v Mabo* (1992), today known as *Mabo (No 2).*

Without any position of mandated authority from her people, she caused their mobilisation in what was, the first time, that Aboriginal people were brought fully and in an equal way to the centre of national executive power. In the 204-year history of the formerly colonised Australia, this had never happened. Never before had the Commonwealth government of Australia and its Cabinet nor any earlier colonial government laid out a basis of consultation and negotiation offering full participation to the country's Indigenous representatives; and certainly not around such a matter as the country's common law where something as significant as native title rights could arise from a collection of laws which had themselves developed from European custom and tradition.

The High Court of Australia had opened the door to this possibility in *Mabo (No 2)*, but without a comprehensive, firm and quick legislative response, that door would have just as quickly closed. Most of the states of Australia had adopted a defensive posture to the opportunity of *Mabo* while Western Australia would have moved to extinguish whatever native title rights were revealed by the High Court's historic judgment, as it, in fact, tried to do.

Lowitja O'Donoghue understood this. She knew that in the dismal history of Indigenous relations with European Australia, this was an illuminated breakout; a comet of light in an otherwise darkened landscape.

Many people here tonight will know the history, or some of it. They will know that no one person or group of persons was ever mandated to assume the authority of or to act on behalf of the whole Indigenous community. They will know that attempts to so act were often met with reaction and derision. They will know there was no

premium for assuming or even attempting to assume such a mantle of leadership. They will also know that in respect of the Keating government's first offers of consultation around the issue of a proposed native title act that many Aboriginal leaders rejected the entreaties of the government out of hand. They will remember the meetings at Eva Valley and Boomanulla Oval in Canberra; they will remember the rancour. They will also remember me saying, as Prime Minister, that 'I doubted whether Indigenous leaders would ever psychologically make the change to come into a process, to be part of it, and to take the burden of responsibility which went with it – whether they could ever summon the authority of their own community to negotiate for and on their behalf'.

I like to think those remarks helped galvanise Lowitja O'Donoghue's view as to what needed to be done. But as it turned out – only she could do it. She was the chair of ATSIC. This gave her a pulpit to speak from but no overarching authority, much less power. But this is where leadership matters: she decided, alone decided – that the Aboriginal and Torres Strait Islander peoples of Australia would negotiate, and I emphasise negotiate, with the Commonwealth government of Australia – and that the negotiators would be the leaders of the Indigenous land councils. She decided that. And from that moment, for the first time in the 204-year history of the settled country, its Indigenous people sat in full concert with the government of it all. This is why I am here tonight: to acknowledge that moment of leadership and to celebrate it.

Of course, Lowitja had helpers. Principal among them was David Ross, a director of the Central Land Council, a leader in his own right and a weighty judge of circumstances. She had Peter Yu from the Kimberley Land Council. She had Rob Reilly from the Legal Service of Western Australia, Noel Pearson from the Cape York Land Council and Getano Lui from the Island Coordinating Council.

She had in those important earlier stages, the support and advice of Pat and Mick Dodson, Chair of the Council for Aboriginal Reconciliation and Social Justice Commissioner, respectively. And she had others who came to the process a little later: Darryl Cronin from the Kimberley Land Council, who effectively became secretary to the negotiating group, Darryl Pearce from the Northern Land Council and Marcia Langton, who fulfilled an important general advisory role.

Indeed, these people or most of them, also attended with Lowitja the first *Mabo* ministerial meeting which I chaired, as Prime Minister, in the Cabinet room Canberra, on Tuesday 27 April 1993.

Had Aboriginal and Torres Strait Islander leaders not stepped up to the plate, the substance and equity of the subsequent *Native Title Act* may never have materialised. In an instant, I was struck by the opportunity of the High Court decision and was determined to not see it slaked away in legislative neglect. But determined as I was, I needed the partnership with Indigenous leaders to get it done and get it done fairly.

We know, sadly, that the history of Aboriginal and Torres Strait Islander land rights had been broadly a shameful one. Not only from earlier High Court decisions implying that all native title rights to land were extinguished at sovereignty, but by unfulfilled promises by a clutch of otherwise well-meaning governments. Save for Gough Whitlam's Northern Territory Land Rights Bill of 1975, passed into law by Malcolm Fraser in 1976, which was, of course, confined to Northern Territory lands, there had been no exercise of the power under the 1967 constitutional amendment in favour of comprehensive land rights.

In 1983, the Hawke government promised a national land rights bill which included an inalienable freehold title and compensation for past acts and alienations. But this promise of uniform national land rights was broken in March 1986 when Bob Hawke buckled to pressure applied by the then Labor Premier of Western Australia, Brian Burke, in concert with his federal factional colleague, Senator Graham Richardson. What Burke promised in substitute for Commonwealth national land rights legislation was to provide Aboriginal people with a title to the reserve lands they lived on while providing an unspecified amount of funds to improve local services. The federal cabinet accepted the Burke proposal in lieu of its own Act and it did so without any legislative enforcement against Western Australia. This was one of the low points in the campaign for national land rights: it was also one of the rare moral low points of the Hawke government.

From 1986 onwards, I always knew that Aboriginal land rights was unfinished business. And I might say, I had the feeling that in some way I would be called upon to deal with it. It was one of those intractable issues, a bit like endemically high inflation; the kind that tends to follow you around. So when the High Court handed down its decision in *Mabo (No 2)* on 3 June 1992, saying that there was a concept of native title at common law and that the source of the title was a traditional connection to or occupation of the land by Aboriginal and Islander people, I saw it as an opportunity to deal with the longest continuing problem Australia faced as a nation; the fundamental colonial grievance; the dispossession of the Indigenous people and the injustice inherent in that dispossession.

By establishing that Aboriginal and Torres Strait Islanders had a private property right to their own soil, the High Court pointed a way as to how the parliament could deal with Indigenous land rights in a way which marked a turning point in the history between Indigenous and non-indigenous Australians. I thought and said at the time, it was 'a once in a lifetime opportunity' to make peace between the first Australians and those who came here later.

I thought this pathway was a superior one to that where land was conferred upon Indigenous people by the act of a parliament. Here we had the High Court saying that title of an ancient kind had survived sovereignty and to the extent that subsequent

grants of interest in land were consistent with the title, the nature and content of the title could be determined by the character of the connection to or occupation of the land under traditional laws and customs. In other words, it is not ours to give you but we recognise it as something which has always been yours. A way better approach, I thought, than one where a broadly non-indigenous parliament gave land back to people who had earlier been dispossessed of it.

But above all that, I saw the approach of using the High Court's native title route as possessing an even greater attribute – and that was truth. There is, especially in public life, no more beautiful a characteristic than truth. Truth is of its essence liberating; it is possessed of no contrivance or conceit – it provides the only genuine basis for progress. By overturning the lie of *terra nullius*, the notion that at sovereignty the continent was possessed by no one, the High Court not only opened a route to Indigenous land, it rang a bell which reminded us that our future could only be found in truth. This is the principal reason I found the *Mabo* pathway to Indigenous land rights so compelling. And I said so at the time, in the address to celebrate the launch of the International Year for the World's Indigenous People at Redfern on 10 December 1992: 'Mabo establishes a fundamental truth and lays the basis for justice. It will be much easier to work from that basis than has ever been the case in the past'.

In the event, virtually across all of the year 1993, my cabinet ministers and I negotiated with Lowitja O'Donoghue and her Aboriginal negotiating group to produce the *Native Title Act*. The Act, while necessarily complex, met two fundamental aims: justice for Aboriginal people and a workable and fair system of land management in Australia. And it did so in accordance with the *Racial Discrimination Act*. The preamble to the *Native Title Act* made clear the objective. It said 'the people of Australia intend to rectify the consequences of past injustices by the special measures contained in the Act … to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire'. The special measures contained in the Act enabled us to determine who has native title and where; it gave native title holders the right to negotiate about actions affecting their land and it bestowed and restored rights without threatening existing rights.

Just eighteen months after the High Court had handed down its decision, and one year, almost to the day, after I had extolled the virtue of the common law pathway to truth and justice in the Redfern Park speech, the Bill had been built and negotiated and had passed both houses of the Federal parliament. Receiving assent on 24 December 1993, the *Native Title Act* went a substantial way in settling the fundamental grievance of Indigenous Australia; the brutal dispossession of their lands and the smashing of their ways of life at the hands of an alien imperial power.

I was grateful at Gough Whitlam's kindly exclamation that the unique process of the

development of the Act 'was a shining example of promptitude in a century old story of procrastination'.

However, in a lecture in the name of someone as significant as Lowitja and around the issues with which much of her public life has been associated, it is opportune to say some other things about the subject of native title and Indigenous circumstances in the broad.

At the risk of repeating myself, I saw the opportunity of the native title route as a modality in dealing with and settling unresolved questions of Indigenous land justice in this country.

This brings me to an important point and one I wish to dwell on; one made by the majority of the High Court (in *Mabo (No 2)*) and illuminated in writings by Noel Pearson. And this is: that native title is not a creature of the common law or indeed, a common law title, rather it is a title recognised by the common law. Or as the majority said at the time, 'whether the Imperial common law as that existed at the time of sovereignty and first settlement, or the Australian common law as it is today'. In other words, while the common law recognises a native title, native title itself did not evolve nor did it spring from the common law. Here it is worth focusing on a refrain from the *Native Title Act* itself. One of its main objects is to 'provide for the recognition and protection of native title'; that is, those rights and interests finding their origin in Indigenous law and custom; not finding those rights and interests arising solely or peculiarly from the Act itself.

Indeed, it is worth my taking this opportunity to say that as Prime Minister, I had always intended that native title be determined by the common law principles laid out in *Mabo (No 2)*. That is, I saw the *Native Title Act* giving expression to native title as native title had evolved; in the same organic and dynamic sense that the common law itself had evolved. The common law, derived from European custom and tradition, was never frozen nor did its development stop with Federation. So too, native title should not be viewed as some museum-like strain of law which, snap frozen, requires defrosting around anthropological principles, documentary records that rarely exist, if they ever existed and an onus of proof built within rules of evidence which are calibrated so as never being able to helpfully apply.

Justice Brennan in *Mabo (No 2)* emphasised the principles of equality in the recognition of native title. The Keating government's *Native Title Act* was built upon and around those principles. Yet in two important subsequent cases before the High Court, *Western Australia v Ward* (2002) and *Yorta Yorta v State of Victoria* (2002), the Court treated native title as an ordinary exercise in statutory interpretation instead of recognising that the legislation did not seek to supersede the common law, so much as to give articulation to its recognition of native title. Part and parcel of that recognition is the possibility, according to circumstances, of enlargement and flexibility. But the

Court chose instead the black letter route of statutory interpretation. And it did this knowing there is a body of relevant common law in the United States and in Canada and Britain which had cogently developed over the course of numerous decisions.

In fact, the current Chief Justice, Justice French, said that in *Yorta Yorta*, 'the High Court again emphasised the statutory definition of native title as defining the criteria that had to be satisfied before a determination could be made'. He said 'to that extent the Court appears to have moved away from the original concept of the Act as a vehicle for the development of the common law of native title'. He went on to say that the Court in so acting 'may have transformed the Act from a vessel for the development of the common law into a cage for its confinement'.

Earlier, I made clear that I regarded common law rights as they were revealed in *Mabo (No 2)* as being superior to any form of statutory creation. Indeed, s12 of the *Native Title Act 1993* made clear that the characteristics of native title under the Act were to be determined in accordance with the developing common law. Section 12, though since removed from the statute, said: 'subject to this Act the common law of Australia in respect of native title has, after 30 June 1993, the force of the law of the Commonwealth'. What it said, or was trying to say, was that the common law, as it had developed in its native title complexion, enjoyed all the force and validity of a law of the Commonwealth. The section provided the guide as to the principles the Keating government endorsed when it constructed the Act. Section 12 was removed from the Act after the High Court in *Western Australia v Commonwealth (1995)* held it was invalid. But technical objections to the place Section 12 tried to preserve for common law flexibility do not diminish at all the high significance of the legislative attempt to promote the recognition of ownership rather than the gift of rights as the true basis for native title.

It is beyond discussion that the government I led intended native title to be determined by the common law principles laid down in *Mabo (No 2)*. I raise this issue because of the significance of the derogations from the principles as set down in the *Mabo (No 2)* judgment and the adoption and incorporation of those principles in the original, 1993, Act.

Going hand in hand in this regression is the continuing high onus of proof falling on claimants to native title. These arise from the need to establish continuity of the existence of native title rights and interests on the part of claimants with reference to evidence of an anthropological kind, including archaeological and historic evidence as well as oral evidence as to group customary traditions and evidence and as to how long such traditions have been maintained.

We all know that the rupture of European settlement had an atomising effect upon Aboriginal society as a whole and on particular groups, such that contemporary efforts to reconstitute that society or groups within it, including the resuscitation of

traditional ways, is beyond our facilities and probably our imaginations.

This brings me back to *Yorta Yorta v State of Victoria*. In that case the High Court held that a determination under the *Native Title Act* was said to be '… a creation of that Act, not the common law'. This is at the kernel of the problem I just referred to; moving away from the *Native Title Act* as I envisaged it, to the snap frozen, museum variety the Court subsequently came up with.

Once you are working in the field of literal or statutory interpretation, you are bound to satisfy more precise, or let us call it, stringent characteristics of the kind laid down in the Act for the award of title. For instance, the title must:

> Be communal, group or of individual rights or interests of Aboriginal and Torres Strait Islanders;
>
> Be rights and interests 'in relation to land or waters';
>
> Be possessed under the traditional laws acknowledged and the traditional customs observed by the Aboriginal people or Torres Strait Islanders;
>
> Be that relevant people by their law or customs have a connection with the land or waters and that those native title rights and interests must be recognised by the common law of Australia.

In *Yorta Yorta*, the trial judge substantially lifted the bar on the whole issue of continuity. As we know, it was in south eastern Australia where the effects of European settlement were the most catastrophic and dislocatory to Aboriginal people. Despite this, the trial judge, Justice Olney, made virtually no concession to the claimants on the need to establish proof. Indeed, Justice Olney put the onus on the *Yorta Yorta* claimants to establish that there was a pre-sovereign society and that each generation of that society had acknowledged and observed the laws and customs of its people – in a material way – and uninterrupted from sovereignty to the present. As an indication of the level of difficulty this involved for the claimants, in the proceedings, Olney would not concede that an Aboriginal person born in the 1840s in the area under claim, had any connection with Aboriginal forebears who inhabited the same land in 1788.

Indeed, Olney went out of his way to discount oral evidence by the Aboriginal claimants preferring to rely on the written records of a squatter in the locality.

In the appeal proceedings before the Federal Court, Chief Justice Black, in dissent, had this to say by way of observation:

> For one thing, the use of historical material to answer a claim based substantially upon an orally-transmitted tradition needs to take fully into account the potential richness and strength of orally-based traditions … It is necessary too, to bear in mind the particular difficulties and limitations of historical assessments, not least those made by untrained observers, writing from their own cultural viewpoint and with their own cultural pre-conceptions and for their own purposes.

He went on to observe:

> The external and casual viewer of another culture may see very little because the people observed may intend to reveal very little to an outsider, or because the observer may be looking at the wrong time, or because the observer may not know what to look for, or for any one of numerous other reasons. Even a conscientious attempt in past times to provide a complete record would run into difficulties of this nature. The dangers inherent in giving particular authority to the written word, and more authority when it is repeated, need to be borne constantly in mind as well.

But no such caveats stopped the Federal Court and later the High Court in backing in the Olney view – notwithstanding the fact that in a number of jurisdictions abroad, once proof of a pre-sovereign society had been established, courts had accepted or presumed continuity thereafter.

This onerous burden of proof has placed an unjust burden on those native title claimants who have suffered the most severe dispossession and social disruption. It has substantially slowed the right of redress by Aboriginal people to adequate recognition of their rights in respect of land, water and other natural resources.

In fact, after fifteen years' operation of the *Native Title Act 1993*, there have been 1,300 claims lodged, arriving at 121 native title determinations, covering just over 10% of the land mass at a cost to the taxpayer of over $900 million.

To ameliorate some of the constraints in the application of the substantive law where applicants are required to prove their continuity with native title rights, the Chief Justice Robert French had some helpful things to say here in Adelaide in July 2008.

In those remarks Justice French highlighted the beneficial purpose which the *Native Title Act* seeks to confer on Aboriginal and Islander people. One of those beneficial purposes is the rectification of the consequences of past injustices wherein, under the main objects of the Act, section 3 seeks to 'to provide for the recognition and protection of native title'. Indeed Justice French went on to provide a quotation from the Full Court in *Northern Territory v Alyawarr* (2005). There the Court said 'the preamble (of the *Native Title Act*) declares the moral foundation upon which the Act rests'; that is, to recognise, support and protect native title. It went on to say 'that moral foundation and that intention stand despite the inclusion in the *Native Title Act* of substantive provisions which are adverse to native title rights and interests and provide for their extinguishment, permanent and temporary …'.

In other words, the Court reminded people that some substantive provisions within the judicial framework may operate such as to be adverse in their consequences for native title.

To ease the heavy requirements on claimants in respect of those substantive provisions, as they go to proof and matters of continuity, Justice French suggested that

some change in the Act as it relates to onus of proof could facilitate a presumption of continuity of connection by claimants and continuity since sovereignty. Such a presumption, he said, 'would enable the parties, if it were not to be challenged, to disregard a substantial interruption of continuity of acknowledgement and observance of traditional laws and customs'. He said: 'were it desired, the provision could expressly authorise disregard of substantial interruptions in acknowledgement and observance of traditional law and custom unless and until proof of such interruption was established'. In other words, Justice French was suggesting a reverse onus of proof where proof of any interruption would need to be established – to be proved.

In this model, a presumption could be challenged by the respondent party, whether it be a state or a territory, but Justice French went on to say 'it would be important that any presumption be robust enough to withstand the mere introduction of evidence to the contrary'; that is, proof to the contrary being required.

His Honour's other helpful suggestion was also by way of another amendment to the *Native Title Act*. One which would allow extinguishment to be disregarded 'where an agreement was entered into between the states and the applicants that it should be disregarded'. Agreements of this kind, of course, go to certain goodwill and judgement by the states and territories by way of them seeking to advance and protect native title. We know that such a specific objective would require somewhat of a sea change on the part of a number of them.

I realise that amendments encapsulating some of these proposals have been put before the Federal Parliament – and I know the Attorney General has said he will take such proposals into consideration. I can only add my recommendation that the Federal government give legislative effect to such changes so as to enhance the efficiency, effectiveness and equity of the *Native Title Act*.

The other major matter germane to native title I wish to address is the question of pastoral leases and the *Wik* High Court judgment of 1996.

As Prime Minister, the pastoral lease question was a very vexing and torrid one for me. And for this reason: notwithstanding that the Commonwealth government's legal advice was that the *Mabo (No 2)* judgment had the effect of extinguishing native title on lands subject to pastoral leases – I did not agree with that advice. That is, I did not personally agree with the logic behind the advice.

Many people will know how much pressure I was under as Prime Minister to clear up the matter once and for all, by having the *Native Title Act* extinguish native title over lands subject to pastoral leases. The argument went: 'if Prime Minister, you say your best advice is that the High Court decision in *Mabo (No 2)* signalled the extinguishment of native title on pastoral leases, why don't you follow your own legal advice and make it certain in the Native Title Bill?'

I had lots of supposedly good people urging this upon me; like the former leader of

the National Party Tim Fischer, who was doing his level best to turn pastoral leases into quasi-freehold titles at the expense of Aboriginal people. I knew there was a massive potential loss here for Aboriginal people – because in 1993 a very large proportion of the land mass of Australia was subject to pastoral leases. In Western Australia it was 38% of the entire state; in Queensland 54%, South Australia 42%, New South Wales 41% and the Northern Territory 51%.

Given the scale and importance of it, I was determined not to deny Aboriginal people the chance to test this question before the High Court. So to keep the naysayers at bay and to fend off the opportunists, I decided to record in the preamble of the Bill that in the government's view, past leasehold grants extinguished native title. Indeed, in my second reading speech introducing the legislation, I said the following:

> I draw attention also to the recording in the preamble of the bill of the government's view that under the common law, past valid freehold and leasehold grants extinguish native title. There is therefore no obstacle or hindrance to renewal of pastoral leases in the future, whether validated or already valid.

I had these words in the second reading speech and in the preamble to the Act but I refused to make extinguishment a *fait accompli* under the operating provisions of the Act.

I knew that the whole idea of pastoral leases over Crown land arose because squatters decided to move on to land for which they had no title and where their activities, grazing or otherwise, were uncontrolled. The motivation for the legislative regime, first in New South Wales in the late 1820s, was to put some control on squatters without conferring on them a freehold title to vast tracts of the country; country largely occupied by Aboriginal people. So I understood that when the various colonial and state governments came to issuing pastoral leases they did so knowing that the pastoral activity would occur over lands where Aboriginal people were still conducting a traditional way of life. That is, the governments issuing these leasehold titles issued them in the knowledge and acceptance of the fact that grazing could be accommodated concurrently with Aboriginal people maintaining a traditional connection with the land under grant.

So when in *Mabo (No 2)* the High Court laid down its principles, I could not see those principles being at odds with a co-existence of title as between pastoral activity and a traditional Aboriginal life arising from the latter's native title.

In other words, I had rejected or at least held under question, the Commonwealth Attorney General's Department advice that the High Court's *Mabo (No 2)* decision and its principles effectively extinguished native title. I told officers of the Attorney General's Department at the time that I regarded their advice as black letter property advice, wherein they failed to understand how and in which ways the High Court was

peering through the common law to the development of native title rights over the course of Australian history following European settlement.

Putting it in the language of the lawyers, I told them that exclusive possession of land could be an incident of a pastoral lease but in the majority of cases was unlikely to be and need not be.

As it turned out, in the *Wik* decision of 1996, the High Court by a majority of four to three held that the grant of the relevant leases did not confer on the lessees exclusive possession of the land under lease and correctly, in my view, made clear that, in the case of the Wik and the Thayorre peoples, that a relevant intention to extinguish all native title rights at the time the grants were issued was not present. That is, the grants did not necessarily extinguish *all* incidents of the native title rights that the Wik and Thayorre peoples enjoyed.

Of course, that decision of the High Court was attacked mercilessly by the Howard government. That villain, Tim Fischer, boasted that there would be bucket loads of extinguishment, in the Howard government's response to the decision.

Many people here will be familiar with the sorry tale which became part and parcel of the *Native Title (Amendment) Act* 1998. That amendment arose from the Coalition government's so-called Ten Point Plan, a plan facilitated in the Senate with the support of Senator Brian Harradine under the advice of the Jesuit priest, Frank Brennan.

As an aside, let me say, and as a Catholic, let me say, wherever you witness the zealotry of professional Catholics in respect of Indigenous issues, invariably you find Indigenous interests subordinated to their personal notions of justice and equity: because unlike the rest of us, they enjoy some kind of divine guidance.

And so it was with the *Wik* amendments. Point two of the amending act declared:

> States and Territories would be able to confirm that … agricultural leases in existence on or before 1 January 1994 could be covered for … exclusive tenure … to the extent it can reasonably be said that by reason of the grant or the nature of the permitted use of the land, exclusive possession must have been intended … thereby extinguishing native title.

The amendments were entitled 'Confirmation of past extinguishment of native title'. But it was never clear that all freehold grants and leasehold grants permanently extinguished native title.

Mick Dodson said at the time 'by purporting to "confirm" extinguishment by inconsistent grants, the Commonwealth is purposely pre-empting the development of the common law – not allowing sufficient time to integrate the belated recognition of native title into Australia's land management system'. He said, 'this does not require the obliteration of Indigenous interests so as to favour non-indigenous interests'. Quite so.

The Keating government's *Native Title Act* of 1993 recognised a right to negotiate

given to native title holders and a duty to negotiate vested in government and grantees with respect to grants of mining tenements as well as compulsory acquisition by governments for the giving of interests for a commercial purpose.

The Howard government's 1998 amendments denied the application of the right to negotiate over those great parts of Australia where native title might be established, indeed, to probably half the mainland. The amendments removed many forms of grant from the ambit of the Act, seriously diminishing the value of the Act while choking off access by native title holders.

The Howard government's 1998 amendments cut across the spirit of the Keating government's 1993 Act; the notion that the Act was, first and foremost, legislation of a beneficial kind – enacted to redress historic inequities – rather than to compound ones sanctioned by earlier acts.

Finally, I wish to say something about another outcome in that historic negotiation between Lowitja O'Donoghue, her negotiating team and the Keating government. And that is, the establishment of the Indigenous Land Corporation and land fund.

In the course of that historic negotiation, I invited ATSIC and the Council for Aboriginal Reconciliation to submit proposals for a wider package of measures to help establish an economic base for Aboriginal and Torres Strait Islander peoples and in establishing such a base, to safeguard and further develop Aboriginal and Islander culture.

That invitation and those submissions came together in what was called the Social Justice Package. A substantial element of that package was a land fund – a fund set up to support those Indigenous people, dispossessed of their lands, yet unable to assert native title rights and interests. In the Second Reading speech to the *Native Title Bill* 1993, I said 'that despite its historic significance, the *Mabo* decision will give little more than a sense of justice to those Aboriginal communities whose native title has been extinguished or lost … their dispossession being total, their loss complete. While these communities remain dispossessed of land, their economic marginalisation and their sense of injury continue'.

The purpose of the fund was to acquire land and to attribute to such land a synthesised native title. In fact, I made clear that I intended that the fund could acquire pastoral leases and convert them to a synthesised native title. That is, where Aboriginal people who own or acquire a pastoral lease and who the Federal Court determines would satisfy the criteria for native title, but for the existence of the pastoral lease and wish to convert their holding to the equivalent of native title, could do so.

The land fund was the centrepiece of the Keating government's social justice measures arising in association with the *Native Title Act*. The fund, which subject of its own act in 1994, became the Indigenous Land Corporation, was set up with the aim of becoming self-sustaining with over $1billion of Commonwealth subscribed capital.

The *Indigenous Land Fund Act* locked in allocations to the fund and the Corporation for ten years. I designed the Act to make it extremely difficult for a future government to undo what I had put into place. As it turned out, I succeeded in making it Howard and Costello-proof; vandal-proof. It galled them that the ILC's budgetary appropriations were beyond their executive influence.

By 2010, appropriations to the Aboriginal and Torres Strait Islander Account stood at $1.421 billion. Payments from the Land Account to the Indigenous Land Corporation stood at $650 million. The ILC is now in an advantageous financial position such that it is able to expend funds on assets other than simply the purchase of land. The land fund and land corporation initiative stands as another successful outcome from the 1993 *Native Title Act* negotiations.

Let me, perhaps, finish where I began.

I accepted this invitation to give the Lowitja O'Donoghue Oration out of respect for Lowitja as a remarkable person and a leader of Aboriginal people. As I said earlier, her unfailing instinct for enlargement marks her out as a person of great significance in the Australian political firmament.

I like to think that together, she and I were able to lead our respective political forces towards an historic outcome for a race of people dispossessed and decimated by the process of settlement.

Without having been lobbied or cajoled, I took the opportunity of the Redfern Park speech in 1992, to lay out, openly and truthfully, the history of our inhumanity towards and thoughtless disregard of Australia's Indigenous people. For the nation's integrity and moral clarity, I thought it necessary it face up to the truths of our colonial history. Similarly, I saw the *Mabo* decision and the *Native Title Act* as an opportunity to transcend the history of that dispossession – to put right an historic wrong. An opportunity to restore the age-old link between Aboriginal land and culture; to declare Aboriginal culture a defining element of who we are: to make clear that our spiritual enlargement as a people could best be accomplished when that enlargement included a secure and prosperous place for the first Australians.

Lowitja O'Donoghue has been and remains an important part of this national transformation. This Oration in her name is testimony to that reality.

2012

Of Constitutions, Interventions and Other Melancholy Tales

PRESENTED BY THE HON. MICHAEL KIRBY AC CMG

Look up my people
The Dawn is breaking
The World is waking
To a new, bright day
Where none defame us
Nor colour shame us
Nor sneer dismay.

Kath Walker (Oodgeroo Noonuccal)
Song of Hope

A TIME FOR REFLECTION

The middle of 2012 is a time for serious reflection about the Indigenous people of the Australian nation and their relationship with our law. The country has before it the report of a panel that has enquired into the desirability of change to the Australian Constitution, so as to re-express provisions relating to Aboriginal Australians and to insert a preamble, acknowledging their special place in our nation. But in the current fragile political circumstances, would any such Referendum fail and thereby add discouragement to the hopes of Indigenous advancement?

Looking backwards, it is now 45 years since, on 27 May 1967, a Referendum was held adopting amendments to the Australian Constitution to remove provisions contained in the original document that were seen as discriminating against Aboriginals. The Referendum was carried by the affirmative votes of the Australian electors. Overwhelmingly they favoured the changes.[3] Optimistically, Australians hoped that the goodwill signalled by such a positive vote was a sign that a page had been turned forever in the history of this country. We hoped that, with one resolve, we could move beyond the past, beyond the 'the pain and sorrow[4] of violence, dispossession, prejudice and disadvantage'. We hoped that we would adopt new laws to protect the basic rights, dignity and economic well-being of the Indigenous people of the Australian continent.

Since the Referendum, with the resulting amendments to the Constitution,[5] there have been enactments and decisions of great importance for the journey that, in the Referendum, Australians recognised they had to take. The National Apology in the Federal Parliament in 2008 was an important high point, rich in symbolism and grace. So have been amendments to State Constitutions – although these have generally been premised on the express requirement that the amendments did not give rise to justicable rights. Some of the court decisions since 1967 have not, in their result, proved favourable to the interests of Aboriginals. Of these, I would mention most

particularly *Kartinyeri v the Commonwealth*[6]*; Yorta Yorta v Victoria*[7] and *Wurridjal v the Commonwealth*[8], all decisions of the High Court of Australia. The first rejected Justice Lionel Murphy's historical view that the amendment to the Constitution, consequent on 1967 Referendum, when it empowered the Federal Parliament to make laws 'with respect to the people of any race … *for* whom it is deemed necessary to make special laws' was to be read so that the words '*for* whom' were confined to mean 'for the benefit of whom' such laws were deemed necessary.[9] Only Justice Gaudron[10] and I[11] were attracted to that interpretation.

In *Yorta Yorta*, in joint reasons, Justice Gaudron and I dissented – as Black CJ had done in the Federal Court[12] – in relation to the way in which Aboriginals, claiming native title rights, could prove continuity in the maintenance of traditional laws and customs in relation to the land of their forebears. And in *Wurridjal*, over my sole dissent, the High Court upheld the constitutional validity of the federal legislation authorising what has become known as the Northern Territory Intervention. This imposes special restrictions and controls on Aboriginals in that territory reminiscent of the special protectorates of the 19th Century colonial patriarchy. By the time that case was decided, in 2009, Justice Gaudron had concluded her service in the High Court. As, indeed, I also soon myself did. *Wurridjal* was the last decision I made, and the last judicial order I proposed, as a Justice of the High Court.[13] Despite these decisions, and doubtless many others, three judgments of the High Court since the Referendum, have generally been hailed in Aboriginal and other circles, as advancing the legal and economic interests of Australia's Indigenous peoples. These were, first, *Koowarta v Bjelke-Petersen*[14] (which upheld the challenge to the validity of the actions of the Queensland Government inconsistent with the *Aboriginal Land Fund Act* and the *Racial Discrimination Act* of the Commonwealth. Secondly, *Mabo v Queensland [2]* [15] *(*which upheld the existence of 'native title' as a legal possibility in the Australian system of land law). And thirdly, *Wik Peoples v Queensland*[16] (which upheld the compatibility of 'native title', as upheld in *Mabo* and given effect by federal legislation,[17] alongside pastoral leases over vast areas of the Australian continent, granted under State and Territory laws prior to the decision in *Mabo*.

The *Koowarta* decision was delivered on 11 May 1982. So it is exactly 30 years ago. The *Mabo* decision was delivered on 3 June 1992, 20 years ago. The *Mabo* decision is much better known than either *Koowarta* or *Wik*. On 7 May 2012, the Australian Broadcasting Corporation broadcast an edition of its *Four Corners* programme dedicated to reflections on *Mabo*. Several university conferences on that decision have also been convened.[18] But without the earlier decision of the High Court in *Koowarta* it is doubtful that the *Mabo* decision and particularly that in *Wik,* would have had much impact at all.

If, in *Koowarta,* the *Racial Discrimination Act* 1975 (Cth) had been struck down, as

lacking a constitutional foundation for its validity, the protection of federal law against the threatened 'bucket loads' of extinguishment of native title would have been missing. The general principle in *Mabo,* and the specific extension of it in *Wik* to pastoral leases, probably would have been rendered nugatory. State and Territory laws, and State executive action, would quickly have swept the dreams of native title into the dust can of lost hopes. Unless validly suspended in relation to inconsistent federal laws,[19] State laws and actions might have attempted to restore the *status quo ante*, before the suggested 'heresy' of Eddie Mabo's native title had intruded onto the scene and spread like new wildflowers in the Australian legal desert.

At this time of anniversaries, we should therefore remember Eddie Koiki Mabo and his struggles in the courts of Australia[20] However, we should also remember the earlier struggles of John Koowarta to uphold the validity of the *Racial Discrimination Act.* And to use that Act to strike down, as invalid, the inconsistent move of the government of Queensland Premier, Jo Bjelke-Petersen, to frustrate John Koowarta's search for legal rights in his traditional lands; rights potentially of great cultural importance to the spirits of the Winchyanam people from whom Eddie Koiki Mabo and John Koowarta sprang. But also rights potentially important to the economic and social survival of their peoples' communities in the often hostile environment of contemporary Australia.

THE KOOWARTA CASE

The people behind the great test cases that come to the highest courts in the land, are rarely, if ever, known to the judges or, indeed, to the general community. When they have died, respect must be paid to the sensibilities of religious customs and to the inhibitions that exist, in some Aboriginal circles, upon reproducing their photographs and images.

Still, in the case of Eddie Koiki Mabo, he is such an important figure in the history of Australia that it is inevitable that books, filmed documentaries and even feature films will portray him and his family for us to look at his real or imagined features. As is well known, although Eddie Mabo lived to see the first decision of the High Court in his long litigious saga[21], he died just a few months before the announcement of the second decision that will forever carry his name into the history books.

We listen to Eddie Mabo's story and that of his people. We stare at his image and at the actors as they attempt to reproduce his determination, strength and resilience. Although justice in his case came after his death, he had already won a number of moral victories against discrimination on the grounds of his race. And the same is true of John Koowarta.

There is much less public knowledge of this early hero in the struggle of Australia's Indigenous peoples to establish legal entitlements over their traditional lands. However Marcia Langton[22] has begun the process of correcting this gap in our civic knowledge.

She has explained the derivation of his name and the links that his name gives to the leech and the dingo; symbols that John Koowarta embraced and affirmed.

John Koowarta wanted nothing more than to have reparative action on the part of the Aboriginal Land Fund Commission. It had been established under federal law, enacted with bipartisan support during the Whitlam Government. John Koowarta wanted the Commission to acquire a pastoral lease in North Queensland, on the Archer River in the Wik country. Neither John Koowarta nor his community had the capital to acquire the holding. However, the Aboriginal Land Fund Commission had been established to support this process. He and other members of the group requested the Commission to acquire the lease so as to enable the land to be used by and for the members of his Aboriginal group for their traditional purposes and for their immediate contemporary livelihood. The Commission immediately acceded to this request. It set about allocating funds to permit the request to be fulfilled.

Fortunately, the Aboriginal Land Fund Commission was comprised of resolute members, five in number. Under the Act, three were of Aboriginal descent and two were not. But there was no recorded disagreement in the Commission about affording the wherewithal to pay the necessary money to fulfil John Koowarta's dream. An excellent and detailed examination by Associate Professor Alexander Riley[23] of the University of Adelaide Law School, has explained the struggle that then unfolded with the officials of the government of Queensland, led by Premier Bjelke-Petersen. This is the story of the bricks and mortar necessary for the advancement of the dignity and economic and legal entitlements of Indigenous peoples in Australia.

Under the *Land Act* 1962 (Q)[24] any sale or transfer of the pastoral holding was subject to the veto of the Minister for Lands of the State of Queensland. The solicitors for the Commission secured the approval to the transfer of the then lessees. They then sought the Minister's permission. In the optimistic times that followed the Referendum on Aboriginal rights in 1967, the creation of the Commission, the appropriation of federal funds, the agreement of the current land holder and the desires of John Koowarta, there was an air of optimism and expectation that the approval would be forthcoming.

However, in June 1976, the government officials of Queensland indicated that the Minister had rejected the transfer. He withheld his permission. He was then pressed for reasons which he took a long time to deliver. This showed once again the unreasonableness of permitting officials, acting under statutory power, a legal exemption from the obligation to provide reasons for their official acts.[25] The politics of the situation, rather than the then state of the common or statute law, ultimately forced the Minister to provide reasons. Those reasons were blunt:

The question of the proposed acquisition of Archer River Pastoral Holdings comes within the ambit of declared Government policy expressed in cabinet decisions of September 1972, which stated – 'The Queensland Government does not view

favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation.'[26]

Because this stated policy had been affirmed and re-affirmed by the Queensland cabinet, John Koowarta concluded that he and his group were being denied an entitlement by reason of their Aboriginal race, colour or ethnic origin. Guided by excellent lawyers, led by the late Ron Castan QC of the Melbourne Bar, (who was also later to act for Eddie Mabo), John Koowarta decided to initiate proceedings in the High Court of Australia, invoking the *Racial Discrimination Act* 1975 (Cth). This enactment makes illegal any discriminatory acts based on racial grounds.

John Koowarta's action immediately led Queensland, for its part, to challenge the validity of the *Racial Discrimination Act*. That challenge in turn, led Mr Koowarta to argue that the Act was valid as a special law based on the races power, as it had been amended in the 1967 Referendum.[27] He also based his argument on the external affairs power[28] in the Australian Constitution.

A majority of the High Court (Chief Justice Gibbs with Justices Stephen, Aicken and Wilson) rejected John Koowarta's reliance on the races power. But another majority (Justices Stephen, Mason, Murphy and Brennan) upheld the validity of *Racial Discrimination Act* based on the external affairs power. They did so for reasons which they differently expressed.

The narrowest expression was that of Justice Stephen. This was to the effect that 'external affairs' in the Constitution included reference to the public engagement of the national government with other nations, things or circumstances outside Australia. Justice Stephen held that it was not enough that a challenged law should give effect to a treaty obligation. Nor was it necessarily excluded because the subject was not one provided for expressly in a treaty to which Australia was a party.[29] By referring to developments in international law since the *Charter* of the United Nations of 1945, Justice Stephen recognised the growing significance for international law of the global prohibition upon racial discrimination. Such prohibition was a central purpose of international law. As he put it, '… [It is a purpose] which, more than any other, dominates the thoughts and actions of the post-World War II world'.[30] A similar point was later to be made by Justice Brennan in the second *Mabo* decision, when explaining and justifying his decision and reasons in that case.[31]

Normally, other judges, lawyers and the public generally are afforded few insights into the modes of thinking of decision makers in courts such as the High Court of Australia, other than those provided by the written reasons delivered by the judges in support of the orders that they propose on judgement day. In the *Mabo* case, however, a few tiny glimmers of extra light were provided as to his reasoning and approach by former Chief Justice Mason in an interview that he recently granted to the *Four Corners* team. In the case of John Koowarta's proceedings a small number of additional

vignettes have been provided by a distinguished former professor of the University of Adelaide, Professor Hilary Charlesworth.[32]

When *Koowarta* was decided, she was serving as one of the associates (clerks) to Justice Stephen. His appointment as Governor-General of Australia, to succeed Sir Zelman Cowen, had already been announced by Prime Minister Malcolm Fraser, at the time of argument in *Koowarta*. With customary propriety, Justice Stephen offered to stand aside if any party objected to his participation in the *Koowarta case*. None did. As we now know, had the Queensland Government objected, legal history would have been different. The *Koowarta* ruling, upholding the *Racial Discrimination Act* on the basis of the 'external affairs power', would not have been made, at least at that time. Absent an established foundation for the validity of that Act, the Queensland Government's veto would arguably have stood. Absent a later, equivalent ruling, the barrier revealed in *Koowarta* against unfavourable State Government or Territorial laws or executive actions, unfavourable to Australia's Aboriginals by reference to their race, might well have been sustained.

In the High Court chambers, the young Hilary Charlesworth was unable to persuade Justice Stephen to change his view that the validity of the Federal *Racial Discrimination Act* could not be founded in the basis of the races power under the Constitution. But her early interest in international law was stimulated by the broad view that Justice Stephen took of the developing head of power on that topic. And of the sheer necessity, in the modern world, of arming the Federal Government and Parliament in Australia with full and appropriate powers to deal effectively with the international community, by treaty and otherwise, and with the growing body of global rules.

The fascination with international law, nurtured in the Stephen chambers in Canberra, was to lead Hilary Charlesworth into a most distinguished career as a professor of international law. This was recognised most recently by her appointment as a Judge *ad hoc* of the International Court of Justice.[33] She contests that there was any disparity between the essential ruling of the ambit of the external affairs power made by Justice Stephen and that offered by Justices Mason, Murphy and Brennan. Basically, all of them were sympathetic to the necessities of Australia playing a full role as member of the emerging system of law. All of them were attentive to the impact of international law on domestic (including constitutional) law. All of them appreciated the obligations of the new world legal order to safeguard peace and security, by defending universal human rights at home and abroad. After the Holocaust and repeated instances of racial genocide, the majority of the Justices of the High Court of Australia were aware that was at the very core of international law. And that Australia could not be a full participant in the new world order combating racism if it was missing from the table because of any constitutional incapacity.

As Professor Charlesworth has observed, the events since the *Koowarta* decision

of the High Court have not borne out the optimistic predictions about the relationship between Australia's constitutional law and international law back in 1982, particularly the international law of human rights.[34] Still, the decisions of the High Court of Australia since *Koowarta* have generally supported the broad ambit of that head of power. They have done so notwithstanding the potential of that head of power to undermine some of the past federal attributes of our Constitution.[35]

The lines drawn by the High Court to mark off the *permissible* ambit of 'external affairs' from the *impermissible* are sometimes disputed and disputable.[36] There is, of course, a point beyond which the 'external affairs' power cannot be pushed, appearing as it does in a constitution whose federal character is an essential and over-arching theme. But the importance of the *Koowarta* case was that it upheld the deployment of the 'external affairs' power in our Constitution in a matter that directly impacted the laws and executive activities of State governments. And it did so in the context of basic human rights that had previously been seen as essentially ones of purely national and domestic concerns. Because there will be no going back on this wider vision of the Australian Constitution and its engagement in the world, John Koowarta left an inerasable mark on the Constitution. The same was true in Eddie Mabo's cases. These were to prove yet another gift of the Indigenous people to the necessary modernisation of Australia's laws and of the nation's view of itself.

THE RISKS OF TEST CASES

John Koowarta's test case, like the later proceedings of the *Wik Peoples* that it foreshadowed, was decided by the narrowest of margins in the High Court: four justices to three.

Over the years there have been many similar outcomes where the composition of the court at a particular time has been vital to the outcome of a case. The *Wik* case came up for decision in 1996, the first year of my appointment to the High Court. Had other nominated lawyers been appointed in my stead, the outcome might well have been different. Legal formalists often like to believe, and even teach, that the law is wholly objective. That its discipline is a pure science. That outcomes are always predetermined. However, experience in Australia, as elsewhere, often shows the contrary. Appointments, especially to a final national and constitutional court, are always important. As Julius Stone, my great law teacher demonstrated in my youth, judges, especially appellate judges, necessarily exhibit legal values in their decisions. Their approaches, opinions and life experiences inevitably influence the outcome of their cases. This happens when the judges are faced (through legal ambiguity or imprecision) with 'leeways for choice' which they must resolve in deciding a case.[37]

This is why our Constitution, like that of other common law countries, rightly reserves the appointment of judges to the elected executive government. It is in this

way that governments, reflecting the changing values and aspirations of people over time, influence judicial outcomes long after the appointing ministers have departed the Treasury Benches. Far from being illicit or objectionable, this is exactly how the Constitution meant it to work. Party political allegiance is and should be irrelevant. But values and philosophy are the very essence of the judicial role.

In Australia, conservative federal governments generally know this well. They give effect to it without embarrassment. It was Deputy Prime Minister Tim Fischer who, after attacking the majority of the High Court for its decision in the *Wik* case, called bluntly for the appointment of 'capital 'C' conservative[s]'.[38] This was a call that was fulfilled. On the other hand, governments of the Australian Labor Party have frequently been neglectful, apologetic or casual about the power of judicial appointment. Of course, it is usually easier to find capital 'C' conservatives amongst appointable lawyers than it is to find candidates who are, or have become, liberals and legal realists. And Labor governments can sometimes be more conservative over values than Coalition ones, as we all know.

With the approaching departures of Justices Gummow and Heydon from the High Court of Australia, two vacancies present which will have to be filled in October 2012 and March 2013. By our traditions, once the vacancies are filled, the appointed judges have nothing to do with politics or politicians. Yet *Koowarta*, *Mabo, Wik* and countless other cases before and since reveal the importance of every individual appointed to the High Court and to other superior courts in Australia. The importance is magnified in our country because the final court comprises but seven human actors. This is smaller than every equivalent national final court, save for New Zealand. Of course, some Labor appointees, after appointment, turn out to be legal conservatives and formalists. Some Coalition appointments emerge as strong liberals and legal realists. But, the point I make is that there is no escaping the importance of the constitutional power of judicial appointment. If a single one of the majority participating judges in *Koowarta* or *Wik* had held a contrary view, the history of the legal rights of Aboriginal Australians would have been significantly different.

It is this fact that demonstrates how risky test cases can be sometimes for advancing the interests of Aboriginal Australians, including in the High Court. Not only is much dependent on the judges. Much also depends on the other actors in the drama. John Koowarta and Eddie Mabo were fortunate to have had the services of Ron Castan, and his team of lawyers. The Wik Peoples were fortunate in the advocacy of Walter Sofronoff, Sir Maurice Byers, J.W. Greenwood and their team. This is not to say that the opponents were poorly represented; quite the contrary. But governments and wealthy interests can usually secure top lawyers. Vulnerable litigants, with few resources, are often dependent on pro-bono lawyers who are willing to discount, or waive, their fees and to act in the interest of their vision of justice.

Another risk is sometimes presented by the approaches of governments and the determination of actors in the administration of public institutions.[39] We now know how important, in the *Koowarta* case, was the resolve of the Aboriginal Land Fund Commission to exercise its powers in support of John Koowarta and his community. According to recent research, the Commission faced not only the vehement opposition of the Queensland Government against what it saw as the Trojan horse of international ideas invading their constitutional space. It also felt pressure from the Minister for Aboriginal Affairs in the Fraser Government to reduce the tensions over Aboriginal rights that were emerging in Queensland. This was especially significant because of the provisions of their statute, which obliged the Commission to carry out the performance of its functions 'under the general direction of the Minister'. Presumably because the political pressure was never formalised as a legal direction, the Commission stuck to its guns. It pressed on with its challenge. And then the Federal Government's lawyers felt obliged, as the Commonwealth usually does, to come in and support the constitutional validity of what the Commission was seeking to do. Which is what then happened.

Counter factual speculation is possible. What if the federal Minister had given a direction to the Commission to back off, so as to avoid political confrontation with Queensland? What if the Commission, by its statute, had not included a majority of Aboriginal members? What if those members had lacked the courage and determination to press on with, and to fund, the constitutional challenge to the Queensland Government's stance? Once again, the risks of a test case are shown. Courage, determination, means and luck are vital ingredients for success.

The timing of litigation, as in legislation, can also be vital. The setting for the significant decisions in *Koowarta, Mabo* and *Wik,* was undoubtedly fixed by the overwhelming vote of the electors in the 1967 Constitutional Referendum. This created a new national *Zeitgeist* – a spirit of the law – to which at least a majority of the judges were not impervious.

Still, some Aboriginal leaders have been critical about other ill-timed and poorly mounted challenges presented by private individuals, such as in *Coe v the Commonwealth*.[40] The litigation that challenged the Northern Territory Intervention has also been questioned, on the basis that it was doomed to fail, as legally it did. On the other hand, there may sometimes be merit in the fact that individuals challenge orthodoxy by approaching the independent courts. The political process in Australia is now indirectly controlled by the ever dwindling numbers of Australians who join the major political parties. Because of the real power they exert over elective government, a disjuncture exists between democratic theory and political power realities.[41] The right of individuals to endeavour to subject public power to questioning and to public and legal scrutiny is an important feature of freedom. I am far from convinced that the *Wurridjal* case, which contested the constitutional validity of the Northern Territory

Intervention, was ill-conceived or untimely. The decision and the dissent stand, at least, as a sharp reminder of the vulnerability of Australia's Indigenous people to the use of the Constitution, as it is presently interpreted, in ways that specially disadvantage the rights of Aboriginals when compared to those of every other race or ethnicity in the nation. When important principles are involved, the symbolism of subjecting power to judicial accountability can be potent, at least in the long term. So it will prove in due time with the Northern Territory Intervention.

JUDICIAL OR POLITICAL?

Just the same, Eddie Mabo died before his challenge to the rejection of land rights was finally decided. Although John Koowarta succeeded before the High Court, his family's claims to their land were effectively stymied by manoeuvres that ensued both before and after his death in 1991. In fact, it was not until 2011 that Premier Anna Bligh in Queensland confirmed the decision to revoke a section of the Mungka Kadju National Park, in preparation for its return to John Koowarta's community. And her successor, Premier Campbell Newman, has recently concluded this legal process by presenting the title documents to John Koowarta's community. It took 30 years to vindicate the success that John Koowarta won in the High Court. But finally it came.

Nicole Watson, a law lecturer and a member of the Birri Gubba people, has asked a pertinent question: Why should Australia's Aboriginal people place their trust in a legal process that rarely delivers justice that is either practical or timely?[42] She points out that, in the aftermath of *Mabo*, *Yorta Yorta* and other decisions, actual access by Aboriginal Australians to economic benefits from 'native title' had been very difficult to attain. It has been problematic to prove. Expensive to litigate. Contested by powerful interests in the mining and extractive industries. And divisive within the Indigenous communities themselves.[43]

Given the dimension of the disadvantages still so clearly faced by urban, regional, rural and remote communities of Aboriginal Australians, why should economic benefits accrue to a comparative few just because of the chance consideration of provable ancestry, where the burdens in terms of health, housing, education and imprisonment rates are so widespread? Was a different solution to Australia's poor record of Indigenous disadvantage not possible? Has the attainment of that different approach been set back, rather than advanced, by the well meaning interventions of the courts in *Koowarta*, *Mabo* and *Wik*? These are serious questions. They demand an answer.

If, in the heady aftermath of the 1967 Referendum, we were starting again, what would hindsight suggest that we should have done in Australia? Probably, our Parliament should have struck with bold legislation while the iron was hot. We should have moved quickly to include a preambular acknowledgement of the Aboriginal and Indigenous peoples in the Constitution. Embarked on a process to create a national,

properly representative, body of all Australia's indigenes. Plunged into a negotiation of a treaty, which after all, was common British practice with dispossessed peoples or their princes, even in Canada and the American settlements. This would probably have happened but for the mistaken belief of the early British administrators that Australia was *terra nullius*. Any such treaty would have addressed the material disadvantages of the Indigenous peoples, viewed as a whole and from a perspective of a comparison with the majority population.

In a proper exercise of the self-determination, promised to every 'people' by international law,[44] Australians should probably have created a much larger body than the Aboriginal Land Fund Commission. One with proper powers to establish a national Equality Fund, designed to improve rapidly the conditions of all of this country's Aboriginals and Torres Strait Islanders. By this I mean all, not just those who could trace their ancestry to specific undemised Crown land. With goodwill and great effort, had we done these things immediately after the 1967 Referendum, we would probably now be much further advanced. A return to paternalistic, unconsulted, impositions such as the Northern Territory Intervention would then probably have been unnecessary. With a little luck, we might have been able to consign the 'races power' in our Constitution to the historic aberration it represents.

But we did none of these things.

This was despite (or perhaps even because of) the fact that Australia was one of the oldest electoral democracies in the world; with forms of responsible government dating back to 1856. And with legislatures created even earlier. We were paralysed by substantial inertia and hostility that remained just below the surface.

Courts do not initiate litigation. Except in plainly hopeless cases, they have very limited power to rebuff it. This is the background against which we must understand the initiatives taken by the courts in *Koowarta*, *Mabo* and *Wik*. The courts simply responded to cases brought to them for decision by others. Under our conventions, courts could not respond to such claims by conceiving and substituting a better one. And so we entered into the era of land rights cases and complex legislation. That is where we now find ourselves. Our solution may not address generically the burden of Aboriginal disadvantage. Yet to John Koowarta, Eddie Mabo, the Wik and their communities, recognition of their land rights has been both precious and long overdue.

The benefits of native title may have proved divisive – and certainly less than a panacea for the variety of Indigenous peoples often in desperate need. Still there is no doubt that the discovery and affirmation of native title in *Mabo*, protected from extinguishment by the ruling in *Koowarta*, and extended and clarified in *Wik*, did advance the civil, community and economic interests of Australia's Indigenous peoples. Associate Professor Maureen Tehan[45] illustrates this truth by reference to lines on the map of the continent, drawn from her long experience with the Pitjantjatjara and

Ngaanyatjatjarra peoples. Very large segments of the Australian land mass are now subject to recognised native title claims. These may not yet – or ever – embrace the majority of our Indigenous peoples. But they do extend to many. Judicial consideration of the outstanding claims is continuing. Responsibility, power and economic benefits are flowing to native title owners and the communities they serve. Whilst it is true that some Indigenous people have had it lucky, that is a common feature of life for the rest of Australia's citizens. In Professor Tehan's word, for a legal practitioner like her in the 1980s, working in remote communities, the decision in *Koowarta* was the first step. It changed the 'toolbox' of lawyers, though its impact was to prove varied and sometimes paradoxical.

Sadly, the Federal Parliament and Government failed to follow up *Koowarta* and to introduce a grand national response. The hope of the early days was replaced by a resuscitation of the permit system upheld in *Gehardy v Brown.*[46] And this was followed by special liquor and other controls of a distinctly paternalistic kind – culminating in the Northern Territory Intervention. Viewed in this context, the continued journey taken by the courts in recognising and upholding native title rights is scarcely surprising. Courts in Australia are law-makers but in the minor key. They are limited to resolving the legal cases brought through their doors. They cannot invent or change the cases brought to them. But they can bring their independent powers to bear in deciding them.

Nicole Watson says that she yearns for the activism of the tent embassy in Canberra, for protests and political action by Aboriginal leaders. No one would doubt the importance of such initiatives. They will certainly continue in Australia. But the inescapable fact of the tiny fraction of Australians who are, or identify as Indigenous, in a population often indifferent and sometimes hostile, means that there must be space for both political and legal initiatives. The questions is not 'either/or'. Each process has its advantages and disadvantages. Whilst the disadvantages of costs, delays and follow-up of court orders are illustrated in *Koowarta* and *Mabo*, the advantages, as shown by a number of leading cases, are many:

- They initiate a process of change which lies outside the compromises and deals effected by those who operate the levers of power in the narrow circle of purely political activisms;
- At their core lie the judicial institutions of a free society. They can draw upon earlier judicial principles to uphold notions of liberty and equality that do not necessarily bend to the pressures of party power-play and political influence;
- Courts introduce a random element, into the power dynamic. They do this precisely because their processes can be initiated by private individuals beyond the 'usual suspects' of partisan political activist and because they cannot be controlled by politicians;

- Courts are more likely to be influenced by notions of justice, equality and principle than the forces of compromise and economics that influence and control purely political decisions;
- Courts can enforce their orders and generally their decisions will eventually be obeyed and upheld in Australia both for legal and political reasons; and
- Courts inject into political discourse decisions that themselves then interact with politics. Judgments can necessitate prompt legislative action, just as the *Mabo* and *Wik* decisions of the High Court of Australia necessitated immediate legislative action on the part of Federal Parliament.

It is natural, of course, for judges and lawyers like me to want to think optimistically about their discipline and its institutions. Some of their euphoria must give way to realism and to the changing moods of different decades. Nevertheless, we should not write off the courts of Australia as continuing, significant players in the process leading to reconciliation, justice and greater equality for Australia's Indigenous peoples. The record is patchy, it is true. But the stories of empowerment told by Aboriginal Australians who were acquainted with the decisions in *Koowarta*, *Mabo* and *Wik*[47] reveal how greatly court decisions can act as a personal catalyst. They can help to mobilise self-confidence and pride in the leadership and courage of heroes who have gone before. And to re-enforce a determination to continue and extend their efforts. Large struggles usually come on multiple fronts. Although the courts will sometimes fail, in Australia they cannot be ignored nor are they destined always to disappoint. The record of the past 30 years since *Koowarta*, and that decision itself with *Mabo* and *Wik* establish the contrary.

RALLYING POINTS AND NEW INITIATIVES

A refection on the 45 years since the Referendum, the 30 years since *Koowarta* and the 20 years since *Mabo* shows, I suggest, this much. Progress in Aboriginal advancement in Australia remains painfully slow. A symbol of this fact can be found in the hugely disproportionate rates of imprisonment of Aboriginal citizens – 2% of the population and 48% of those incarcerated. So shocking are these statistics that, exceptionally, the Governor of New South Wales (Professor Marie Bashir), used her office to convene and encourage fellow citizens, who demanded action, fresh and radical thinking and real change.[48]

We recognise now that the issues affecting Aboriginal citizens are interrelated, not neatly divided like different departments and ministerial responsibilities. Homelessness and poor housing is connected with problems of nutrition and access to clean water. These deprivations, in turn, are related to the health crisis. The health impediments are interrelated with poor educational opportunities, truancy and despair. Australians of goodwill on all sides of politics want to see action. But the landscape is messy. The

initiatives are often disappointing in their outcomes and counterproductive in their execution. In these circumstances, there is room, and a need, for multiple initiatives from all branches of government: legislative, executive and judicial. And from the private sector, the educational institutions, the churches and civil society. Above all from Indigenous peoples themselves, out of whom must come the solutions to endemic disadvantage, which the rest of the population can support and sustain.

Despite the doctrinal quandaries[49] and the occasional deficiency of the judicial decisions in Australia concerning Aboriginals, the fact remains that court proceedings and their aftermath have constituted an important opportunity for heroes to emerge from the Indigenous community and to be recognised, in full dignity, by their fellow citizens because they have refused to accept indifference and hostility as an answer to legal injustice.

John Koowarta was such a hero. So was Eddie Mabo. So are the Wik. But there are other heroes, and many of their faces were seen in the recent documentary about the negotiations that followed the *Mabo* decision of the High Court.

Lowitja O'Donoghue is foremost of these. And there have been many others. Marcia Langton, Roberta Sykes, Mick and Patrick Dodson, Larissa Behrendt, Noel Pearson and many others.

Increasing numbers of younger heroes are now entering the legal profession and the academy. Political action is essential. Legal action and court judgements can occasionally quicken the pace. Theoretical and conceptual analysis of where we are and where we have come from and where we might be in another 30 years is critical. This is the role for everyone to play in this long drawn-out journey. Ideas for political and judicial action in Australia will surely come from the reports and recommendations of Megan Davis – a young hero. She was recently elected by the General Assembly of the U.N. as Special Rapporteur for the world – on Indigenous Peoples. We should listen to her and learn from her reports.

Above all, it is necessary for Aboriginals to speak out; and to be listened to respectfully, attentively. I hope that in my lifetime I do not see another initiative like the Northern Territory Intervention – pressed forward for suspect motives, within eight weeks of a federal election and with no consultation in its design with the Aboriginal peoples and communities most affected. And this despite the recommendation that this was an absolute pre-requisite for an effective and just initiative.[50]

To the heroes of Indigenous Australians of the past, like John Koowarta and Eddie Mabo and other brothers and sisters: honour and praise. To the heroes who struggled but did not succeed, respect and thanks for standing your ground. To the heroes still amongst us – encouragement and recommitment.

To our father's fathers
The pain, the sorrow.
To our children's children
The bright tomorrow

Song of Hope

Kath Walker (Oodgeroo Noonuccal)

2013

Healing the Fault Lines: Uniting Politicians, Bureaucrats and NGOs for Improved Outcomes in Aboriginal Health

Presented by Ms Olga Havnen

It is an honour and privilege to be invited to deliver this address – the 7th Lowitja O'Donoghue Oration hosted by the Don Dunstan Foundation.

I acknowledge the traditional owners – the Kaurna people and thank you for your very warm welcome here today.

Dr O'Donoghue – Lowitja and Don Dunstan have shared much in common – their courage, leadership and vision for better futures and vibrant communities. Their life-long commitment to justice and social change is beyond question. They are truly honourable people whose legacies will be enduring.

As is ever the case, between the asking and the giving, things change; even since supplying the Abstract for this speech, things have changed and moved on — not least the events surrounding the Indigenous round of the Australia Football League last weekend. But then again, some things haven't changed a bit.

In recent weeks I have been taken by an African-American phrase which I understand comes from Washington DC. It certainly has some religious overtones to it, but it goes along the lines of 'to tell the truth is to shame the devil'. And the devil that must be shamed may be many things. The devil may be in the casual racism of a football game, and the abuse hurled at our players. The devil may be in the measurements of outcomes, such as those around health, housing, education, employment, incarceration and the like. Or the devil may be in the consequences of those outcomes, such as is reflected in lives that are shorter, less productive, and less happy. And the devil, of course, is not just in the detail, but in how the detail is measured out in terms of who benefits, and those who don't. The truth can be a slippery concept, as the devil well knows.

For myself, the truth is grounded in my childhood and the sense of duty and obligation that has been drawn from personal experience. I was a direct beneficiary of the Whitlam policies that allowed us to go to boarding school under Abstudy, and for my mother to gain access to a university education as a mature aged student. My mother – who could be a somewhat fierce woman when the mood took her – was in the 1980s Director of the Centre for Aboriginal Studies at the Darwin Community College as it then was, and active in Aboriginal community affairs. My sister Ingrid and I were in our 20s, and mostly interested only with our social lives with little thought to tomorrow.

But for mum, tomorrow was a meeting at Bagot (a still impoverished and neglected Aboriginal community in urban Darwin) as part of establishing a combined organisations movement in the Top End. Mum had told us the night before that she expected my sister and I to attend this meeting despite our plans for a late night out – it was Saturday night after all! The next morning the old girl had a hissy fit insisting that we attend the Sunday meeting within the next half hour. As you can imagine, facing the prospect of a long, all-day meeting in the middle of a hot, wet season day in an un-air conditioned crowded room at Bagot was not pleasant – made even less so by the jobs

she, as Committee member, delegated to us in terms of organising the next meeting. It mattered nothing to mum that we were dying from a lack of water and the over-indulgences of the night before.

But for her, it was about 'giving back' to a community – in the broadest sense – from which we benefited, and to which we had obligations and duties. The idea of 'commitment' was ingrained in us by a mother whose passion for the community had always been paramount.

That 'commitment' has – in some ways unfortunately – been something my children have had to put up with. As Lowitja may recall, for them it meant sleeping on floors in Canberra's Parliament House during the Wik Native Title debate. It was a parliamentary experience a far cry from that you might see on television. There were death threats delivered to my home, and windows smashed in our offices. It was not good – I recognise – for our kids to go through such experiences. I wonder, sometimes, whether I have infected them with the same sort of 'commitment' delivered through my mother now that my girls seem to have become what some might describe as 'bleeding hearts'.

I must also acknowledge the long-term support and dedicated commitment of many non-Aboriginal people – health professionals, lawyers, anthropologists, accountants and the many other individuals who work with us and our organisations. Their contributions have made it possible for the Aboriginal community-controlled sector to deliver much needed services across the country.

So I am now back in Darwin, and still facing the truth of a society that in many, many ways has not delivered the benefits promised at that meeting in Bagot so many years ago. We still live in a community in which Aboriginal people experience outcomes that lag far behind that of the rest of society. Perhaps a rational person would have given up a long time ago. But I am not a rational person, and the truth remains as slippery as ever.

I am currently the CEO of Danila Dilba Health Service in Darwin, which has not long ago celebrated its 20th anniversary. We are an Aboriginal Community Controlled Health Service – and part of a broader, national movement of community-controlled comprehensive primary health care that had its origins in Redfern some 42 years ago.

At the core of what we have achieved over those many years has been an aggressive approach to basing our work on evidence. Our accumulated achievements have always been based on what works – in clinical as well as social practice. At the heart of what we have strived to achieve is the development of a practice – both clinical and social – that displays our strong and central commitment to comprehensive primary health care.

This model was codified at an international level at Alma Ata in 1978, and subsequently endorsed by the World Health Organisation (WHO) and the United Nations:

> Primary health care is essential health care based on practical, scientifically sound and socially acceptable methods and technology made universally accessible to individuals and families in the community through their full participation and at a cost that the community and country can afford to maintain at every stage of their development in the spirit of self-reliance and self-determination.

Primary health care is socially and culturally appropriate, universally accessible, scientifically sound, first level care. It is provided by health services and systems with a suitably trained workforce comprised of multidisciplinary teams supported by integrated referral systems in a way that:

- gives priority to those most in need and addresses health inequalities;
- maximises community and individual self-reliance, participation and control and;
- involves collaboration and partnership with other sectors to promote public health.

Comprehensive primary healthcare includes health promotion, illness prevention, treatment and care of the sick, community development, advocacy and rehabilitation services. So that's what we do, but how well do we do it? Is what we do any better than, say, than the conventional primary health care services supplied by a suburban GP?

The oft-touted 'Gap' between Aboriginal and non-Aboriginal health outcomes is no secret, and reflected in massive differences in life expectancy, infant mortality rates and the toll of chronic diseases. It's a story that tells – in dramatic terms – of fourth world outcomes in the midst of one of the most prosperous nations in the world. For example, kidney disease increasingly affects all Australians – from Darwin to Hobart, from Perth to Sydney. But, it is something that affects Aboriginal people in the Northern Territory – and in the traditional lands that lie just beyond our borders – at greater rates than anywhere else in the nation. In some areas, at greater rates than anywhere internationally.

However, some recent data shows that it is possible to close the gap in Aboriginal life expectancy – indeed according to a recent Council of Australian Governments Report 'only the Northern Territory is on track to close this gap by 2031 if the trend from 1998 to 2010 continues'. The major factor that has contributed to this improvement has been a large improvement in the health system – in which the Aboriginal community-controlled primary health care movement has played a major role – along with substantial increases in funding for primary health care from the Commonwealth.

There is a good news story here: there are real improvements now happening for Aboriginal people's health here in the Northern Territory, and they have been happening for over a decade. The headline improvement is that between 1998 and 2010 there has been a massive 26% decline in the Aboriginal adult mortality rate in the Northern Territory, which is a strong proxy for improved life expectancy. At the other end of life

for our people, childhood immunisation rates in the Northern Territory are among the highest in the nation, and indeed higher than in many non-Aboriginal communities.

Just to put this into context – the NT faces some unique challenges in terms of service delivery. Approximately 80% of the NT's Aboriginal population lives outside the main urban centres of Darwin, Katherine, Tennant Creek and Alice Springs. There are more than 650 discrete, geographically dispersed Aboriginal communities across the Territory. Despite these challenges recent data from the Australian Institute for Health and Welfare, documenting the 'Healthy for Life' program indicates that achievements in Aboriginal health in the Territory leads the nation – and indeed the data strongly suggests the community-controlled sector is largely responsible for those advances.

That is what the evidence is telling us, but these improvements, as tentative as they may appear, face major obstacles. The first is a fundamental issue – and one that is universal – and that is a consideration of the broader social determinants of health. The second is a disturbing cultural gap between our sector, and that of the bureaucrats and politicians and non-Aboriginal (NGOs Non-government organisations/not-for-profits) that interact with Aboriginal communities and organisations.

First things first. The health gains, and apparent closing of the gap, may well prove transitory. In other words, we fear that the gains in life expectancy may well plateau in the near future. The evidence strongly suggests that health interventions can only account for about 30% of differences in health outcomes unless the social determinants of health are confronted.

To quote a key document produced by the Aboriginal Peak Organisations Northern Territory.

The overwhelming body of evidence of the social determinants of health shows that our health and wellbeing is profoundly affected by a range of interacting economic, social and cultural factors. Key amongst these are:

- Poverty, economic inequality and social status;
- Housing;
- Employment and job security;
- Social exclusion, including isolation, discrimination and racism;
- Education and care in early life;
- Food security and access to a balanced and adequate diet;
- Addictions, particularly to alcohol, inhalants and tobacco;
- Access to adequate health services; and,
- Control over life circumstances.
- Psychosocial factors, particularly stress and control, are critically important.

Put simply, the less control we have over our lives the more stress we experience. Stress is associated with anxiety, insecurity, low self-esteem, social isolation and disrupted work and home lives. It can increase the risk of chronic illnesses such as

depression, diabetes, high cholesterol, high blood pressure, stroke and heart attack. This evidence demonstrates that there is a social gradient of health that reflects and affects our opportunities to lead safe, healthy and productive lives for ourselves and our children.

Control is also central to a further fundamental determinant of our health and wellbeing – that of culture:

- Culture is a universal aspect of human societies that gives meaning and value to individual and collective existence.
- In the context of societies with dominant and minority cultures, such as Australia, the widespread and persistent suppression of minority cultural practices causes severe disruption, making our communities susceptible to trauma, collective helplessness and endemic maladaptive coping practices.
- These can be passed on through the generations, as we have witnessed in relation to the processes of colonisation and past government policies such as those of the Stolen Generations.
- We believe that we are also witnessing the generation of such impacts in relation to ongoing government policies, for example, the misguided, coercive approaches of the NT Intervention and Stronger Futures.
- The final report of the World Health Organization Commission on the Social Determinants of Health highlighted the issues of cultural suppression and loss, social exclusion and lack of consent and control as key factors affecting Indigenous populations.

In other words, we may be at the limit of health gains in the Territory, that can be achieved by our sector alone unless we seek solutions to the social determinants of health. And that brings me to my second point about the cultural gap between our sector, and that of the bureaucrats, politicians and non-Aboriginal NGOs that interact with Aboriginal communities and organisations.

In less than a month, we will mark the sixth anniversary of the then Federal government's Intervention into Aboriginal affairs in the Northern Territory. The Northern Territory Emergency Response (NTER), as it was known formally, has had substantial impacts on our people over that time. It's not my task here to describe the detail of the Intervention, or indeed the ways in which the emphasis of the NTER has shifted somewhat with its re-badging as Stronger Futures.

However, what I will point out is that the six years of the Intervention process has had profound psychological impacts on our people over a very short period. Again, I'll make no judgement here on the NTER in itself, but make the following points.

First, the arrival of the Intervention was nothing if not dramatic, with the use of the army as a stark symbol of the determination of the national government in its actions. The army personnel involved were not armed, but it certainly engendered

considerable fear and anxiety in the early weeks of the Intervention, with at least some documented episodes of people heading bush, and away from larger towns and communities. People's places of residence – from towns and communities to small outstations – were, and still remain, 'prescribed areas'.

Second, the NTER saw the dismantling, over a short period of time, of a significant number of Aboriginal organisations and structures which had been evolving over many years. This included bodies such Aboriginal Community Housing organisations but also the network of community government councils which were subsequently dismantled under Northern Territory Government restructuring of local government, from some 60-odd local government bodies to eight shire councils. Parallel with the abolition of these local community government bodies, many communities saw the introduction of federally appointed and controlled Government Business Managers – now billed as Government Engagement Officers. (The Government Business Managers – or GBMs – were soon nicknamed Ginger Bread Men by wits in the communities. Their replacements are now known as Geckos.)

Third, employment mechanisms, particularly through the Community Development Employment Projects workforce, were shattered, and now only exist in a rump form, with the current intention to have CDEP be allowed to wither away. Whatever one thinks of CDEP as a mechanism for people to engage in the labour market, it is difficult to imagine that such a move from work to welfare in a context where there is only a tiny market economy will be of benefit in the short term.

Fourth, the introduction of mandatory, universal income control, and the introduction of the Basic Card – although welcomed by some welfare recipients – has nevertheless had a major impact on the ways in which people use and control their money.

Fifth, the NTER – ostensibly introduced in the name of child protection – effectively demonised Aboriginal men and women. It universally painted men as violent drunks, paedophiles and consumers of pornography, and women as passive, helpless victims.

Sixth, the introduction of alcohol controls across all prescribed areas of the Northern Territory has affected all local mechanisms – legal and informal – over alcohol control. Again, while the new controls have been welcomed in some areas – along with an increased police presence through the so-called Operation Themis – there have been unintended consequences.

Many communities had voluntary alcohol restrictions in place for years prior to the Intervention. The hundred or so locally initiated 'dry areas' were abolished in favour of blanket restrictions that have driven drinkers into unsafe drinking behaviours in towns and drinking camps.

Finally, there was a substantial – thus far largely unrecorded and unremarked – impact on the working lives and careers of Aboriginal and non-Aboriginal people across many work places and professions.

Take, for example, those in the primary health care setting of regional and remote health clinics. The massive expenditure on child health checks, operationalised through doctors and nurses recruited from interstate who had no or little experience of the north, carried with it an explicit condemnation of those health professionals such as Aboriginal Health Workers and nurses who had been working in difficult and under-resourced situations – often for decades. It carried with it the message that they had failed to detect child abuse, and failed to deliver health services to children and others in their communities. For many, the psychological impact has been devastating. In effect, they were being told that their careers had been rubbish.

And it is that final point that I wish to raise – although I see no ready solution. The psychological impact of the NTER has gone by almost completely unnoticed and, as is the way of these things, is likely to play out its effects over many years. It will affect many people over a long time. Given the thus far marginal benefits that many have experienced flowing from the NTER, we may yet see effects on people's emotional well-being that could be deleterious. Only time will tell – and thus far I see no attempts to deal what could be looming problems for a great many people.

In other words, while considerable money is being spent – some very well, some less wisely – remarkably little attention is being paid to the emotional and social impacts of the NTER and the coming program of Stronger Futures. While much is made in the corporate and public service worlds of 'change management', we don't see much in the way of fostering change management in the Aboriginal communities and organisations so profoundly affected by the massive disruptions of the last half decade.

As I mentioned, one of the key 'disruptions' of the Intervention has been to the viability of Aboriginal organisations in the Northern Territory – but this has not been an artefact of the Intervention alone. In 1996 the Commonwealth Government dealt a half billion dollar cutback to ATSIC. The first programs to go from a male-dominated Commission were many outstation resource centres, along with Women's programs. The abolition of ATSIC itself in 2004 accelerated what APO NT in an ongoing research study has described as 'the decline and decline' of Aboriginal organisations in the Northern Territory. By the time the Intervention arrived on our doorsteps, the rot had well and truly set in. While the outcomes of that research have not been finalised, the strong evidence is that the number of organisations has dropped markedly, and the capacity of remaining organisations has been dramatically compromised. What this has meant is that, with the exception of Aboriginal health services, land management bodies and art centres, Aboriginal community-driven service delivery has in many parts of the Northern Territory simply disappeared.

In its place – and this has accelerated dramatically under the Intervention – has been a rapid growth in the involvement of non-Aboriginal NGOs in service delivery to our people. Many millions of dollars has gone into resourcing what have been dubbed

NINGOs – or Non-Indigenous NGOs, or BINGOs – or Big International NGOs. So what has all this meant?

First, Aboriginal control of service delivery in many areas has withered on the vine. Despite jurisdictional, national and international evidence that community control over service delivery achieves better results, with control being a key element in the social determinants of health, for example, we have gone backwards.

Second, the massive expansion of NGO involvement in service delivery – often undertaken with scant or non-existent evidence bases – has added to this acceleration in decline of community capacity.

Third, and perhaps more importantly, it is a process which has allowed government agencies to quarantine themselves from what they too often ascribe as 'risk' in funding Aboriginal organisations. The agency's response has all too often been to protect themselves and their political masters by taking the apparently safe way out, and hand the resources across to the BINGOs and NINGOs, whether the programs they run are effective or not.

We are all aware of the bureaucratic and corporate mantras of 'risk management' and 'risk aversion'. They are not necessarily bad ideas in and of themselves, but what has developed is not just 'risk aversion', but what should be termed 'the doctrine of risk intolerance'. By this I mean that nothing is done, or can be done, that might in any way shape or form come back to haunt politicians or bureaucrats at a Senate Estimates hearing, or their state and territory equivalents.

It is important that Aboriginal community-controlled organisations critically review and strengthen our management and governance arrangements. We need to lead and initiate reforms that will ensure that community controlled organisations are viable, dynamic and efficient, capable of delivering the best possible services to our communities.

Which brings me back to 'the devil of the detail', and how the detail is measured out in terms of who benefits, and who does not. A direct consequence of risk intolerance is that there can be no innovation or change, especially innovation or change that threatens the cosy relationship between governments and public servants, let alone the easy comfort of dealing with NGOs that are headquartered in the southern cities. Risk intolerance, in fact, is a long distance from risk management – and that is where the devil in the detail lies.

The advances in delivery of Aboriginal comprehensive primary health care that I have outlined have not occurred in a climate of risk intolerance. These advances have occurred first, because they have been based on increased resources being made available to community-controlled health services. Second, they have occurred because the activities of those services have been strongly grounded in the evidence of what works well, and what does not. And third they have occurred, because those

services have developed innovative and progressive approaches across both health system design and delivery.

A key part of this, for example, has been in the development and use of Clinical Information systems. These have been used, even in our most remote services, in individual patient monitoring and recall systems, as well as the development of public health data that informs our health services in their day-to-day operations as well as in setting local, regional and jurisdictional primary health priorities. It is no accident that, as I have mentioned, our childhood immunisation rates are among the best in the nation.

Increasingly, this data is being used at regional levels. For example, one region of the Northern Territory, in sharing data across a number of clinics, detected a worrying spike in childhood anaemia – which in turn has led to a determined focus on the condition among the kids of that region. This small example demonstrates that our sector has fostered innovation and change. None of this would have occurred in a climate of risk intolerance – indeed the real risk of childhood anaemia may well have gone unnoticed, with obvious consequences. The devil really is in the detail!

So what I am calling for is a fundamental change in the relationship between Aboriginal service delivery in the Northern Territory and elsewhere, and the politicians, bureaucrats and NGOs who are involved in the process. I am calling to heal the faultiness – the 'tighteners' and 'straighteners', and the inefficient, ineffective competitiveness that has developed between these groups. Increased monitoring, reporting and rigidity associated with grant management does not ensure better use of resources and improved accountability – it simply increases the costs of delivering the service.

In the late 1990s and early 2000s, there was a significant expansion of Aboriginal community-controlled primary health care in the Northern Territory with the establishment of the Katherine West, Tiwi and Sunrise health boards. These services came about not because of Aboriginal-specific funding, but through innovative – dare I say risky – approaches contained in what were known as Co-ordinated Care Trials. Each of these organisations ran trials that were measurably very successful – and indeed in evaluations of the Co-ordinate Care Trials, were far more successful than similarly funded trials run by non-Aboriginal health services. The measure of that can be seen in that two of these health services – Katherine West and Sunrise – still prosper, and deliver high quality services to their people.

However, one service – the Tiwi Health Board – failed. It did not fail because it was not delivering high quality services, but because of financial mismanagement of which the Tiwi people were largely ignorant of, and certainly not responsible for. The reason why the Tiwi Health Board was dismantled was because of risk intolerance by governments of the day – from both sides of politics – that were unwilling to continue

down the path of community control because of the risks it might engender to the bureaucrats and politicians responsible for what occurred. It is no accident, in my view, that the investigative report into the Tiwi Health Board collapse has *never* been made public.

What the events surrounding the collapse does say is that governments have been risk intolerant ever since to actively encouraging and facilitating community control since then. In the last decade there has been only one new community controlled health service established in the Northern Territory—and it is still a significant distance away from being an active service deliverer; and in the last decade there have only been two remote clinics handed across to community control.

What has changed is risk intolerance. In the development of Tiwi, Katherine West and Sunrise, both Commonwealth and Territory public servants were actively engaged in finding solutions wherever obstacles arose, and were enthusiastically engaged in innovative approaches to change. That spirit must be revived if we are to improve health outcomes.

During that same period, to the extent politicians were aware of developments in community control at all, they were supportive of such initiatives. In a little known episode in the late 1990s it was a Northern Territory CLP health minister, Steve Dunham, who directly intervened in the successful development of the Sunrise Health Service in the face of bureaucratic obstruction. In other words, it can be done. The politicians and public servants can be agents of innovation and change if they abandon risk intolerance.

Similarly, the response of NGOs to the last decade or so of reaping the benefits of government funding into Aboriginal service delivery must also change. Both I in my former role as Co-ordinator General in the Northern Territory, along with my Commonwealth counterpart Brian Gleason, strongly focused on this trend, and the deleterious impact it was having on Aboriginal community and organisational capacity.

More importantly, the Aboriginal Peak Organisations Northern Territory, in partnership with the Australian Council of Social Services, Northern Territory Council of Social Services and National Congress have developed a set of key principles that will guide participating NGOs in their relationships with Aboriginal service delivery. These principles were developed as an outcome of a major meeting of local, national and international NGOs held in Alice Springs in February this year, and have now been distributed for endorsement within the NGO sector.

In short, these principles cover principles of not competing with Aboriginal organisations for funding and resources; in building independent capacity in Aboriginal organisations that they partner with; and in having an exit strategy to allow Aboriginal organisations to take over service delivery. I am told that, at the end of this week, some major NGOs will be announcing their endorsement of the APO NT principles at the

NTCOSS annual conference. In other words, this can also be done.

Risk intolerance cannot be part of Closing the Gap. The public sector, and their political masters, must engage with Aboriginal organisations in a renewed spirit of innovation – and the capacity to take the occasional risk that was seen with the establishment of Katherine West and Sunrise. This means a structural reform in government approaches to Aboriginal organisations and communities.

I am tired of the media and public commentary that is of the view that the only Aboriginal people with intellect and ideas are those with a public profile – profiles which those same media outlets and public commentators have created. It's another form of risk intolerance – you get the views that you have cultivated and expect. It is a disservice to those who contribute daily at the coal face of service delivery. It is a disservice, as well, to the notion of working from an evidence base, and analysing what works, and not what opinion leaders think might work. For example, early childhood development and well-being has been at the forefront of concern within the Aboriginal community-controlled health movement for decades, along with issues such as child neglect and abuse. Aboriginal health services have been campaigning for increased resources many, many years before the Intervention.

But instead of investing in what we know works, such as the nurse home visitation program, the Intervention saw an army led home visitation program. Instead of providing resources for parenting and family programs, which we know work, at far greater cost we have politicians pushing for compulsory adoption of our kids. Instead of controlling the supply of alcohol through mechanisms that are internationally proven, such as floor prices on alcohol, we have so-called leaders who tell us that grog and gambling should be protected as an integral part of our Territory lifestyle.

I said at the beginning of my remarks this evening that 'to tell the truth is to shame the devil'. I'm not getting all religious on you – don't worry – but telling the truth is not the *full* story. There is also the Ninth Commandment about not bearing false witness – in other words – not lying.

In our dealings with politicians and public servants, falsehoods are too often the order of the day, and therein lies one of the major fault lines in improving Aboriginal health. We have to be honest with each other, and not hide behind the doctrine of risk intolerance. If we are to achieve real change, we must act on the evidence – in other words the truth of what works, and what does not.

But, as I said, the truth is a slippery beast.

Thank you.

2014

Rights, Recognition and Reconciliation

PRESENTED BY PROFESSOR PATRICK DODSON

Ngaji gurrjin. We are meeting tonight on the traditional lands of the Kaurna people. I begin, in the ancient and enduring custom of this land, by acknowledging the traditional owners and by paying my respects to your elders and ancestors. I offer my thanks for a warm and generous welcome to your country and I acknowledge your lasting custodianship of it.

I am honoured by the invitation to deliver this year's Lowitja O'Donoghue Oration. I thank Lowitja herself, the Don Dunstan Foundation and the University of Adelaide. I also thank each of you who have made the time to come to this event or to tune in to a broadcast.

I acknowledge: Uncle Lewis O'Brien, Kaurna Elder; Dr Lowitja O'Donoghue; His Excellency Rear Admiral Kevin Scarce, the Governor of South Australia, and Mrs Scarce; Senator Nigel Scullion – the Federal Minister of Indigenous Affairs; Ian Hunter MP – the South Australian Minister for Aboriginal Affairs and Reconciliation; Former Premier and State MPs Lynn Arnold, Greg Crafter and Anne Levy;Professor Michael Barber – the Vice Chancellor of Flinders University; Professor Denise Kirkpatrick – representing the Vice Chancellor of the University of Adelaide; Professor Peter Buckskin and Robyn Layton QC – the co-chairs of Reconciliation SA; The Very Reverend Frank Nelson – Dean of St Peter's Cathedral; Professor Lester-Irabinna Rigney, representing the Deputy Vice-Chancellor and Vice-President (Academic) at the University of Adelaide; Associate Professor Veronica Arbon, director of the Wirltu Yarlu Aboriginal Education Unit, The University of Adelaide. Daryle Rigney, Dean, Indigenous Strategy and Engagement Flinders University.

As I began to prepare some thoughts on what I might say to you tonight, the seasons up north were turning. Yellow flowers were blooming, the long grass was beginning to dry and die off, signalling the salmon were running, and the set of tasks and obligations for our people in managing country ticked over into the next part of the cycle, the season of Wirralburu.

Such management of country is guided by a deep knowledge of the land that has sustained civilisation in the harshest continent on earth over millennia – by sophisticated and clever design, rather than any imagined fluke or coincidence. And yet regrettably many Australians remain less than familiar with stories like this of our nation's origins, and of the remarkable achievements of the first Australians. I suggest that one of the underlying reasons this unfamiliarity persists is in part because modern Australian's founding document, the Constitution of Australia, continues to remain silent about this history of occupation.

So tonight I want to speak to you about the constitutional recognition of Aboriginal and Torres Strait Islander peoples, and the once in a generation opportunity that we have to address this silence.

I want to talk a little about the recommendations of the Expert Panel and urge our

political leaders and the committees charged with deliberating further on the model of recognition and assessing public readiness to be bold, and to have courage and confidence in the Australian people. I ask that they do not give us cause to walk away from this moment of promise.

I also want to put the struggle for rights and recognition into some perspective and acknowledge the dedication, leadership and resilience of my fellow Aboriginal and Torres Strait Islander Australians, whose determination has brought us this opportunity at long last.

I want to speak briefly to the handful of doubters who seek to bring fear where there is need for none. And I want to recognise the growing movement of mainstream Australians who understand the rareness of the opportunity before us, and who are working together for this chance to make Australia a better place for all of us. One that will improve our international standing and respect if we get it right. No doubt our derision if we don't.

On Rights

In many respects, Lowitja O'Donogue's life reveals and reflects a little of our Nation's evolution. Taken from her Yankunytjatjara mother as a two-year-old she was raised in a Children's Home.

There was time spent as a domestic servant for a family with six children before blazing a trail into the world of nursing to become one of the first Aboriginal nurses in South Australia. She helped to push open many doors that had been shut to Aboriginal people, through activism in the Aboriginal Advancement League and as part of the movement of black and white campaigners who gave us the resounding 1967 Referendum victory.

A long and distinguished career in public service would follow, accumulating enormous public regard and recognition. She would lead landmark negotiations on native title and chair ATSIC; become an Australian of the Year, a National Living Treasure, and an Order of Australia amongst her many honours. In time, too, would come a reunion with the mother who had yearned for her through all those lost years, and whose language and country and culture Lowitja was denied in that long and painful separation.

Hers is a story that should remind younger generations of Australian about the injustices and exclusions of law and policy, and the prejudice that Aboriginal and Torres Strait Islander people have endured in our own land. It should also spur them on to question the unjust foundations for such laws and policies so they might work to make Australia a better place.

Equally, it should remind us of the determination, courage and perseverance of the many who worked to create a better future, a more just future, for our people

and our nation. And it gives us a glimpse of how we have worked methodically and constructively to help the country take each next step forward.

Discipline, stamina and resilience are required to achieve outcomes of great moment. In this, history can be our guide. Each of those watershed moments of the last century – the Day of Mourning in 1938, the Yirrkala bank petitions in 1963, the Gurindji walk-off of 1966, the Referendum victory of 1967, the *Northern Territory Land Rights Act* of 1976, the Royal Commissions into Aboriginal Deaths in custody, the 'Bringing Them Home' Report on the Stolen Generations, *Mabo* and – and the 2008 Apology – each of them came after sustained and resolute effort by our own leaders and by non-indigenous leaders who stood with us. None of these events by themselves resolved every issue that confronts our people. But each of them took us a step forward, so we could then contemplate another.

Don Dunstan's personal story reflects another part of this jigsaw of progress. For in his powerful legacy as a social reformer, whether it was campaigning for justice for my friend Max Stuart, advocating alongside Aboriginal people for land rights in South Australia or supporting the advocacy of the 1967 Referendum campaigners, he remains fondly remembered by many. Personal courage and leadership are always associated with his legacy.

It is also heartening to watch the passion and commitment of the next generations of young campaigners for this recognition Referendum – younger leaders like Tanya Hosch and Jason Glanville and Shannan Dodson along with Charlee-Sue Frail and Pete Dawson and all of their many contemporaries who are helping to build the movement of recognition.

On the walls of our Yawuru office hangs a series of art panels from an exhibition called: 'Opening the Common Gate: Challenging the Boundaries in Broome'. The term common Gate referred to a fence line on the outskirts of Broome that was used to keep cattle out of the town, but following the passing of the 1905 Aborigines Act was used as a physical boundary to keep 'natives in law' out of the town.

This exhibition was developed to commemorate the 40th Anniversary of the 1967 Referendum, and tells personal stories of local people's experience with laws and policies that sought to segregate, marginalise and exclude them. This segregation is explicit in a 1928 map of Broome, which is reproduced on one of the exhibition panels. This map shows the demarcated zones where people of different nationalities could live, with each house colour-coded according to the race of the occupants – Blue for Whites, Green for Aborigines and 'half-castes', Red for half-castes, Asiatics and 'FB's (for 'full-bloods') and Yellow for 'Asiatic only'. Underpinning this formalised discrimination in Broome was the White Australia Policy and the Aboriginal Protection policy, both of which were informed by the racist thinking of the time. This happened not just because it was the policy of the era, but also because notions of race that informed the

drafting of our Constitution gave confidence to all those who pursued such policies.

As Australians we still live with the original dispossession of Aboriginal and Torres Strait Islander peoples and the devastating impact of colonisation on Indigenous peoples of this continent.

We live with a history that has involved systematic efforts to wipe out the rich cultures and languages that existed before any permanent European presence. The devastating death tolls of the frontier wars and the forced exile of Indigenous people from their spiritual and ancestral homelands; the displacement and destabilisation of families; and the efforts to wipe out traces of our very being, were part of the settler history of this country.

People of my parents' generation lived with formal discrimination and servitude; they were treated as second-class citizens on their own lands and had their lives subjected to intrusive administrative surveillance and control.

The disadvantage and dependency that some of our people experience – the chronic poverty, the poor health, the substance abuse, family violence and high incarceration rates – cannot be divorced from this history. Our disadvantage is not ahistorical – it has a history of structural violence – which we must deal with in order to be liberated from the past.

This has always been part of the challenge of the Reconciliation – truth, mercy, justice, forgiveness – each goes to the hard work of building peace and reconciliation. Each requires a personal decision – a choice – to acknowledge and repair the wrong, to re-build trust, to let go of the grievance and re-set the relationship.

I speak of these heart-breaking parts of our national story not to dwell on the past or become stuck in it – but so we might go forward – with an understanding of why race and discrimination should no longer be part of our legal framework – and why meaningful Recognition of Indigenous people is a cause worth fighting for.

On Recognition

I was part of an Expert Panel established by the Gillard Government in 2011. The Expert Panel comprised of 22 Australians from diverse backgrounds and political persuasions and was co-chaired by Mark Leibler and myself. I want now to outline some of our recommendations.

The Expert Panel's task was to consult on possible options for Aboriginal and Torres Strait Islander peoples of Australia to be recognised in the Australian Constitution. We had one year to report back. During that time we consulted as widely as we could, received numerous submissions and sought extensive advice from Indigenous leaders and constitutional law experts. We also gathered data through research, surveys and polling.

When formulating our recommendations, the Panel were guided by four principles. These principles were that each proposal must be technically and legally sound, and be

capable of being supported by an overwhelming majority of Australians from across the political and social spectrums. In addition, they had to be of benefit and accord with the wishes of Aboriginal and Torres Strait Islander peoples, and contribute to a more reconciled nation.

The Expert Panel recommended five specific changes to the Constitution. I will briefly outline them, and then talk about some of the options we recommended. I urge those who have not already done so to read our Report. It is on the 'Recognise website' and there is a plain English version.

The Panel proposed changes that entail the removal of two sections and the insertion of three sections to the body of the Constitution.

- Firstly, we recommended the removal altogether of section 25 of the Constitution. This is a section that still enables the states to disenfranchise people on the basis of race.
- Secondly, the Panel recommended the removal of section 51(26), otherwise known as the race power.
- Thirdly, the Panel recommended that a new power – section 51A – be inserted to replace 51/26. This new section 51A would contain a preambular statement and give the Commonwealth Parliament the power to pass laws for Aboriginal and Torres Strait Islander peoples.
- Fourth – the Panel recommended the insertion of a non-discrimination provision – section 116A. Such a provision would prohibit the Commonwealth, States and Territories from discriminating on the basis of race, colour or ethnic or national origin, but would still allow for laws to address the effects of past discrimination, to overcome disadvantage amongst a group of people, or to protect the culture or heritage of any group.
- The Fifth recommendation was the insertion of a new section 127A that affirms English as the national language of Australia and recognises Aboriginal and Torres Strait Islander languages as a part of our national heritage.

The Commonwealth Parliament passed the *Act of Recognition* in 2013 to ensure that this matter is progressed by Parliament within two years. The recommendations of our panel are now being considered by a committee of the Commonwealth Parliament, Chaired by Ken Wyatt MP with Senator Nova Peris as Deputy Chair. This committee is tasked with the responsibility of finalising the question or proposition to be put to Parliament in the form of a Bill, and then to the Australian voters by way of a Referendum.

The call for constitutional recognition of Aboriginal and Torres Strait Islander peoples is not new. Throughout the last century many Indigenous groups and leaders have noted the glaring omission in the founding document of our nation state. Most notable were the 1967 Referendum campaigners, who helped bring about one of the

most successful Referendums in our country's history. This was no mean feat, as a double majority was required – that is a majority of 'yes' votes by those eligible to vote in a majority of the states.

Australia does not have a very good record of voting 'yes' in a Referendum, with only 8 out 44 Referendums delivering a successful outcome. The 1967 Referendum was won with more than a 90% 'yes' vote, making it a great source of inspiration – a testament not only to the perseverance and hard work of those who campaigned for decades to bring about this reform; but to all Australians who voted overwhelmingly to end the constitutional exclusion of Aboriginal people from the national polity.

In this respect, I regard the 1967 Referendum as a pivotal turning point in the relationship between Indigenous and non-indigenous Australians – arguably one of first steps we have taken as a nation on the long journey toward reconciliation. While the 1967 Referendum addressed the provisions that expressly excluded us, it did not deal with the recognition of Indigenous peoples. Nor did it eliminate the potential for laws in Australia to be racially discriminatory.

Both section 25 and section 51(26) in their current form allow for the making of laws by reference to the concept of 'race'. Section 25 gives the states the ability to disenfranchise people on the basis of race. Even though there are consequences for the state in terms of their representation in the House of Representatives if they were to do this; it still remains that the Australian Constitution permits the states to discriminate against an entire race of people by excluding them from voting. By any standards, this is simply unacceptable.

When we turn to Section 51(26) we are confronted with the same potential for discrimination. The intent of this power was clear from the outset. As Sir Edmund Barton – the man who would go on to become Australia's first Prime Minister said in 1898, it was regarded as necessary 'to regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'. It is no surprise then that first Act passed under this head of power was the *Immigration Restriction Act,* an act that laid the foundations of the 'White Australia Policy'.

As it currently exists, section 51(26) allows the Commonwealth to make laws for people of any race for whom it is deemed necessary. Prior to 1967, Aboriginal people were expressly excluded from this power. In the main this was because Aboriginal people were regarded as being the responsibility of the States, rather than the Commonwealth.

Following the 1967 Referendum, the words prohibiting the Commonwealth from passing laws for Aboriginal people under section 51(26) were removed. This enabled the Commonwealth to use this head of power to pass national laws for us, and therein to assume greater responsibility for Indigenous affairs.

However, relying on the race power for law-making was not without concern.

During the parliamentary debate people like Sir Robert Menzies and Billy Snedden – both members of the Liberal Party – warned about the potential for unfavourable use of the race power in its current form if Aborigines were included. Billy McMahon argued it should only ever be used in a favourable manner, but we now know from the Hindmarsh Island Bridge Case there is no requirement for the laws passed under this head of power to be for the benefit of a group of people. This means that laws which have an adverse or discriminatory effect on a particular 'race' of people can also be passed.

It thus remains that in at least two important respects our Nation's Constitution wants for something imperative and fundamental. Firstly, it makes no reference to Indigenous people's occupation of this land prior to British settlement, and it contains anachronistic race provisions that do not reflect our modern values or our obligations under international conventions to eliminate racial discrimination.

To complete the work of those leaders of the 1967 Referendum we must ensure that the laws passed for our people cannot be for an adverse purpose. In order to do this we must deal with the race provisions once and for all, and eliminate race as a basis of law-making. Nor can we ignore the discriminatory potential of section 51(26). If we are to sever any future legal interpretation based on that abhorrent thinking about 'inferior or coloured races' we must consign the 'race power' to the dustbin of history.

That is why the Expert Panel proposed deleting the race power altogether, and recommend the insertion of a new head of power – section 51A. This new section would provide recognition of our unique status as the First Australians through the inclusion of a preambular statement, and give the Commonwealth Parliament the power to make laws with respect to Aboriginal and Torres Strait Islander peoples. The Panel also found a new head of power, such as the proposed section 51A, was necessary because repealing section 51(26) would have implications for the validity of legislation enacted previously under 51(26). This includes legislation like the *Native Title Act.*

With regard to a preamble, the Expert Panel took the view that a preamble of 'no legal effect' would not be in accord with the wishes of the majority of Indigenous Australians, and would likely be regarded as tokenistic and half-hearted. There were also a number of other issues to do with structure and content, which indicated that the proposition of a stand-alone preamble would not be straightforward. This is why the Expert Panel recommended that the preambular statement of recognition be incorporated into the new section 51A. The words proposed were:

> Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;
>
> Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

> Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;
>
> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

We also proposed that as a modem democracy our Constitution should provide a guarantee against racial discrimination. To that end, we proposed that a new Section 116A on non-discrimination should also be adopted. Such a provision would prohibit the Commonwealth, State and Territories Governments from passing laws that discriminate against people on the basis of their race, ethnicity or nationality. Such a guarantee is a feature of other constitutions, including both Canada and South Africa.

There is clear and compelling logic of how these proposals fit together as two halves of the whole – the recognition of Aboriginal and Torres Strait Islander peoples and non-racial discrimination against any citizen.

You can't have the recognition of Aboriginal and Torres Strait Islander peoples and then maintain the ability of the Commonwealth to racially discriminate against us.

The racial non-discrimination protection proposed in section 116A affirms the principle that all citizens of this country should be protected from laws that discriminate on the basis of race, ethnicity or nationality. In this regard, it is a protection for all – not just Indigenous Australians.

The proposal for a racial non-discrimination provision is not a one-step Bill of Rights. At the end of the day, our Constitution is not like the American Constitution. It is primarily concerned with setting out the powers of the Commonwealth Parliament, the Executive and Judiciary. In this regard, it says more about institutions and their powers rather than the rights of citizens.

Lowitja once remarked: 'Our Constitution says little about what it means to be Australian. It says nothing about how we find ourselves here, save being an amalgam of former colonies of Britain. It says nothing of how we should behave towards each other as human beings and as Australians.'

I also want to take the opportunity to say a few words tonight in that broader context of reconciliation about the proposed changes to the *Racial Discrimination Act* and to stand with the many Indigenous people, Jewish and the ethnic communities who have voiced such powerful and passionate objections. Perhaps it is easy when you haven't experienced racial abuse almost daily over a lifetime to think that the only solution needed to racial hatred is a debating society. Yet for every Australian who has known the experience of seeing or reading another human being's racist venom directed towards you – based on the colour of your skin or the ancestry you have – we know the damage it inflicts on us, and most heartbreakingly, on our children and

grandchildren. It can make us ill and sap our confidence. It drives us out of places and spaces where we have every right to learn and earn and live our lives like any other Australians. It is not a triviality.

We have recently seen the courage shown by Adam Goodes in confronting such racism, and the ability of these moments to unify all Australians in eliminating behaviour that is clearly at odds with our national character. We need the ongoing signal that is sent by the law, which says that some modest recourse should be available to any of us when foul racial abuse or hatred is directed towards us. Under the current laws, it's important to note that people can still say and do things that are racially offensive – so long as they also meet the test of doing so 'reasonably and in good faith' in a fair and accurate report on a matter of public interest or a debate on public policy. Free speech is not the problem, its expression in a responsible and respectful manner is what is important.

Keeping such modest protections is part of the greater national project of reconciliation, of helping us to live alongside one another with respect, with more cohesion and with empathy and humanity. Of appreciating our diversity of cultures and celebrating our common humanity rather than discriminating against another on obnoxious notions of race or out of some misplaced sense of superiority.

The recommendations of the Expert Panel need to be weighed fairly and honestly. We need to be able to carry the proposals for recognition and non-discrimination in great numbers, but we also need those tasked with deciding the proposition to be put to electors to deliver something worth campaigning for. If there is no attempt to deliver substantive reform that will be meaningful for Indigenous and non-indigenous Australians, we should not be proceeding to a Referendum.

I want to say to those men and women who are serving the nation in that task – and indeed to the Prime Minister and his Cabinet colleagues who will consider their draft proposal – that we should seek the best model and we should be courageous about it. Recognition of Aboriginal and Torres Strait Islander peoples goes to the heart of what type of nation we want to be. Are we people who shrinks from the uncomfortable truth of the past? Or a Nation that is mature and capable enough to address a wrong and make our Constitution something we and the next generation can take pride in.

The rest of us can play our part in that outcome by letting the political leadership know that there is support for meaningful, unifying and responsible reform. We can reassure them that we are ready to begin a new chapter. We need to make it clear to the whole world and to future legislators that we value our country's unique Indigenous heritage and traditions. We need to recognise the first Australians and continue down the pathway that will enable us to genuinely reset the relationship.

In order for this to be a powerful unifying moment, we also need to ensure that this is carried by the highest possible percentage of Australians with Aboriginal and Torres

Strait Islander support. But, all of the groundwork needs to be complete before a final date can be set for this Referendum. And this is where every one of us has to work hard and play a role. So tonight I ask you to apply yourself to building the groundswell of popular support further and deeper and wider among the Australian people. This will not happen without your active involvement, and the active involvement of many other Australians like you. I urge you to join the 'Recognise movement' at recognise.org.au, and add your name to the more than 185,000 Australians who have already registered their support for this Referendum. I ask you to talk about why this is important to you, wherever you go. Make clear your own aspirations – be informed, and familiarise yourselves with the Expert Panel's Report and its recommendations. Be on the record with your views to your representatives and institutions.

It is important to have a constructive debate and to consider carefully what the proposition means for us as a Nation. However, we should distinguish between those simply wanting to bring fear and division, and those that may have legitimate insights into how a head of power could achieve meaningful and respectful recognition of Aboriginal and Torres Strait Islander peoples.

It is important to remember that even in the lead-up to Federation, there were some who fretted and frowned and got themselves tied in anticipatory knots about the move to bring the colonies together into one nation. There were claims it could suppress wage increases. Claims it may lead to Melbourne becoming the national capital. Wild assertions that trade would 'not be allowed to follow its natural channels' and that Federation would 'lower the value of all property'.

When the *Mabo* and *Wik* judgments were handed down, we heard some ludicrous statements as well – that recognising native title would lead to people losing their backyards; that Native title would ruin the mining and pastoral industries and Australia would be divided forever. There were attacks on our High Court for passing such rulings. But twenty years have now passed and has the sky fallen in? In fact, some of the most vocal opponents of native title – the mining and pastoral industries – are now among the biggest supporters of reconciliation and have working relations with Aboriginal peoples. We need to consider any unintended consequences that may arise in advance. We need to be responsible and cautious, but we also need to be brave.

Symbolism over substance will simply not suffice. We must demand that the way forward be meaningful and just, not out of a sense of guilt but out of what we know to be right. This will be a moment of truth for us, and so we must insist upon the search for the highest truth to prevail in our seminal document.

Tony Abbott, just seven months before he became Prime Minister, had the measure of what this project meant for the country when he declared that without constitutional recognition of the fact that people were [initially living] here, Australia would remain 'an incomplete nation and a torn people.'

In recent decades, many other settler societies around the world have recognised Indigenous peoples or cultures or languages in their Constitutions. Canada, the United States and New Zealand have long-standing Treaty Rights. And in Denmark, Norway, Sweden, the Russian Federation, Bolivia, Brazil, Colombia, Ecuador, Mexico, the Philippines and South Africa, there are constitutional mentions or powers about some aspects of their nation's Indigenous cultures, tongues or people. This doesn't mean every issue that confronts these societies and their Indigenous populations has been perfected. But it has meant that there has been a time in the lives of each of these nations when each acknowledged that people were already living there at the time of settlement.

We should be striding together, neither one in front nor behind, but alongside each other to rectify what has long been an omission – that the modern Australian Nation-state of Australia is established on the lands of Indigenous people with a history of occupation that spans millennia. It's important to remember that before European arrival, Aboriginal and Torres Strait Islander peoples had both rights and obligations in our country. We had rights and obligations to manage and renew the land. We had trade rights. We had rights and obligations to practice ceremony and pass down the law of the land from each generation to the next. Rights to induct and educate our generations to become aware of their obligations and responsibilities. In all ways we were sovereign peoples of the ancestral lands and waters that we occupied. There may be those amongst the Aboriginal and Torres Strait Islander peoples who prefer to maintain a separate sovereign position. I understand this perspective and respect those views.

On the matter of Treaty – which is dear to the hearts and minds of many Indigenous people – the Expert Panel came to the view that this was a matter that required political resolution and negotiation first, a task that was simply beyond the terms of reference of the Panel. Constitutional recognition in this respect does not foreclose on sovereignty, treaty or agreement-making.

Opportunities to change the Constitution come along rarely. It is a chance for the people of Australia to come together knowing their sovereignty is not being challenged; nor is that of the Indigenous people. Constitutional Monarchy is not being overturned and the rule of law is not being changed. The Constitution tomorrow will still set out our policy and institutional arrangements.

On Reconciliation

The vision I hold is not one of separate existences but co-existence on principles of acknowledgement, respect, law and unity. As the Reconciliation Council's view spoke of – a united Australia that respects this land of ours, and values the Aboriginal and Torres Strait peoples.

In the early days of the Council for Aboriginal Reconciliation, we sought to help find common ground between people who had felt none before. On one trip, the late great Rick Farley from the National Farmer's Federation and I brought together the cattlemen of the Kimberley to try and help them bridge the divides. The white stockmen complained about Aboriginal people camping on properties leaving gates open. The Aboriginal stockmen took issue with being locked out of their own traditional lands, and with being disrespected. It took a while before we could find the unity of common ground. But find it they did.

As these men talked, they realised what it was that united them – rather than what divided them. It was a common pride and stake in the iconic industry they all shared. And when they came together to talk about how they could work together in that way, it helped to take many of the other 'burrs out from under the saddle' of their relationship. That is not to say that everything was perfect. We are a work in progress, after all, as human beings and as a nation. We come from diverse backgrounds and understandings, but we are all Australians. We have to aspire to bring the best out of each other on the basis of mutual respect and acceptance. Less than that and it becomes very undignified.

And so I return to where I began – to the task of finding our common ground ever more firmly as a Nation. If the country can come together around our Indigenous heritage, and our ongoing place in the heart of the national identity – no longer forced to live constitutionally outside the Common Gate – we can then responsibly look to building a better society.

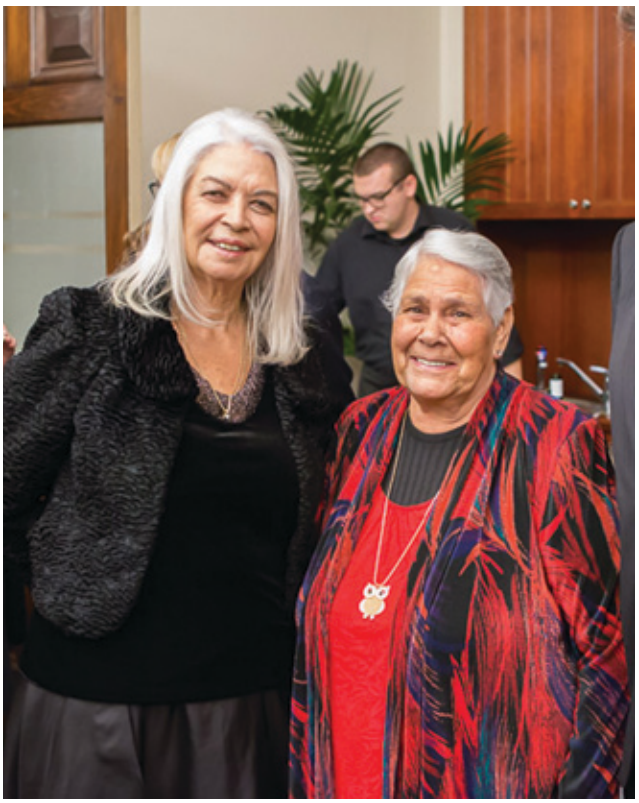
It will be an honouring of those Australians who sought constitutional change for the better in the past. A service to ourselves and each other as an act of unity and reconciliation. A service to future generations of Australians. An opportunity to repudiate *terra nullius* and co-create a new narrative for the modern Australian-nation-state; and a moment of truth for all of us to celebrate with great pride.

Galiya

2015

Our Constitutional reform dilemma: to win or to delay?

Presented by Professor Marcia Langton



I acknowledge the Kaurna traditional owners, their elders past and present. I also acknowledge the amazing woman after whom this Oration has been named, Lowitja O'Donoghue, and her profoundly important contribution to the nation, to Indigenous affairs, to Indigenous health reform, and I especially want to record my personal appreciation for her leadership of our country.

I also acknowledge the great Don Dunstan, former Premier of this State. He was one of the supporters of the 1967 Referendum question to remove racially discriminatory clauses from the Constitution. He was a great reformer and supported many bills and initiatives that improved our lives.

It is a great honour to present this Oration to Lowitja, and in memory of Don Dunstan.

It was the great Arnhem Land leader, Galarrwuy Yunupingu, the elder of the Gumatj clan in North-east Arnhem Land, who, in 2007, raised with me his desire to see Aboriginal people recognised in the Constitution. He was concerned to ensure that the Yolngu people have a rightful place in the nation. Noel Pearson came to visit and together we talked about how this might be achieved. As far as I know, Noel had never met Galarrwuy face-to-face, but had followed his activities because for much of his adult life Galarrwuy had served as Chairman of the Northern Land Council, which was in its day a very powerful organisation. Galarrwuy was the interpreter for Justice Woodward, the Land Rights Commissioner appointed by Whitlam, and learnt from a young age about clan matters, the cultural history, heritage and landscapes. Galarrwuy was trained by his father to be the leader of the clan; his father was Mungurrawuy, and Mungurrawuy and others took the first Native Title case in Australia, *Milirrpum v Nabalco*, the Australian case that laid out the flawed legal fiction of *terra nullius*. Native Title was later recognised in 1992 by the High Court in *Mabo* Number Two.

Noel is much younger than Galarrwuy, and believed, incorrectly, that Galarrwuy was on the left and himself a man of the right. Neither is true, and as each of them is a problem-solver with little regard for shibboleths of the parties if they do not advance Aboriginal interests. In this regard, they are very similar in their thinking and they came to understand that about each other, but it took some time. Several Aboriginal leaders are like that, eclectic in their policy stances, and always problem-solving with the best thinking, whether notionally of the 'left' or the 'right.' This is because of the terrible impact that libertarian views and the belief in 'racial exceptionalism', especially in relation to economic participation, alcohol, drugs, and violence, have had on our population.

Standing on the sacred land at Gulkula in Galarrwuy's estate, Noel picked up a very large branch and asked Galarrwuy to hold the other side of it and push it with him, and they pushed it backwards and forwards and Noel said: 'This is what we have to do; you have to push from the left and I have to push from the right, and then we'll win –

arrive at a solution that combines our ideas.' This idea of the dialectical relationship and its effect in allowing creative synthesis of apparently conflicting ideas has long been a source of intellectual inspiration in Noel's work. Noel thus began his friendship with Galarrwuy. Following this, at my instigation, Galarrwuy gave two lectures at the University of Melbourne on this very topic of constitutional recognition of Indigenous Australians and how the future of Australia might accommodate us with honour. He envisaged a future Australia in which our legal, constitutional, economic and cultural aspirations could survive and flourish. The fates favoured his ideas during these final months of the Howard Government. His visit to our University House staff club coincided with Kevin Rudd's visit and a brief discussion in the entry hallway sparked some interest from Rudd in the challenge of accommodating Aboriginal concerns. Jenny Macklin who later became the Minister for Indigenous Affairs under the Rudd and Gillard governments attended one of his lectures, and she was very interested in what Galarrwuy had to say. Some years later, Prime Minister Gillard appointed an Expert Panel to investigate the recognition of Indigenous Australians in the Australian Constitution.

I will summarise the Expert Panel's recommendations, Noel Pearson's proposition and Frank Brennan's proposition. But first, let me make it clear that I believe that any idea of race and the ability of the Parliament to use race in its law-making should be removed from our Constitution. Because of the way that the notion of 'race' has been historically applied to Indigenous people in Australia, our rights to peoplehood have been undermined. I believe that our peoplehood should be recognised.

I am arguing that defining Aboriginal people as a 'race', as the Constitution does, sets up the conditions for Indigenous people to be treated, not just as different, but exceptional, and inherently incapable of joining the Australian polity and society. The history of legislation and policy applied to Indigenous Australians demonstrated this in a number of ways: not citizens until after the 1967 Referendum; the shameful effects of the nearly half-century old Community Development Employment Program (a work-for-the-dole scheme); the Northern Territory Emergency Intervention; and this is to only name a few of the exceptionalist initiatives that have isolated the Aboriginal world from Australian economic and social life. In turn, many Indigenous Australians have developed a sense of entitlement, and adopt the mantle of the 'exceptional indigene' – the subject of special treatment on the grounds of race. My experiences across Australia during the past 50 years have impressed upon me how this exceptionalist status, to which many Aboriginal people have ascribed unwittingly, involves a degree of self-loathing, dehumanisation, and complicity in racism.

As the exotic, Aboriginal people are not required to be normal, such as attending school regularly, or competing in a meritocracy (except in the AFL and NRL and some other sports codes). In the slowly building campaign for constitutional recognition

of Indigenous Australians, it is vital that we broaden the understanding that the constitutional tradition of treating Aborigines as a 'race' must be replaced with the idea of 'first peoples'. By this I mean simply what is proposed in the UN Declaration on the Rights of Indigenous People. It recognises that: 'Indigenous peoples are equal to all other peoples, while recognising the right of all peoples to be different, to consider themselves different, and to be respected as such. The very next part of the Declaration states:

> Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.

The problem is not 'race', but racial discrimination. Indigenous people define themselves according to their lineages and cultures that tie them to places and ways of life that existed long before colonisation. If we accept these principles of defining the status of Australia's Indigenous people, then the power that 19th century race theories have had on our society through our Constitution and scores of legislative acts becomes null and void. Not immediately, of course, but over time. This would not be a simple task, I need to say.

Since the Expert Panel recommendations were presented to Prime Minister Gillard and published, Prime Minister Abbott has made an unequivocal commitment to supporting recognition of Indigenous Australians in the Constitution, several arguments have been mounted against those recommendations, and a 'No' case has been threatened. The question is: 'what would constitute 'recognition' and what would 'recogniton' mean?' However, before we become optimistic, let me also warn that if a 'No' case is formalised, funded by the Government, and included in the question to be put to a Referendum, constitutional recognition of Indigenous people will almost certainly fail. In the history of Australian Referendums, all those questions which have had a formal 'No' case have been voted against by the majority of Australians.

Ours is the most difficult Constitution in the world to change. Not only do a majority of voters have to vote positively for a question, put in a Referendum to Australian voters, each Australian State Parliament must vote in the affirmative and in the majority for a constitutional change. There is no other constitution in the world that is so difficult to change as the Australian Constitution. And as a result only eight out of 44 Referendum questions in Australia's history have succeeded.

Some of us who served on the Expert Panel on Constitutional Recognition of Indigenous Australians are concerned to ensure that, when the proposed Referendum question is settled, we have a strategy to avoid failure at the Referendum. If this question fails at a Referendum proposed to be held in 2017, it will not be supported by

any government in the future. A negative vote would completely rule out any question of this being taken up again in our lifetimes. Those of us who have considered this matter would rather leave it to another generation than have a failure now.

The exclusion of Aboriginal people from the nation's Constitution took place in the nineteenth century. In the 19th century, the Federation Movement began with a speech by Henry Parkes, the Premier of the Colony of New South Wales. In 1889 at Tenterfield he called for the Colonies to unite and create a great national government for all Australia. At that time Australia was six colonies. All Australian colonies reported back to the Home Office in London on matters of State, and were, in most important ways, governed from the Home Office.

Parkes wrote to the other Colonial Premiers proposing a meeting to discuss a Constitution for the new nation, at which he famously remarked that: 'The crimson thread of kinship runs through us all.' By this he referred to common racial and British heritage of the colonists as the basis upon which the new nation might be founded. Parkes initiated a decade of conventions and public debate which culminated in a Constitution and the Australian Federation in 1901. So the Constitution was drafted at two Constitutional Conventions. I'll just say something about those; Conventions are tremendously important, and most people who are interpreting the Constitution read those Conventions and read the debates to look for the spirit of what was meant in the actual Constitution drafting. So the Convention transcripts and speeches are quite powerful in their impact on Australian society today.

The main issues at the Conventions were the financial and trade issues arising from the Federation. So at that time the colonies could not trade with each other; they had to write back to the Home Office to get permission to trade with each other. There was no free trade across the colonial borders. And they couldn't do anything jointly about finance, so each colony operated independently as a financial unit which was very restricting in terms of building the economy. What they were considering was how best to weigh the interests of the small states against those of the more populous states in the new Federal Parliament. They proposed: 'how would New South Wales and Victoria stand against the smaller states'. So all the white people were down here in this corner and there were a few scattered elsewhere in the country, so if everybody down here had the money, did they have to hand their money over to the others? The same old budgetary problems. This is why Aboriginal people were excluded – to prevent the colonies with large Aboriginal populations from getting a greater share of the tax distributions that would have been funded by New South Wales and Victoria – the jurisdictions with the largest white populations.

Customs, duties, tariffs and the capacity of the Upper House to veto money bills were of far greater concern to the Convention delegates than anything else. No Indigenous person attended any of the conventions, nor did any delegates seek to represent their

interests. At one point one of the delegates proposed that New Zealand be a part of Australia, and then there were complaints about including the Maoris, and the possibility of including Aborigines in the recognised population. Hence, New Zealand, the Maoris and Aborigines were excluded, the Aborigines quite formally so.

There was a long interregnum but they eventually they made a fresh start with the 1897-1898 Convention, at which they revised the draft. It was endorsed by the 1891 Convention. Later under Edmund Barton, the first Prime Minister of Australia, and one of the first members of the High Court, developed the revised draft and it was put to the people of the Colonies of New South Wales, South Australia, Tasmania and Victoria; no Referendum was held in Queensland or Western Australia. The draft Constitution received majority support in each of the four colonies holding Referendums, but nevertheless it was deemed unsuccessful in New South Wales because the number of people who voted for the draft did not reach the minimum of 80,000 required by the New South Wales Parliament. It was then amended again in 1899 at a Conference attended by the Premiers; in 1899 and 1900 it was again put to the voters in the colonies, this time also in Western Australia and Queensland, and it was supported by the majority of voters in each colony, but large sections of the community were excluded from voting, including most women and many Aboriginal people. Women were able to vote for or against the draft Constitution only in South Australia and Western Australia, while Aboriginal people were able to vote only in New South Wales, South Australia, Tasmania and Victoria. However, even where Aboriginal people had a legal entitlement to vote there is no evidence that they did so. Aboriginal people played no role in the Constitution.

Then in 1899 and 1900 a delegation of the Australian Colonies went to London to have the draft Constitution enacted by the British Parliament. The Imperial Parliament still exercised ultimate authority over the Australian Colonies, so the draft was introduced to the House of Commons, completed its passage through the Imperial Parliament on 5 July 1900, was assented to by Queen Victoria on 9 July 1900, and came into force on 1 January 1901, entitled the *Commonwealth of Australia Constitution Act 1900*. Section 9 of the Act reads: '*The Constitution of the Commonwealth shall be as follows …*' and thereafter the Act contains the entire text of our Constitution.

Two constitutional experts, Megan Davis and George Williams of the University of New South Wales, have published a book, *Everything You Need to Know About the Referendum to Recognise Indigenous Australians.* Helpfully, at the very beginning of the book, they have set out summaries of 'The Case for Yes and The Case for No'.

The case for Yes, they write, is the following:

> The Constitution was drafted to exclude Aboriginal and Torres Strait Islander peoples from the political settlement that brought about the Australian nation.

It is important that the Constitution, the founding document of the nation, recognises Australia's full history, not just the period from British settlement.

We need to remove discrimination from our Constitution; it should prevent rather than permit racial discrimination so that all Australians are treated equally.

Recognition in the Constitution would protect against the future loss of Australia's unique Indigenous cultures which are a vital part of our national identity. Recognition will help improve Indigenous health and wellbeing.

A successful Referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution would be an uplifting achievement that unites Australians.

The No case:

There are more important issues to address. Rather than changing the Constitution Australia's politicians should focus on ending Indigenous disadvantage by way of health and education reforms.

Changing the Constitution is expensive; there are better things to spend tens of millions of dollars on.

The Constitution has worked well enough for more than a century; it should not be changed or tinkered with unless there is a compelling reason. 'If it ain't broke, don't fix it.'

The High Court would be left to make sense of what the changes mean, and judges could bring about unintended consequences.

There is no agreement about how the Constitution should be changed. Even Aboriginal and Torres Strait Islander peoples have different views. Until there is unanimity no Referendum should be held.

These are the broad grounds of the debate as it is being conducted today, but there are more details to understand.

Another matter to understand about our Constitution is that when it was drafted in the 19th century it specifically excluded Aboriginal people on the grounds of race, and it is this exclusion that lies at the heart of the state authorised discrimination that continues to this day. Moreover, the Constitution authorised racial discrimination. Ironically, as George Williams points out: '… the change actually laid the seeds for the Commonwealth to pass laws that impose a disadvantage on [Indigenous peoples.]' [Race and the Australian Constitution, George Williams, Australian Parliamentary Review, Autumn 2013, Vol. 28(1), 4-16, 6.]

There is yet a third matter that is worth mentioning about our Constitution. Our Constitution sits in a glass cabinet in Westminster, because it was created by an Act of the British Parliament at Westminster in London. Its Preamble is a nineteenth century concoction of Imperial forelock-tugging.

Section 51 sub-clause xxvi, prior to the 1967 Referendum read:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to … The people of any race other than the Aboriginal people in any state for whom it is necessary to make special laws.

Until 1968, the Parliament could not pass laws for Aborigines because of 51(xxvi); it excluded any law-making power of the Parliament in relation to Aboriginal people which legally included Torres Strait Islanders, of course. The second reading speech for the Repeal Bill – Repeal of Section 127, reflects the strange views of the time:

> Some people wish – and indeed the wish has been made clear in a number of petitions presented to this House – to associate with the repeal of section 127 the removal of what has been called, curiously to my mind, the 'discriminatory provisions' of section 51(xxvi). They want – and I understand their view – to eliminate the words 'other than the Aboriginal race in any state', on the ground that these words amount to discrimination against Aborigines. The power granted is one which enables the Parliament to make special laws, that is, discriminatory laws in relation to other races – special laws that would relate to them and not to other people. The people of the Aboriginal race are specifically excluded from this power. There can be in relation to them no valid laws which would treat them as people outside the normal scope of the law, as people who do not enjoy benefits and sustain burdens in common with other citizens of Australia.
>
> What should be aimed at, in the view of the Government, is the integration of the Aboriginal in the general community, not a state of affairs in which he would be treated as being of a race apart. The mere use of the words 'Aboriginal race' is not discriminatory. On the contrary, the use of the words identifies the people protected from discrimination …
>
> ['Aborigines', Extract from Second Reading Speech on Constitution Alteration (Repeal of Section 127) Bill; Attachment 'E'; National Archives of Australia: A4940, C4257, page 155.]

The other clause that was removed was 127:

> In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted.

The question was:

> Do you approve the proposed law for the alteration of the Constitution entitled 'An act to alter the Constitution' so as to omit certain words relating to the people of the Aboriginal race in any state so that Aboriginals are to be counted in reckoning the population?

The majority of Australians voted 'Yes,' and this Referendum had the highest ever YES vote recorded in a Federal Referendum with 90.77% in favour of amendment. So 51(xxvii) was deleted from the Constitution and the words 'other than the Aboriginal people in any state' were removed from 51(xxvi). But strangely, and I haven't done my homework on this but I'm doing it, but people tell me that it was some kind of oversight; I don't believe it, but anyway, Section 25 was not removed. Let's have a look at

Section 25. So this remains in our Constitution. We'll go to [0:26:58.4], and it reads: 'Provision as to races disqualified from voting.' This remains in our Constitution.

For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of the race resident in that State shall not be counted.

Let me now take you to the Expert Panel Recommendations.

> Remove Section 25 – which says the States can ban people from voting based on their race;
>
> Remove section 51(xxvi) – which can be used to pass laws that discriminate against people based on their race;
>
> Insert a new section 51A – to recognise Aboriginal and Torres Strait Islander peoples and to preserve the Australian Government's ability to pass laws for the benefit of Aboriginal and Torres Strait Islander peoples;
>
> Insert a new section 116A, banning racial discrimination by government; and
>
> Insert a new section 127A, recognising Aboriginal and Torres Strait Islander languages were this country's first tongues, while confirming that English is Australia's national language.

What Prime Minister Abbott has said, is that he wants to recognise Indigenous Australians, but like the constitutional conservatives, rejects proposed amendments 116A, that constitute what he calls a 'one clause bill of rights.'

Most sensible people agree that Section 25 should be removed. I wrote in *Meanjin* a few years ago: Section 25 which was not the subject of the questions put in the '67 Referendum and which remains in the Constitution, is more difficult to comprehend. According to constitutional law scholar Brian Costar, this 'obscure, puzzling, contested but largely neglected Section 25 of the constitution mandates not who should have the vote but how many House of Representatives divisions each state shall be entitled to. Some constitutional lawyers assert that it is 'a mild deterrent to discrimination on racial grounds … while others view it as 'odious and outmoded'.

Harold Holt stated:

> We believe the provision should be taken out of the Constitution because it is outmoded and misleading, and gives cause for criticism both inside and outside Australia by people unaware of the actual situation. ['Referendum Statement by the Prime Minister, Mr Harold Holt.' National Archives of Australia: A4940, C4257, p. 204.]

Why would you use a race power to manage the number of divisions in the House of Representatives for each state? This smacks of Apartheid, the hallmark of the old South African Constitution. Costar's thinking on this clarifies the debate, for me at least. He writes:

> At first glance then Section 25 appears racialist but on second glance one cannot be so sure. The section certainly seems to permit the states to exclude potential voters on the grounds of race, but also to penalize states that do so by reducing the number of federal electorates to which they might otherwise be entitled. Under this contemporary reading of the section, the constitutional framers emerge as progressive inclusionists: an interpretation, however, which it not borne out by the historical record.' [Brian Costar, 'Odious and Outmoded? Race and Section 25 of the Constitution.]

To assume that the Section has been voided by the passage of legislation deeming discrimination on the grounds of race illegal, … [like the *Racial Discrimination Act*, would be false, for the simple reason that such legislation may be repealed or amended by parliament.

And you'll remember that there was an attempt to do so last year. Furthermore, the right to vote is not explicitly enshrined in the Constitution. We don't have a constitutional right to vote, it must be understood. Costar continues:

> And Section 30 has been interpreted as giving to the Commonwealth parliament the authority to determine its electoral procedures. … We can only speculate, as to whether any future legislation restricting the right to vote on grounds of race, gender, class, etc. would be held by the High Court to be in breach of the 'directly chosen by the people' words of Sections 7 and 24. Given that uncertainty, a case can be mounted that Section 25 should be retained until the right of citizens to vote is unambiguously guaranteed in the written Constitution or firmly embedded by judicial review in the unwritten one.

So having dealt with Section 25 as part of the proposition, and as I say, most people agree it should go; how do we then deal with the problem of the Parliament's law-making powers? So if Section 51(xxvi) is interpreted to allow discriminatory treatment, there is a dilemma. We must retain the law-making power so Parliament can make laws for Aborigines and Torres Strait Islanders, but find a way to prevent racist discrimination by the Parliament.

This is difficult because many Australians are race-obsessed, and their political discourse is not sophisticated enough to accommodate notions of ethnicity or polity or culture or First Peoples. So we have this problem that for the Parliament to make laws for Aborigines and Torres Strait Islanders we have to write it in such a way that there is an explicit power to do so, but which doesn't empower the Parliament to discriminate against us, as it presently can.

Noel Pearson devised this idea to resolve this dilemma, a dilemma which may yet prove fatal to our aspirations for our rightful place in the nation. This may be the best solution to preserve parliamentary sovereignty and to avoid justiciable clauses in the Constitution. It is these two issues that are the grounds for objection by constitutional conservatives to the Expert Panel recommendations.

He proposes that there be a simple constitutional amendment – to establish a body

of Indigenous people empowered to review specific legislation in Parliament and to comment on the effects of legislation on Indigenous people. This would, he believes, provide a hook for something more substantial outside of the Constitution, including a Declaration of Recognition which could then be legislated in the Parliament, or could be a freestanding document. He envisages a proposed Declaration of Recognition having the status of the Gettysburg Address, or in other words, a founding document or a post-founding document. The body is envisaged as being empowered to comment on laws for Indigenous affairs and affecting Indigenous people, rather than 'all legislation'.

Professor Anne Twomey has provided constitutional drafting giving effect to Pearson's proposal in a way that respects parliamentary sovereignty. A new Chapter 1A could be inserted into the Constitution, reading as follows:

> CHAPTER 1A
>
> Aboriginal and Torres Strait Islander Body
>
> 60A(1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [Title], which shall provide advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.
>
> (2) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, functions and procedures of the [Title].
>
> (3) The Prime Minister shall cause a copy of the [Title]'s advice to be tabled in each House of Parliament as soon as practicable after receiving it.
>
> (4) The House of Representatives and the Senate shall give consideration to tabled advice of the [Title] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.

Because Indigenous people constitute about three per cent of the population, it's just good luck that any Aboriginal person gets elected. As it happens, there are a few: one and one only in the House of Representatives of Australia, and he's the first ever – Ken Wyatt from Western Australia. We've had two Senators – one back in the 1960s, Senator Neville Bonner, and then a second one in the 1990s, Aden Ridgeway from New South Wales. So they're the only three people who have ever been elected to the Federal Parliament. The State Parliaments have a few, but again this all is very recent in Australian history; so there's one in New South Wales, Linda Burney for the Labor Party; one in Queensland at the moment, Billy Gordon from Cape York; five in the Northern Territory where 26% of the population is Aboriginal; one in Western Australia, Ben Wyatt; (but there were two until a woman stood down, Carol Martin); none in South Australia, none in Tasmania, and none in Victoria. We don't have much of

a say in the Parliamentary life of Australia, and we have almost no say about legislation.

So to have a permanent body commenting on legislation, would be a solution to the problem of our status as an extreme minority, and our desire for a rightful place in the nation. Imagine that the Prime Minister had supported the government of Western Australia and announced the closure of 150 out of 500 Aboriginal communities over in Western Australia. The body that Noel Pearson proposes would lodge a report with the Parliament giving advice on that proposal as to its impact on Indigenous people and other matters, such as finances, good governance, and human rights.

Frank Brennan's proposal accepts neither the recommendations of the Expert Panel, nor Noel Pearson's proposal for an Indigenous constitutional body to advise on laws relating to Indigenous peoples. In fact, Brennan proposes no substantive recognition or reform at all. Brennan suggests we remove s25, amend the Race Power to become an Indigenous power, and insert a symbolic preamble. This kind of merely symbolic reform sets the bar too low, and will not, in my view, be supported by Indigenous people. The proposal is dismissive and disrespectful of decades of Indigenous advocacy for serious constitutional reform. Since the 1920s, Indigenous people have petitioned and advocated for constitutional protection of their interests, and a constitutional voice in their affairs. Brennan calls himself an advocate for Indigenous rights, yet he supports no substantive reform. He suggests that the Indigenous body should be road-tested before our people should be trusted with a body of constitutional status. He also suggests there will be identity issues in deciding who is Indigenous or not, which the High Court would need to resolve. Brennan is wrong. We know who we are. There are established legislative tests which provide rules in relation to Indigenous identity. Finally, the whole point of Pearson's proposal is for a constitutional guarantee that the Indigenous voice is heard in Indigenous affairs. A legislative guarantee will not do. I implore Australians to listen to what Indigenous people want. Not Frank Brennan.

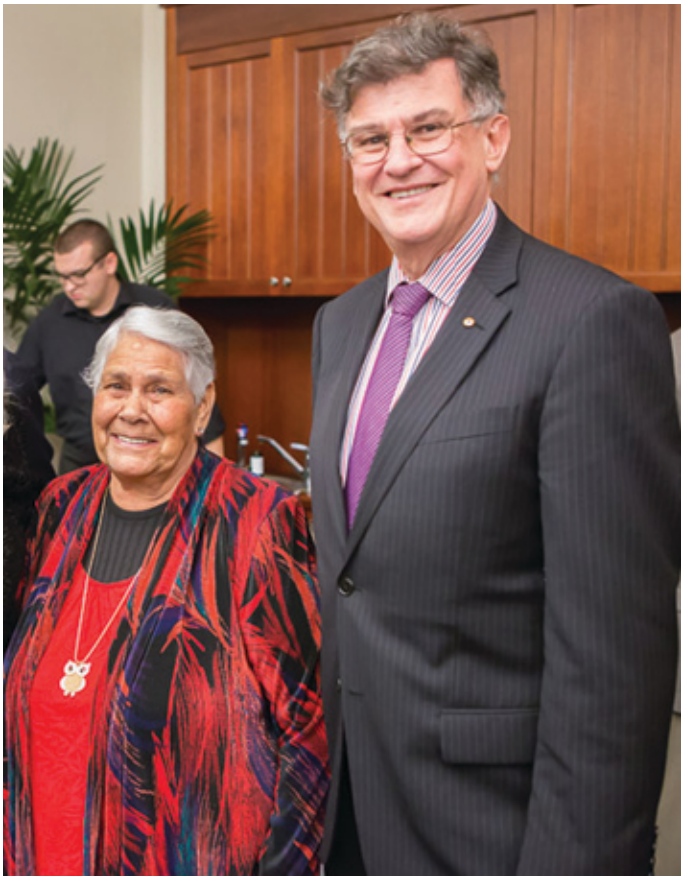
I trust that we find the right question and achieve success in this most important endeavour – obtaining the majority vote of Australians at a Referendum on recognising us, and giving us a rightful place in the nation.

I thank you for listening to me.

2016

Lingua Nullius: A Retrospect and Prospect about Australia's First Languages

Presented by The Hon. Rev. Dr Lynn Arnold, AO



Ngadlu tampendi Kaurna meyunna yerta mettanya womma tarndanyako. Kaurna meyunnako yertako taikurringa towilla. Parnako tappa purruna, bulto, yailtya kuma, ngadlu. Padnaidlu wadu, turlatina. Mankoriadlu. Ngadlu tampendi Ramindjeri, Ngarrindjeri, Anangu, Adnyamathanha, Narrunga, Barngarla. Meyunna Kuma Ia Yellara. Marni nao budni yaintya imbarendi Kaurna yertangga, bilyonirna yertangga.

With respect to Kaurna speakers here present and with the approval I have previously been given by Kaurna elders to use this acknowledgement, I have wished to say:

'We acknowledge the Kaurna people and their spiritual relationship with the land as the traditional custodians of the Adelaide region. We acknowledge their living culture, heritage and beliefs. We also acknowledge the Ngarrindjeri, Ramindjeri, Anangu, Adnyamathanha, Narrunga and Barngarla people here today and welcome them to this meeting on Kaurna land. May we walk together in harmony in a spirit of reconciliation.'

It was January 26 in Adelaide this year – 'It's Australia Day, we speak English in Australia!' So said some unknown woman to artist Elizabeth Close who, at this Adelaide ceremony, had been speaking to her young daughter in Pitjatjantjara.

Ironically, it was on that same day that, atop Sydney Harbour Bridge, Jessica Mauboy sang our national anthem in English and then, in what some of the press referred to as an Aboriginal dialect, and the SBS referred to as a 'medley of local Sydney dialects' but which was, in fact, and as reported by NITV, constructed from a range of Eora dialects.

Three weeks later, Northern Territory MP and government minister, Bess Nungarrayi Price, a speaker of five languages, was denied permission to speak in her first language, Warlpiri, in the chamber. The Speaker saying: 'Should a member use a language other than English without the leave of the assembly it will be ruled disorderly and the member will be required to withdraw the words.' Tellingly Bess Price said: 'I feel that I cannot effectively represent my electorate without using my first language, Warlpiri.' The Speaker for her part, writing about the issue and the obvious potential solution of the provision of interpreting services in instances such as this, stated: 'there (is) a standing order, number 245 (which) applies to prohibit interpreters and translators on the floor of the assembly during proceedings.'

Coincidentally, it had been about the time of these two incidents that I had quite separately been speaking with Lowitja O'Donoghue about what I might choose for my topic for the Oration named in her honour. I said that I was keen to speak on the subject of Australia's first languages, the situation these languages had faced over the time since colonial settlement, and then look at both the challenges and opportunities ahead for those that are still being spoken or are capable of being revived – or awakened as Professor Ghil'ad Zuckermann says. I was very appreciative that Lowitja was not only agreeable to my speaking on this subject but felt that it was an important one to raise.

At the outset, I must point out that, though my doctorate is in Sociolinguistics and focused on 'Language and Identity', I cannot pretend to have deep knowledge of all the socio-linguistic and linguistic complexities that apply to Australia's first languages. Furthermore I am aware that I am speaking tonight very much in the shadow of giants in that field, both Aboriginal and not – people such as De Kauwanu Lewis Yerloburka O'Brien, Dr Ngarrpadla Alitja Wallara Rigney, Jack Kanya Bucksin, Georgina Yambo Williams, Professor Lester Iribinna Rigney, Dr Rob Amery and Professor Ghil'ad Zuckermann amongst many others. But I have timorously stepped into this space because of my own love of the subject of 'Language and Identity' and, in the face of languages living in environments where they are dominated by others, the universal questions and methodologies that may at least be considered to enable those languages not only to survive but to thrive.

In my doctoral thesis I drew a number of conclusions that were all based upon the study of the language of Asturianu (also known as Bable) spoken in the northern Spanish province known as the Principau d'Asturies. For the purpose of tonight's Oration, I will be referring to three broad conclusions that will be followed by a more detailed commentary about each of them, and will be in the expanded text of my Oration that will be uploaded on the Don Dunstan Foundation website later this week.

Firstly, at the level of policy-making, a generic approach, applied like a cookie-cutter policy framework to each language at risk, would work only occasionally and then only by happenstance. This is because policy in the area of language promotion needs to take into account a complex interaction of issues that revolve around the status and vitality of both the language spoken by a group and of the group itself. By status I refer both to extrinsic (status conferred) and intrinsic (group self-consciousness) in terms of both group and language. In terms of vitality, this refers to the degree of dynamism as opposed to a more static state that is evident in both group and language. I will attempt to show how policy approaches would need to differ. If low Group Status is the predominant problem, then a priority of policy development would need to push in the direction of Language Status. If Group Status was at a reasonable level, but the Language Status was not, then the policy development direction would need to be in the opposite direction – and so forth.

In the case of Aboriginal communities in South Australia, the current situation, for some of our first languages, could be described as reasonably high Group Status for the Anangu Pitjatjantjara Yankunytjatjara, followed by Kaurna and Ngarrendjeri through to lower Group Status for Barngala. On the Language Status front, there has been more extrinsic recognition over time of Pitjatjantjara than almost any other language in the state and, until recently, almost none for groups such as the Barngala. Turning to the dimension of the languages spoken, Language Vitality also varies between the various languages; and likewise vitality. Taking this approach, it can be seen that there are

myriad permutations of the four elements that would create a diversity of need too wide for a generic policy on language to adequately deal with.

Secondly, notwithstanding successful policy-making by the policy-makers, there is also the issue of implementation that arises from policy. Here my thesis proposed that successful implementation of policy necessitates an interactive process that engages both the macro and micro levels – that is to say both the governance institutions of the wider community (such as government and education departments), namely the macro; and the immediate community itself, namely the micro. The engagement point between these two is the meso level and would be represented by such entities as schools, churches, local police stations and courts, local health facilities and the like. These meso level entities become key to the degree of genuine interaction that may occur between the macro and the micro; their roles can be mediating or stymying. At its best, this approach would echo what is known in development circles as co-design with co-governance; an approach which, again citing development circles, is often best affected when using such methodologies as Appreciative Enquiry.

But a key finding in my thesis was made by attempting to map language use by an analysis of the domains where it is used and also the genres in which it is used. The domains starts at the more local (family, local community) moving towards the less personal (through larger community settings) and on to the impersonal (such as institutions like government). Genres of use where more simple genres are (family conversations, nursery stories, folk tales) down through more complex genres (literature, drama). In this genre spectrum there is also, in most instances, a move from active (e.g. conversation) toward passive (e.g. audience/viewer); though the exception of genres like the internet and the interactive components of radio (talk-back) are exceptions here. The premise here is that the further domains and genres have retreated or that entirely new genres have opened up of which a language has no experience, the more difficult the task will be for promoting that language. In the case of my study of Asturianu, there were areas of reasonable engagement by that language in both domains and genres; other areas of deficit were represented. The relative size of the areas will differ according to each language under consideration.

An underlying premise here is described by the old adage: Languages don't die, they simply stop being spoken. And why might they no longer be spoken? The key issue is that individual speakers might have found less and less utility in using the language in question compared to the alternative dominant language. This may have happened because both the domain and genre fronts have retreated back towards the top left.

The solution to such shrinking back of domains and genres is to work intentionally in expanding the areas of each where individual speakers might come to find it worthwhile using their first language in more situations than previously; reducing their dependence on the dominant language in such situations.

So it will be through the lens of these three broad approaches from my thesis that I will be considering tonight's topic. In doing so, a consideration of the present-day situation of Australia's first languages is needed.

In October 2008, on the occasion of a special event to celebrate the International Year of Languages, I gave an address entitled 'Breaking free of the fear of Babel – a celebration of the linguistic diversity of humanity'. In this speech I spoke about the fragile state of Australia's first languages. In an attempt to have some comparative understanding of the situation I consulted the then most recent edition (15th) of *Ethnologue: Languages of the World* edited by Raymond G Gordon. Such compendia are always risky to use, and Rob Amery has pointed out to me subsequently some of the limitations of the *Ethnologue* analysis, not the least of which being its failure, in that edition, to list Kaurna; not to mention the somewhat suspect nature of many of the statistics cited for the number of language speakers. Nevertheless, on the basis of a somewhat messy E&OE (Errors and Omissions Excepted) basis, the book is capable of providing indicative information. So let me tell you what it found. Perusing the entry for Australia, in particular with respect to the 231 Aboriginal and Torres Strait Islander languages listed, it found that eleven of them were being spoken by between one and ten thousand people (Alyawarr, Anindilyakwa, Arranta, Arrernte, Gunwinggu, Kala Lagaw Ya, Ngaanyatjarra, Pitjatjantjara, Tiwi, Walmajarri and Warlpiri).

A further forty were being spoken by between 100 and 999, while eighty were being spoken by between 10 and 99 people. The largest individual group of Aboriginal and Torres Strait Islander languages, ninety two of them, were being spoken by less than ten people. However, there was a final, and itself a very large group, of eighty-eight languages that were listed as being either 'extinct' or 'nearly extinct'.

These are alarming figures; made much worse though by some comparative analysis with the rest of the world. The ninety two languages in Australia said to be spoken by less than ten people represented 45% of all such languages in the world. *Ethnologue* was reporting those figures in 2008 but, by its own citations, much of the data was from the 1980s or 1990s, so it was uncertain how much deterioration in the situation there might have been in the intervening decades – or recuperation; for I should note that Kaurna did not appear in the *Ethnologue* list at all, and Barngarla appeared as 'extinct'; but I will come back to the awakening of those two in a few moments.

For the record, again using *Ethnologue's* figures, it would seem that Aboriginal and Torres Strait Islander languages, in addition to being 45% of all languages spoken by less than ten people, made up 23% of languages spoken in the world by between 10 and 99 people; and nearly 4% of those spoken by between 100 and 999 people. In that Olympic year of 2008 it seems Australia was winning Gold, Silver and Bronze medals in the race to language extinction. [Source Batchelor Institute]

What does the current situation look like using somewhat more rigorous statistics?

Batchelor College statistics show the proportion of people who reportedly spoke an Indigenous language as a percentage of population (divided geographically by statistical local area) in 2011. It gives a clear impression of where language loss has been greatest; a situation that has not improved since.

Australian Bureau of Statistics so far in this century have suggested some deterioration in the number of Aboriginal and Torres Strait Islanders reportedly using Indigenous languages. For example, just looking at those aged over 45, the figure has fallen from 16% in 2001, to 13% in 2006, and then further to 11% in 2011. For other age groups the 2011 Census reported 10% of those under 15, 11% for 15-24 and 13% for those between 25 and 44. Two other statistics from the ABS to round out the picture – firstly in 2008 the ABS reported that 40% of people living in ATSIC communities reported being able to speak the language of their community even if only a few words. While in 2011, the ABS reported that 16.6% answered that they did not speak English or did not speak it well.

Does this imply that the remainder in those communities were speaking English? The answer is: not necessarily. For example, while 10% of those under 15 were reported as speaking an Indigenous language, 85% were reported as speaking English. So what about the missing 5%. I don't have information on that, other than the speculation that Kriol, Yumplatok and Aboriginal English may have filled the gap.

Whether those three modern Aboriginal languages did or did not explain the gap, what the 2011 Census did find was that Kriol had become the most spoken language in Indigenous communities. Furthermore that Aboriginal English was reportedly spoken by 1037 at home, with thousands more speaking it presumably within the community. Of all languages considered in the survey questions, Aboriginal English in fact showed the largest increase.

So the statistical evidence has not been promising and could be interpreted to suggest that there may be an inevitability to ultimate demise of all of Australia's first languages. Unfortunately, there are many who simply see such a prospect of mass language extinction as an indicator of social evolution, a Darwinian linguistic survival of the fittest. In reality, in sociolinguistic terms, language survival or extinction is not a case of survival of the fittest but survival of the most powerful. Aden Ridgeway, when he was still a senator, said: 'Language is power, let us have our power.'

By implication he was acknowledging that the capacity of Australia's first nations to have real equality of power and status within the Australian commonweal would be severely hampered if there was not appropriate recognition of Australia's first languages.

The earliest days of colonial settlement showed differing power faces to the language communities they encountered. Here in South Australia, in 1841 the then Governor of South Australia, George Grey wrote that, upon the bringing of commerce to the new

colony: 'The ruder languages disappear successively, and the tongue of England alone is heard around.' George Grey obviously hadn't read a report written just six months earlier by Matthew Moorhouse to the Colonial Secretary; Moorhouse wrote this about the 'ruder languages':

> Seven parts of speech are now clearly recognized … the substantives, adjectives and pronouns admit of a regular declension, leaving the inflections of the verbs the chief field for future research. This division … is not altogether unknown, for we are in possession of four moods – an indicative, subjunctive, imperative and infinitive: a present, imperfect, perfect and future tense of the indicative mood, and a perfect and future of the subjunctive.

Lewis O'Brien said the same, but more succinctly, when he noted: 'Our Kaurna language is very specific and has many rules – we have no conjunctions – no 'and' – but more conjugations than Latin.' 'Ruder language' indeed!

Why should we consider it important to retain as much of Australia's linguistic inheritance as possible? Taking a step back, to the very purposes of language; language is the repository of a group's stored information about physical and social context, and of the general experience and perceptions of living. How else can the past inform the present? That may sound simple enough until we consider the mental process by which we do this. Douglas Hofstadter and Emmanuel Sander in their book *Surfaces and Essences* write:

> No thought can be formed that isn't informed by the past; or, more precisely, we think only thanks to analogies that link our present to our past. [p. 20] … Immanuel Kant and Friedrich Nietzsche had extremely different personalities, philosophies, and views about religion, but they were united in their unswaying belief in analogy. For Kant, analogy was the wellspring of all creativity, and Nietzsche gave a famous definition of truth as 'a mobile army of metaphors'. [p. 21]

So simply ascribing sounds to an object or an event is not what happens in language formation – if such were the case, translation between languages would be much easier. The words and structures of language are the result of very involved processes giving the term 'linguistic richness' much greater meaning. And it was just such a complex linguistic richness that the first colonial settlers encountered in Australia rather than just a confusing array of languages; it was a rich and purposeful linguistic diversity across the continent's 500 nations Each of those languages represented millennia of evolutionary experience.

The subsequent destruction, through neglect and even outright repression, of many of those languages saw also the death of a vast amount of knowledge about the country that those languages had contained in their lexicons and their analogical perspectives that had authored those lexicons. As has been noted in the Report 'Indigenous Kids and Schooling in the Northern Territory' (Penny Lee, Lyn Fasoli et. al):

> The death of small languages is a tragedy for all human beings in a global sense. This is because ancient wisdom and artistic productions handed down from generation to generation in stories and songs and poetical dramas or dances die out. Old, specialized languages of small Indigenous groups also have great scientific value. For instance, from a medical point of view, the names and uses of medicinal plants may be lost when old people who speak those languages die. These languages provide understandings about climate food sources, animal migration and reproduction patterns and other forms of information about the world around us.

The report goes on to make the point: 'When languages die, a central part of a group's identity changes forever and it may take generations for new core elements of identity to evolve.' What has been done to Australia's first languages since 1788 has been akin to burning the Great Library of Alexandria, in terms of knowledge of land, context and the world that has been lost as languages have died. The Library is still on fire, with much already destroyed, so the challenge to us as an Australian people is whether we let that great repository of knowledge continue to burn; or will we douse the fire to save what has not yet been lost, and scour the ashes to retrieve what may yet be salvaged?

Professor Ghil'ad Zuckermann has suggested that this vast linguistic loss should open up a discussion on the concept of Native Tongue Title, including a debate as to why there should not be compensation for the language loss that has occurred. He cites these ethical reasons for Native Tongue Title:

- The loss of language is more severe than the loss of land
- Language death = loss of cultural autonomy
- Language death = loss of spiritual and intellectual sovereignty
- Language death = loss of soul
- Language is a repository of ideas, values and experience.

A contentious proposition perhaps but one that nevertheless raises important points that must be considered. In my strong opinion, the most appropriate compensation for this language loss is no more nor less than a significant investment of time, effort and resources in sustaining those languages that are still being spoken, and in awakening those that Ghil'ad refers to as 'Sleeping Beauties'.

Let me turn now to the issues involved in sustaining presently spoken languages and awakening the 'Sleeping Beauties'. What is needed is appropriate recognition of the first languages of this country. In saying that, there has to be a recognition that there can also be inappropriate recognition of such languages. Ignoring the reality of such languages – *Lingua Nullius* – is problematic enough; but there has also been a cost to sociolinguistic integrity by some of the supposed recognition of first languages that has happened since 1788.

How many Aboriginal or Torres Strait Islander words do you know? Think for a

moment. I am not sure what words are coming into your minds; but it is possible that you may be thinking such words as: *Kangaroo, Wallaby, Emu, Echidna, Boomerang, Didgeridoo, Dingo, Koala, Goana, Quandong, Yabby, Willy-willy, Yakka, Kadaitja, Wurley, Cooee, Woomera, Nulla nulla, Cassowary, Cockatoo* and *Kylie*. Before you think that Kylie Minogue gets herself into everything, I hasten to add that it is thought that the name Kylie comes from the Noongar word for a throwing stick.

But coming back to the words I have just listed, and you doubtless would have thought of more, there are some problems that arise from the commonality of such words. Firstly, a number of them were never Aboriginal or Torres Strait Islander in the first place. *Cockatoo* and *Cassowary* come from Malay (*kakatua* and *kasuari)*, while *Echidna* comes from the Greek for viper; and *Goana* is a simplification of iguana, a word originating in Latin America.

In a similar vein, *didgeridoo* is said to have been coined by early colonists out of a combination of its onomatopoeia-like quality and the Scotch Gaelic *dudaire dubh* (for black piper). But a more serious problem is that of the seventeen remaining words in the list above that are of Aboriginal or Torres Strait Islander etymology, seven of them came from one language alone – Dharug – that which was spoken in the area where Sydney now sits. In other words, the Aboriginal language that was first encountered by the first colonists has had a disproportionate impact on the number of words we, across the country, have taken into Australian English as being authentic first language words. For the record, those words are: *Cooee (guui); corroboree (garaabara); dingo (dingu); koala (gulawong); nulla-nulla (ngala ngala); wallaby (walaba);* and *woomera (wumara*).

The significance of the problem here is that other Aboriginal and Torres Strait Island languages have not only had to face the powerful linguistic assault of English, they have also had to cope with the imposition on their own lexicons of alien words from other totally different first language lexicons. To get just a taste of the impact of this, imagine if Chinggis Khaan and his band of merry men had occupied all of Europe in the twelfth and thirteenth centuries, including the birthplace of English, and had applied some local words they may first have encountered as they crossed over into Hungary, for example. Subsequent generations of Mongol colonists living in Britain, may have felt they were using local Indigenous words when they said *imádat* and *szertartás* (when describing our religious practices of worship and ritual) or may have called our spears *lándzsa*; all words that would in fact have been meaningless to the locals. Incidentally, in that earlier list of words, only one came from Kaurna – *wurlie* (coming from *wadli*).

On a related matter of the problems of imposed words is that of foreign language descriptions of auctochtonous practices. I think I was about seven or eight when I first heard of the concept of an untranslatable word. We had been watching a documentary at school on the Netherlands and its canals; at some point the narrator

mentioned a Dutch word that he said was untranslatable into English. I am having trouble remembering the word, but know that it had something to do with canals and their management. Googling suggests that the word may have been *gracht* – of which Wikipedia commented: Although the word *gracht* means 'canal' or 'waterway' in the general sense, there is no exact equivalent for the term in English, therefore it is best left untranslated.

I am sure you may be able to think of other such words – the Scottish word *canny* for example. What happens in such situations is that often the foreign word is simply brought into English. On other occasions a best fit is concocted from within the English lexicon. That has been the case with two words in Australian English – *Dreamtime* and *walkabout.* The website creativespirits.info has a particularly interesting entry about the word preferred to the word *Dreamtime* – namely *Dreaming.* The reason for the change from earlier practice is expressed on that site by Karl Telfer: 'We are the oldest and the strongest people, we're here all of the time, we're constant through the Dreaming which is happening now, there's no such thing as the Dreamtime.'

What Karl Telfer describes is a translation chasm between two cultures. The now predominant culture sought to compartmentalise a spirituality with a notion of archaism, of a time gone and now lost; when in fact the culture that generated this particular spirituality consciously chose to remove it from the realm of time. For the record, that same website contains a number of words from different Aboriginal languages for spirituality and beliefs. One listed from South Australia is from Pitjatjantjara – *tjurkurrpa* (also written *jukurrpa* and *tjurgurba*)

The same website, on another page, says of the word *walkabout* that it is 'a derogative term, used when someone doesn't turn up or is late.' Because of this, the site also states that: 'Its use by non-Aboriginal people is considered inappropriate (and notes that) groups such as Reconciliation Queensland advise against its use when discussing Aboriginal culture.'

Nicole Tiedgen, Advocacy Manager of Tourism SA, has this to say about the real nature of the concept labelled *walkabout*: An Aboriginal person who is on 'walkabout' connects with their spiritual obligations by tracing the paths formed by their ancestors at the beginning of time. In the process important information is encrypted in songs and ceremony that have led to the concept of Songlines. These paths or songlines criss-cross Australia, connecting important waterholes, food sources and landmarks. By going 'walkabout' Aboriginal people enhance their cultural and spiritual connection with the land and their ancestors. They return with a sense of oneness within themselves and with the world in which they live.

Where we have historically chosen not to impose a seeming 'close-fit' English word for an Aboriginal or Torres Strait Islander word, phrase or concept, the tendency has been to impose a word from only one of the Aboriginal or Torres Strait Islander languages. A case

in point is the word *corroboree.* Again referring to the creativespirits.info website, it notes the wide variety of words used by different languages – such as *inma* in Pitjatjantjara*, palti* in Kaurna, *Ngikawalin* in Ngarrindjeri and *Gurribunguroo* in Narrunga*.*

Since we are now talking about matters related to faith, spirituality and ritual – and, again don't worry, this is not going to turn into a sermon, despite my relatively recently gained title – let me turn my attention to the churches. The churches have played a significant role in what has happened to Aboriginal and Torres Strait Islander languages. In South Australia the first recorded use of an Aboriginal language by a non-Aboriginal person took place on May 25th 1839 when Rev. Schurmann read the Ten Commandments to those Kaurna assembled as part of the Queen's Birthday festivities.

The impact of churches on Aboriginal and Torres Strait Islander languages have reflected the tension of the theological dialectic in the Bible between the Tower of Babel of the Old Testament and the Feast of Pentecost of the New Testament. Symptomatic of this division had been the long-standing mono-lingualism of the Western church which contrasted with the multilingualism of the Eastern church. While local vernaculars reigned in the Eastern church, Rome's fear of a repeat of the linguistic chaos that followed in the wake of the failure of the Tower of Babel as an infrastructure project led to the linguistic hegemony of Latin.

When it has been at its best, the Church in Australia has sought to echo the spirit of Pentecost. Acts 2:4: 'All of them were filled with the Holy Spirit and began to speak in other tongues as the Spirit enabled them.'

In 1969 the Bible Society completed a project of some decades with the printing of a New Testament in Pitjatjantjara; this is that Bible's version of this verse: *'Ka tjanala tjalngarangu Kurunpa Milmilnga, kaya tja: kutjupa-kutjupatjutangku wangkangi, Kuruntu nintinyangka.'* There have been many Bible translation endeavours over the last couple of centuries. A notable one being the 1864 *Scriptural selections in Ngarrindjeri* which was the first part of the Bible published in any of Australia's first languages. Only one of the original three hundred copies printed has yet been found.

The result was that some early missionaries sought to nourish first languages in schools for Aboriginal and Torres Strait Islanders. Much has been written about the excellent work in the 1940s done by the Lutheran missionaries, C.G. Teichelman and C.W. Schurmann; including the dictionary of Kaurna words and phrases that they compiled, but also the teaching of Kaurna that they included in the Adelaide school they established. And, in the past decade, there has been the excitement over letters written the late 1840s in Kaurna by some of the students of that school to German supporters of the program.

But while such sociolinguistic enlightenment was occurring in a part of the colony of South Australia, it was matched by other more oppressive educational approaches. We are here tonight at Adelaide University, an historic South Australian institution

that was given a much more enlightened start than was the case with other early Australian universities. In no small part, the first Anglican Bishop of Adelaide, Augustus Short, could claim credit for the distinctively progressive nature of this university. Yet it would be this very same man who would encourage an type of schooling to which Aboriginal: '… children could go where they would be away from tribal life.' Michael Whiting, in his book *Augustus Short and the Founding of the University of Adelaide*, notes that the aim of such schooling in the opinion of Bishop Short and his supporters was so that the children would: 'become self-sufficient and employable … (and) that society would be enhanced by socialising Indigenous people into English collective values.'

In a letter written in 1848 to the Governor of Western Australia, Short wrote: 'In the process of civilisation the first effort must be to detach the young natives from connection with native customs and influences …' Interestingly, such a process of intentional alienation from cultural roots was at odds with the aspirations of the British at the time of establishing the colony. The Order in Council signed by King William IV on 23 February 1836 contained this statement: '… nothing therein contained shall affect or be construed to affect the rights of any Aboriginal natives of the said Province to the actual occupation or enjoyment in their own persons or in the persons of their descendants of any lands therein now actually occupied or enjoyed by such Natives.'

That some of the early settlers understood that statements such as this implied more than mere land tenure, but the right to have social continuity, which would include language, is evidenced by a letter written on July 27th 1840 by Matthew Moorhouse, Protector of the Aborigines, to the Colonial Secretary. He wrote in part: 'The language of the Aborigines has not been overlooked, nor its importance forgotten.'

Incidentally, of particular interest in Moorhouse's letter is a further statement indicative of his appreciation of the power of language to be a repository of knowledge that could easily be lost: 'A more extended knowledge of the language has introduced us to a more general acquaintance with the manners and customs of these people. We find – what the Europeans thought the Aborigines of Australasia did not possess – territorial rights, families owning and holding certain districts of land which pass from fathers to sons … They go further than this: occasionally one family will barter their territory.'

Schools remain a very important part of the future sustainability of currently spoken languages and the revival of those that have 'fallen asleep'. But sometimes those schools have had checkered histories in terms of their support or otherwise of local languages. Raukkan Aboriginal School today proudly proclaims: Ngarni-yan Yunti Enani [Together we can do it].

Indeed the school's most recent Annual Report notes that today Ngarrindjeri is taught at the school and also that the home language of students 'is a form of Aboriginal English which contains some Ngarrindjeri vocabulary.' And we know that the Raukkan

community, as I mentioned earlier, was the place where the first undertaking of a translation of portions of the Bible had been published (in 1864); yet later, by the Annual Report's own admission, there would be a long period when: 'The use of Ngarrindjeri language was forbidden.'

I had first visited the APY lands in 1980 when my wife and I responded to an invitation from the Principal of Fregon School for us to visit him and his wife. We flew to Ernabella where, whilst we waited for Neil to collect us for the drive back to Fregon, we spent an hour or so with a young woman who was collecting oral histories from the Ernabella community. It was the first direct contact I had with the issue of language maintenance in the APY lands. Over the few days we spent in the Lands on that visit, I was able to see first-hand the two-phase bilingual program in the school. The first phase had English as second to the local language in cross-curriculum teaching for the first years of primary; this was reversed in the later years of primary when English became the primary language.

The concept of bilingual education very much appealed to me and, when I would, just a few months later, be appointed Shadow Minister of Education, I considered ways in which I could promote such a positive idea both in the Lands and elsewhere in education. At that time another type of bilingual education (Italian and English) was being piloted in two eastern suburban schools in Adelaide. At the time bilingual education was a concept with considerable cachet. However, it would ultimately cease in both locations for entirely different reasons. The Italian/English experiment of the eastern suburbs wound down for want of students from an L1 Italian setting; while the experiment in the APY clearly did not have, and still does not have, a want of students from an L1 setting, but was closed for other reasons.

Bilingual education is a concept whereby the curriculum is conveyed to students in two languages; the curriculum being more than just teaching of core language competency in either of the two languages, but the use of those languages for teaching of other disciplines – such as science, mathematics, social studies. Overall bilingual programs use dual languages not just to improve the capacity to learn non-language subjects, but also to enable students to complete their education with high levels of competency in both languages.

Were these two South Australian programs achieving their objectives? In the case of the Italian-English bilingual programs, the answer was broadly 'yes'. However, with respect to the Pitjatjantjara-English bilingual programs, it can only be noted that, following particularly vocal concerns by elders in the Kenmore Park community, those programs ceased in 1992.

It is my contention that they ceased for want of sufficient training of teachers running those programs. The reality was that, certainly for most of the 1980s these programs were being taught by teachers who could not speak Pitjatjantjara. For classroom

learning to proceed, these teachers had to rely on Aboriginal Education Workers as the linguistic go-between with the students.

A course in Pitjatjantjara was introduced in about 1985 to give prospective teachers some conversational skill in the language. The materials for this course included cassette tapes. Many years later a CD version was introduced – *Wangka Kulintjaku* – that would enable teachers to do the subject as a self-instructional course. The provision of such courses was good; however, the fault, in my retrospective opinion, is that any teacher going to teach in the APY lands should have been required to undertake a three-month intensive course in the language before being posted to the Lands.

In 1984 another initiative was undertaken by what was then the SACAE (now UniSA) in the introduction of a two-year modified teacher training program known as ANTEP – Anangu Teacher Education Program. This program was open to Aboriginal Education Workers from the Lands and offered a two-year curriculum of teacher training that would then enable them to return to their communities as teachers in the schools. Additionally, those who were to successfully complete those two years would have the option to undertake a third year of training which would then qualify them as teachers in any school in the state. Over the intervening thirty plus years, fifty students graduated with a Diploma of Education (Anangu Education) and twenty five with a Bachelor of Education (Anangu Education). I understand, however, that this program that has provided significant local capacity-building in education may not continue beyond the end of this year. If this is the case, this would be doubly unfortunate not just for the denied opportunities to local people, particularly women, in the APY lands but also because the graduates of these courses should be considered as filling the necessary bilingual language-capacity need, the absence of which killed off bilingual education in the APY in 1992.

At this point, it would be worthwhile my making some comments on my involvement in the establishment of the Kaurna Plains School. Dr Alitja Rigney has, in other fora, very graciously commented on the contribution she believes I made to assisting the rejuvenation of the Kaurna language by my support for the establishment of that school. I thank her for those comments. It is certainly true that I strongly supported the establishment of the school back in 1985 in the face of significant opposition from elements of the local non-Aboriginal community. There was even the suggestion – put directly to me at the time that, were a No Confidence vote to be moved against me in the House of Assembly and, given the Government's minority status in that year, that I could lose my ministerial position.

What we now know as the Kaurna Plains School was originally called the Elizabeth Urban Aboriginal School. In its report in December 1985 recommending the school's establishment, the Parliamentary Public Works Standing Committee noted three aims for the proposed school, these being:

- To maintain and reinforce the feelings, knowledge and understanding of Aboriginality, in order to develop pride, confidence and self-esteem as Aboriginal people;
- To provide students with the skills necessary for the interaction in their own community and the wider Australian community; and
- To involve the Aboriginal community in the responsibility for education in order that a familiar and positive learning environment be provided for Aboriginal students.

The report then also noted that these three aims would be meet by eleven means. Particularly relevant for tonight there were two that were related to language:

- Teaching an Aboriginal language; and
- Using Aboriginal English patterns in early literacy experiences, and while introducing the use of Standard English, never doing so in a way that devalues the first language.

During the Committee's hearings, I appeared before the PWSC to put the case for the school, and also to contest allegations made against me in particular as to my motives in promoting the school's establishment. In the course of that opposition, I had been accused of introducing Apartheid into our education system, and of wanting to limit exposure to Aboriginal studies in the education system by limiting the discipline to this school and other primarily Aboriginal schools. I gave a very long statement to the committee, too long to quote here; but perhaps I might quote this one statement: 'All I ask is for members of the community to give this their fullest consideration, a fair consideration, and look at the examples we have in South Australia where Aboriginal education is following various models, proving themselves successful for the students within them, and compatible with communities in which they are located.'

And there are many more initiatives happening in our schools promoting teaching of Aboriginal languages; but this all seems to be operating at the meso and micro levels with insufficient support from the macro.

> What is clearly needed is a more coherent policy framework at the state and national levels that also provides proper resourcing for teacher training and material production. This resourced policy framework should seek to:
>
> - Introduce or strengthen bilingual programs in schools in majority population Aboriginal and Torres Strait Islander communities;
> - Provide in communities, where the Aboriginal and Torres Strait Islander numbers are significant but not in the majority, compulsory second-language teaching provided to all students;
> - Provide in all other communities for the teaching of local or regional languages as separate subjects or as modules of study within other subjects.

> All of this would be easier to achieve if, at the state and national levels, there were government policies regarding Australia's first languages.

Noel Pearson, back in 2012, promoted the idea that the Expert Panel on Constitutional Recognition of Indigenous Australians, should include a reference to language in the proposals for amending the Constitution. As a result, there was a draft Clause 127A put out for discussion. This draft clause read:

> (1) The national language of the Commonwealth of Australia is English.
>
> (2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

The proposal, as Pearson puts it: 'has largely disappeared from the national discourse about constitutional recognition'. It will therefore most probably not be included in the Recognise Referendum to be held next year. I can agree that there are sound reasons for this, but this should not stop the issue of legal recognition of Aboriginal and Torres Strait Islander languages being dealt with in other ways than by amendment to the Constitution. In other words to examine alternative ways of giving the status of Officiality to Aboriginal and Torres Strait Islander languages.

English is not, by constitutional proclamation, the official language of Australia; rather its pre-eminent status has come about through a quasi-constitutionalism resulting from state practice since the first exercise of colonial governance on 26 January 1888. All federal, state and territory statute law and regulations are composed in English; all court judgements are composed in English. In Australia, English has not needed Constitutional sanction to shore up this pre-eminent status. So if English could not only survive and thrive without such sanction, one could well ask why would any other language need some form of officiality?

Ghil'ad Zuckermann has previously pointed out that New Zealand has two official languages. If you haven't heard him speak on the subject, I almost certainly know what you are now thinking. You are thinking that New Zealand's official languages must be English and Te Reo Maori. And you would only be half right. Te Reo Maori certainly; but the other official language is New Zealand Sign Language. English has no such status in New Zealand. Te Reo Maori gained legal official status in 1987, and NZSL in 2006. Both achieved such status through statute law, not through constitutional amendment.

The same could be done in this country. But to do so would require an acknowledgement of an element of primacy being given to Aboriginal and Torres Strait Islander languages. There are some in this country who might reject that. In commenting on the use of Warlpiri by Bess Price that I referred to at the beginning of my speech tonight, Bob Gosford, writing for crikey.com.au, had this to say:

> … there are very real practical issues to do with the provision of an interpreter to those members of the NT Legislative Assembly who may … choose to use a language other than

> English … Two … are of Dutch descent … (while two others) are of Italian and Indian heritage (and) may wish to (use their first languages) from time to time.

In other words, he is presuming an absolute equality amongst all languages other than English in this country. But why should that be so? Why, in this one area, should it be inconceivable that Australia's first languages could have primacy over all others? Not only for the sake of an historical recognition that this land was not *Lingua Nullius* at first colonial settlement; but also because, Bess Price's point had been to be able to communicate the feelings of some of her constituents, Australian-born people, who did not have fluency or even proficiency in English. Aboriginal and Torres Strait Islander languages are autoctonous; they exist nowhere else on the planet. If they are not to be protected here, then they will be protected nowhere else other than perhaps in the aspic-quality of museum files.

In fairness to Bob Gosford, while I take serious issue with his implied attitude re the status of Aboriginal and Torres Strait Islander languages, I should acknowledge that in that same article he did go on to make a very important point that the linguistic killing fields are not in the Northern Territory parliamentary precinct but in the dozens of small territory townships where on every school day kids walk out of their houses where English is spoken as a third, fourth or fifth language, and end up the road to spend the day in a monolingual classroom.

But to return to the point, in dealing with the merits or otherwise of official status being given to Aboriginal and Torres Strait Islander languages, amongst the issues worth considering is the status of such languages in the courts of law. Unlike some other countries that have Human Rights Charters that enshrine the right of a plaintiff to interpretation, Australia has relied on its being a signatory to the International Covenant on Civil and Political Rights and in particular, in terms of tonight's topic, regarding this particular defined right; I quote: 'The right to the free assistance of an interpreter if the person cannot understand or speak the language used in the Court.'

The history of the de facto existence of such a right, certainly before the Covenant, is mixed. In a very interesting paper (entitled *Ngayulu nyurranya putu kulini – The Legal Right to an Interpreter*) presented to the Language and Law Conference in Darwin in 2012, Russell Goldflam noted a judicial finding in Queensland in 1885 where four Aboriginal men were acquitted of a murder charge: ' … because no interpreter could be found to enable them to hear and understand what they had been charged with.' [p2]

Goldflam's use of the phrase 'hear and understand' was more than casual as, earlier in his presentation he had noted how in both Pitjatjantjara and Arrernte a single word conveyed the meaning of both 'hearing' and 'understanding' (*kulini* in the former and *aweme* in the latter). And he used this duality to make the point that:

The accused must both be able to hear and understand. [p.1] He further used his presentation to examine the International Covenant on Civil and Political Rights

acknowledged by Australia alongside his assertion that 'In Australian law, the judge has a final discretion whether to allow an interpreter or not.' [p. 3] Whilst he noted that such discretion must be properly exercised and would be highly susceptible to a successful appeal in the event of a failure to allow such interpretation, Goldflam highlighted the danger of ambiguity in such an uncertain situation. He cited a statement made in 1999 by the then Chief Minister of the Northern Territory that 'Providing Aborigines with interpreters is like giving a wheelchair to someone who should be walking. [p. 3]

The 1986 Report of the Australian Legal Rights Commission [Report 31: Recognition of Aboriginal Customary Laws: General Use of evidence and procedure] included two quotes that spoke to the 'hearing and understanding' dilemma as it particularly applied to those Aboriginal and Torres Strait Islanders for whom English was not their particular first language. The Report quoted Justice Kriewaldt's comments about the situation that applied in the 1950s: ' … in the Northern Territory the trial of an aborigine in most cases proceeds, and so far as I could gather, has always proceeded, as if the accused were not present. If he were physically absent no one would notice this fact. The accused, so far as I could judge, in most cases takes no interest in the proceedings. He certainly does not understand that portion of the evidence which is of the greatest importance in most cases, namely, the account a police constable gives of the confession made by the accused. No attempt is made to translate any of the evidence to him.'

And in another place, the Report cited a comment made in 1981 by a Central Australian Aboriginal Legal Aid Service lawyer: '… the new and impressive court building in Alice Springs [announces] the fact that interpreters can be obtained on request in about nine languages including two Chinese dialects. A notable omission is … any reference whatsoever to any Aboriginal language. This is despite the fact that Aboriginal people comprise between 60% and 70% of all Defendants in the Summary Courts held at Alice Springs and Tennant Creek, as well as virtually all Defendants listed in the bush courts and as much as 90% of all matters listed in the Supreme Court Criminal Sittings.' [510]

Toponymy is a sometimes underrated aspect of language recognition and respect. Place names matter, if they didn't every place would simply be given a number. As it is, there is only one place in the whole of Australia whose place name is a number – 1770 which is in Queensland and, in case you're interested, its postcode is 4677. So if place names matter, so does the language that is used to name them.

I am pleased that it was my government, back in 1993, that accepted guidelines by which both Aboriginal names and English names could be given to a place. In 1999, those guidelines were incorporated into law under the Geographical Names Board legislation. Incidentally, that board was only itself incorporated in statute law in 1969. From its founding in 1916, when it was called the Nomenclature Committee – which had

been set up for the ethnic cleansing of German place names from the South Australian map – the GNB operated under government authority.

Surprisingly, place naming can generate strong feelings. Back in October 2010, a contributor to Andrew Bolt's blog on Uluru posted this comment concerning another contributor named Jim who had defended the renaming of Ayer's Rock; he wrote: 'I still call it Ayers Rock, Jimbo, also The Grampians which is the white fellers name, even still call Footscray Rd, well, Footscray Rd, not that Birralung thingy that was foisted upon us … Just because someone changes names, doesn't mean we all have to fall into line and like it, or even use these new names …' Apart from his transparent bigotry, the correspondent put forward a deeply flawed proposition. Ayers Rock, The Grampians and Footscray Road were all changes to names; well maybe not Footscray Road, as that was a post-colonisation construction. The reality is that place names are, overwhelmingly, arbitrary, at least those that are in English in Australia. On the other hand, Aboriginal place names always had historically or, if given later, currently a connection to context. So Onkaparinga came from Ngangkiparinga, meaning Women's River.

As an indicator of the arbitrariness of English language names, Colonel William Light chose, in 1836, to name the central square in his plan, the Great Square. A year later, on 23rd May 1837, the town elders chose to rename it after Princess Victoria. So it became Victoria Square – entirely arbitrary as Victoria hadn't done anything to merit the honour, and the space isn't even a square – it's a rectangle. Much less arbitrary, therefore, was the proclamation 165 years later to change the name officially to Tarndanyangga/Victoria Square. Tarndanyangga, place of Red Kangaroo Dreaming, having a connection pre-colonial settlement with the general area now covered by the CBD and Parklands. I should note, however, that there was at the time an alternative name proposed by Rob Amery and Georgina Yambo Williams, namely *Ngamatyi.*

Toponymy might be considered tokenistic by some, on the other hand it is emblematic; and efforts should be made to extend the dual naming, not just of geographical features, but also human constructs, such as streets and suburbs. That being said, there are two issues that should be noted. Firstly, the potential for loss of exclusivity of use; and secondly, the question of whether one or other should have primacy. The New Zealand Geographic Board/Nga Pou Taunaha Aotearoa has, in recent years, opted to give primacy to Maori names over English. Both these issues would need to be addressed in extending Aboriginal and Torres Strait Islander toponymy.

In summary Language Policy needs to focus on supporting surviving original languages to thrive, for the benefit of our shared cultural inheritance. I have talked about ways that this can happen through education, through language officiality and through place naming. But I return to the third conclusion of my doctoral thesis – the question of the genres and domains where language use is occurring. To repeat the

adage – 'languages don't die, they just stop being spoken' – and they stop being spoken if speakers feel that the language at risk no longer meets their needs in an ever-growing range of genres and domains. Such is the power of the micro level to determine the ultimate success or failure of language policy and investment.

So what sorts of things can be done to expand language usage across domains and genres? What I now list are some examples from overseas experience.

A key possibility involves the languages used on computers. We know from other evidence that there has been a significant investment in computer infrastructure in schools and communities in Aboriginal and Torres Strait Islander areas. But it is the case that everywhere those computers will be using English as their operating language. Yet, Windows 10 offers Cherokee (from North America), K'iche (from Central America) and Quechua (from South America) are amongst the range of operating languages on offer. Perhaps government or private sponsors could offer to support Windows offer some of Australia's first languages as additions to the list.

On the internet-related topic, many minority languages around the world have found the World Wide Web to have been a boon to promoting information and networks in support of languages at risk. I first came across this in my doctoral studies with the site Asturies.com – but there are many others. I have been very pleased to see similar developments happening with Australia's first languages and have noted in particular the Kaurna Warra Pintyanthi website.

Besides the internet and computing in general, a key area of potential is broadcast media. Back in 1986, on behalf of the South Australian government, I gave evidence at hearings of the Australian Broadcasting Tribunal into the proposition that there be a new TV channel footprint covering central Australia. There were two applicants for the licence – one from northern Queensland and the other based in Alice Springs – the Central Australia Media Alliance or Imparja. As a state government we had decided to support Imparja and offered a $1m guarantee as well as a commitment to purchase air time. Our hope was that the station would help in the delivery of education programs in remote areas, but that it would also offer an opportunity for a wider diversity of languages in broadcast use.

Finally, in the list of things that can be done to encourage a growth in genre usage, is the idea used by many languages at risk of supporting the translation of major works in other languages into the minority languages. Speakers of such languages will not always want to be limited to literature in their vernacular that has only come from their own communities; they would want literature from the global library as well.

Returning to electronic media for a moment, this idea of casting a net wider than traditionally thought about in language promotion has seen some interesting experiments. Galician television in Spain, in order to promote the audience of programs broadcast in Gallego, has over the years bought the rights to popular overseas programs

and then dubbed them into Gallego – I recall they did this with the US soapie *Falcon Crest*. They also obtained the broadcast rights for certain sporting events which were then narrated in Gallego.

I started my oration this evening talking about an incident on Australia Day and a performance of our national anthem by Jessica Mauboy. Back in 1993, when I was Premier, I had raised the suggestion in Executive Council as to whether the Opening of Parliament that year could have an element conducted in an Aboriginal language. The formal Opening of Parliament is an occasion of pomp and ceremony all designed to reinforce the authority of a commonweal of people brought together as an institution of state for the benefit of those very people. The then Governor, Dame Roma Mitchell, was sympathetic to the idea though, with her characteristic sound knowledge of constitutional and statute law, pointed out that such an event would have no legal standing in the opening proceedings, and would be akin to the fanfare that was to be played from the Strangers' Gallery of the Legislative Assembly as Assembly MPs paraded into the Chamber prior to the Governor's Address. With this semi-green light to proceed, I asked our Minister of Aboriginal Affairs, Kym Mayes to investigate how best this might be effected. A few weeks later he reported back that the idea was proving more difficult to progress than initially anticipated for the very good reason of the multilingual nature of South Australia – which language or languages would be chosen being key, but not alone, amongst the questions raised. Sadly, as time was too short before the opening was to take place, and with many other affairs of the busyness of state to pre-occupy Cabinet's mind, the idea was laid aside. It is one of my regrets but, as Ned Kelly would say: 'Such is life.'

However, the principle behind my idea was a recognition of the power of language symbols quite apart from genres and domains of usage or legal status. Time would come where Acknowledgement of Country would become commonplace, but the issue I sought was more integrative – namely a conscious acknowledgement of language equality in the very organs of state.

On ANZAC Day this year, I attended the Dawn Service held in Katherine in the Northern Territory. About one thousand people attended and I was moved to note that the bi-national nature of the ANZAC story was recognised by those present as both the Australian and New Zealand national anthems were sung. But at that point, the irony of the situation came into sharp focus as our national anthem was sung mono-lingually while New Zealand's 'God defend New Zealand/Manaakitia mai Aotearoa' was sung bilingually. There, in the Top End, with strong representation in the crowd attending the Dawn Service from the local Aboriginal communities, we listened to anthems in English and Maori … and no other language.

Of course, the excuse the South Australian Cabinet accepted in 1993 played well again – it would not be possible to have a bilingual Australian anthem … there are

simply too many Aboriginal and Torres Strait Islander languages – our anthem would rival *Aïda* in length if all were to be recognised. The South African National Anthem, 'Nkosi Sikelel iAfrika', does follow a selective multi-lingual path with verses in five of the countries national languages (Xhosa, Zulu, Sesotho, Afrikaans and English) – but a national anthem with over one hundred verses? Not realistic.

However, I believe there are two solutions that the national parliament should consider. The first would be the authorising of official translations of our anthem into all Aboriginal and Torres Strait Islander languages spoken in Australia today with the provision that these official translations could be sung in those geographic areas where each of those languages is autochtonous. Thus here in Adelaide, a Kaurna version could be sung at the Dawn Service alongside the English version or at Australia Day ceremonies.

Thinking about this possibility, I thought about South Australia's own candidate for a national anthem that had topped the poll here in SA in the 1977 Referendum but came fourth nationally – Carolyn Carleton and Carl Linger's 'Song of Australia':

There is a land where summer skies
Are gleaming with a thousand dyes,
Blending in 'witching harmonies, in harmonies;
And grassy knoll, and forest height,
Are flushing in the rosy light,
And all above is azure bright – Australia!

Perhaps our South Australian legislature might consider proclaiming official translations of this would-be anthem as an encouragement to the national parliament.

But then another possibility occurred to me – two anthems. Our existing national anthem could be complemented by another one that would have its provenance from Aboriginal and Torres Strait Islander inheritance. We have three official flags and, as we South Australians note with pride the Aboriginal flag (designed by Harold Thomas, a Luritja man) first flew in Australia on 12 July 1971 in Tarndanyangga-Victoria Square, and was proclaimed official 0n 14 July 1995 – the same date as the Torres Strait Islander flag.

A parallel national anthem, in multilingual versions, would give Australia a richer voice of unity. As I thought about this, I recalled a poem by Eva Johnson called *Visions.* Eva, of the Malak Malak people in the Daly River region was taken from her mother at the age of two. first to Croker Island Mission and then, at the age of ten, to an orphanage in Adelaide. The first and last verses of her poem had, for me, an anthemic ring about them; and so, I will finish by reciting them:

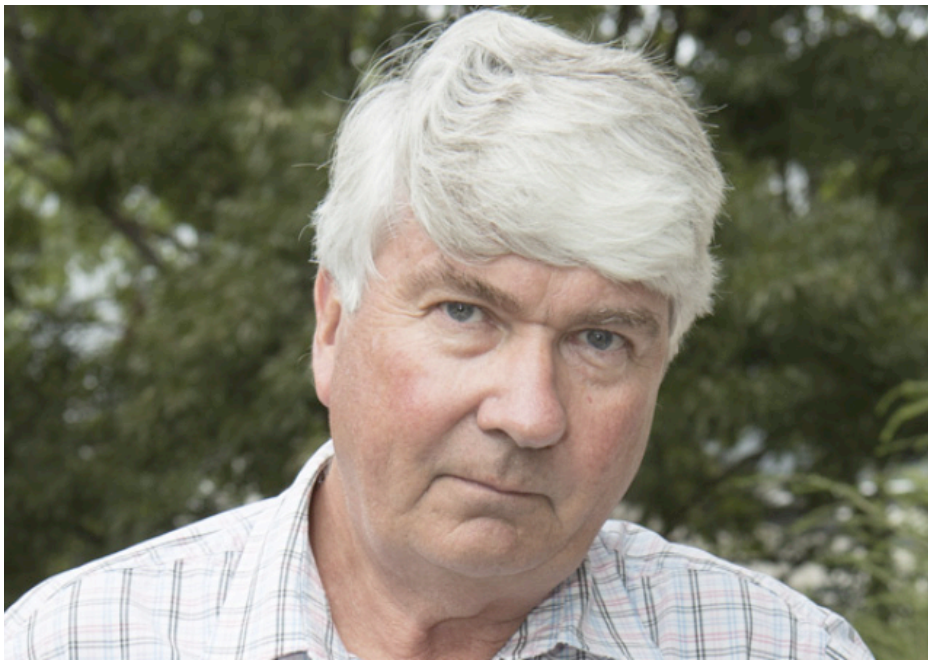
We cling to our hopes and dreams
Of another brand-new day
That mould our lives into sculptures
Of images wrapped in clay
There is hope in our tomorrows
Our love must show the way
Let our children's words be spoken
From the visions of yesterday.
We keep our own flag flying
In colours black, red and gold
To remember our living and dying
Our history that has never been told
Let the voice of our new generation
Break the barriers across this land
And fight with pride and dignity
With the vision we hold in our hand.

2017

On Aboriginal Land: Seeking a Place at the Table

Recognising 50 years since the 1967 Referendum

PRESENTED BY FR FRANK BRENNAN SJ AO



A Roadmap after the Uluru Cry from the Heart

I acknowledge the Kaurna people, the traditional custodians of the Adelaide region and join you in paying our respects to all the Elders present.

It's a great honour for an Australian without any Aboriginal or Torres Strait Islander heritage to be asked by Lowitja O'Donoghue to deliver the Lowitja Oration marking the 50th anniversary of the 1967 Referendum. It is also the 25th anniversary of the High Court's *Mabo* decision and the 20th anniversary of the first Reconciliation Convention held in Melbourne and chaired by Patrick Dodson. I was privileged to be the Rapporteur at that Convention.

Fifty years on from the successful 1967 Referendum, we have all heard the 'Uluru Statement from the Heart'. Aboriginal and Torres Strait representatives have told us that 'in 1967 we were counted, in 2017 we seek to be heard'. Australians of good will acknowledge that sovereignty is a spiritual notion for Indigenous Australians and that Aboriginal and Torres Strait Islander incarceration and separation of children are indicators of 'the torment of (their) powerlessness'.[51] We affirm the aspiration of the Indigenous leaders gathered at Uluru: 'When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.'

Indigenous leaders this last week have called for the creation of two new legal entities. They want a First Nations Voice enshrined in the Constitution, and a Makarrata Commission set up by legislation. The Makarrata Commission would supervise agreement-making between governments and First Nations, and engage in truth-telling about history. The envisaged destination is a national Makarrata (or treaty).

So the immediate constitutional issue is the creation of the First Nations Voice. There is no point in proceeding with a Referendum on a question which fails to win the approval of Indigenous Australia. Neither is there any point in proceeding with a Referendum which is unlikely to win the approval of the voting public.

The consultations conducted in Indigenous communities under the auspices and with the financial support of the Referendum Council have yielded a constant message that Indigenous Australians want substantive constitutional change and not just symbolic or minimalist change.

The question is: 'How much should we attempt to put in the Constitution now, and how much should we place outside the Constitution, or delay for constitutional inclusion until another day'? There's certainly one thing worse than minimal symbolic constitutional change accompanied by substantive change outside the Constitution, and that is no mention of Aboriginal and Torres Strait Islander peoples in the Constitution, either because we judged it all too hard or too compromised, or because we tried to achieve too much, too soon.

The Referendum Council is required to report to the Prime Minister and the Leader of the Opposition by 30 June on 'options for a Referendum proposal, steps for finalising a proposal, and possible timing for a Referendum'. The Referendum Council needs to recommend to government a timetable for constitutional change with maximum prospects of a 'Yes' vote for proposals sought by Indigenous Australians.

Australians will not vote for a constitutional First Nations Voice until they have first heard it and seen it in action. The work needs to begin immediately on legislating for that First Nations Voice, so that it is operating as an integral part of national policy and law-making, attracting national support for constitutional recognition. Presumably this new legislated entity would replace the existing National Congress of Australia's First Peoples which boasts: 'As a company the Congress is owned and controlled by its membership and is independent of Government. Together we will be leaders and advocates for recognising our status and rights as First Nations Peoples in Australia.'

The Referendum Council should recommend that the government commence immediate consultations how best to set up a new Indigenous advisory council as a First Nations Voice. It should recommend that Parliament legislate for the creation of such an advisory council. It should recommend that any Referendum be delayed until the advisory council is established and working well. The Parliament might then, and only then, consider legislation for a Referendum proposing relevant changes to the Constitution. Prime Minister Malcolm Turnbull was right when he said on Saturday at the 50th anniversary of the 1967 Referendum: 'No political deal, no cross-party compromise, no leader's handshake can deliver constitutional change. To do that, a constitutionally conservative nation must be persuaded that the proposed amendments respect the fundamental values of the Constitution and will deliver precise changes that are clearly understood to be of benefit to all Australians.' That will happen only once the proposed First Nations Voice has been set up and been seen to be working well.[52] One desirable change would be to section 51 (26) of the Constitution which could be amended to provide that the Commonwealth Parliament have power to make laws with respect to the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples, and their continuing relationship with their traditional lands and waters. These are the distinctively Indigenous matters which warrant Indigenous peoples having a secure place at the table. Section 51(26) of the Constitution could go on to provide that the Parliament have power to make laws with respect to the Constitution and functions of an Aboriginal and Torres Strait Islander Council which may request the Parliament to enact a law or advise the Parliament of the effect of a law or proposed law relating to any of those matters.

Other issues will wait for another day, or be dealt with outside the Australian Constitution. One thing is certain following last week's cry from the heart at Uluru. There is no quick fix to the Australian Constitution. Successful constitutional change

acceptable to the Indigenous leaders gathered at Uluru won't be happening anytime soon. We need to take the time to get this right. This evening, I will argue that a First Nations Voice is more like a complex symphony with multiple conductors than a chamber choir under one conductor.

I will explain why a racial non-discrimination clause is unachievable and unworkable in light of the High Court's development of the common law recognising native title. In any event, such a clause should be attempted only as part of a comprehensive constitutional bill of rights or as part of a non-discrimination clause addressing all key discrimination concerns in contemporary Australia.

The removal of the 'race' provisions and the addition of 'an Acknowledgement' could have been put to Referendum fairly promptly if sought by Aborigines and Torres Strait Islanders. The constitutional recognition of a First Nations Voice will take more time. A Referendum is more likely to succeed if the First Nations Voice is already in existence, so that people know what they are voting for or against.

I will add a note of well-intended caution about the political risk and cost of deferring incremental constitutional change. With a slightly Irish touch, I will be suggesting that if I were setting out on a journey towards a Makarrata between Aborigines and Torres Strait Islanders and the Commonwealth, and a First Nations Voice enshrined in the Constitution, I would prefer to set out on my journey with a Constitution which acknowledges Aboriginal history, present reality and future aspirations and which specifically empowers the Commonwealth Parliament to legislate on such matters, rather than setting out with a Constitution that does not even mention Aborigines and Torres Strait Islanders. And if I were not setting out for those destinations, I would still prefer a Constitution that actually mentions Aborigines and Torres Strait Islanders and which specifies that the Commonwealth Parliament has power to make laws with respect to Indigenous Australians, without having recourse to the generic term 'race'.

There should be no incremental change to the Constitution unless that change is commended, supported and advocated by Indigenous leaders.

Acknowledgements

This evening's event is organised by Reconciliation South Australia and the Don Dunstan Foundation. I pay tribute to the late Don Dunstan. I met him only once, but it was in the best of circumstances. A group of us were camping under the stars with him and Nugget Coombs in the Pitjantjatjara Lands while consulting on proposed reforms on the 'Pit lands'. We were all aware that we were in the presence of two of the all-time greats. Don entered the South Australian Parliament before I was born. Having witnessed the appalling living conditions for Aborigines living on the Point Pearce Mission in the early 1950s he was resolved to act. He got to know some young Aboriginal men here in Adelaide including Charles Perkins and John Moriarty who had lived at the St Francis

Home. He listened to them. He learned from them. And he provided them with hope and leadership. The Federal Council of Aboriginal Advancement (FCAA), later named FCAATSI was established here in Adelaide in 1958. Sue Taffe notes in *Black and White Together*, Lowitja's preferred history of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders:

> The people at the Adelaide conference were old and young, male and female, black and white, liberal and socialist. Nonetheless they were connected by a common view. They agreed that the repeal of restrictive laws would allow Aboriginal Australians to join the Australian community as citizens. They were moved by a common drive to pressure apathetic governments and electorates to take greater responsibility for Aboriginal Australians … They would travel together for the next fifteen years, not always harmoniously but on the whole accepting the good intentions of those with whom they differed.[53]

Don Dunstan became involved and was to be the last white President of the Council in 1960, paving the way for Joe McGinniss to take over at the Brisbane Conference in 1961. Joe remained president of FCAATSI until 1973. I was privileged to meet him a few times in Cairns when I was legal adviser to the Queensland Aboriginal Co-ordinating Council. Joe had been a wharfie; he had worked for the Cairns Council; he worked for the newly established Commonwealth Department of Aboriginal Affairs, and then was a leader of Aboriginal Hostels in North Queensland. Together with Clarrie Grogan, he was very welcoming of the new young Catholic whitefella on the block. Don Dunstan became a Minister in the new Labor Government here in 1965, and by 1966 he had succeeded in having the South Australian Parliament pass the first law instituting an Aboriginal land trust and the first Australian law prohibiting racial discrimination. He withdrew from FCAATSI later telling Peter Read: 'They didn't need Europeans sitting around doing a sort of hand-holding job. That we should be in the background helping'.

I note the presence this evening of Dawn Casey and Kerrie Tim – two extraordinary Aboriginal women who have contributed so much to the well-being of their people and to the common wealth of our nation, through public service to governments of all political persuasions. I am greatly honoured that each of them has travelled from the east to be here. They were to be accompanied by Patricia Turner, but she needs to be at Parliament House first thing in the morning to represent her mob in discussions with some of our elected politicians. We have supported each other through many political battles in the past. I particularly thank Pat Turner for writing the foreword to my book *No Small Change,* and I acknowledge Lowitja's successor as Chair of ATSIC, the late Gatjil Djerrkura who courageously and generously launched my book

The Wik Debate during the difficult aftermath of the acrimonious 1998 native title debate.

I note the presence of Fr Brian McCoy SJ, the provincial of the Jesuits here in Australia. He is my boss. He worked for many years with Aboriginal people – from

Palm Island in Queensland to Balgo in the Kimberley. He worked for Patrick Dodson on the Royal Commission into Aboriginal Deaths in Custody. Brian and I take pride in our Jesuit predecessors like Donald MacKillop, the brother of the now canonised St Mary MacKillop. Donald MacKillop ministered amongst the Aborigines of Daly River in the Northern Territory at the end of the nineteenth century, and wrote one of the great letters to the editor when he sent his 1892 Christmas epistle to the *Sydney Herald*: 'Australia, as such, does not recognise the right of the blackman to live. She marches onward, truly, but not perhaps the fair maiden we paint her. The blackfellow sees blood on that noble forehead, callous cruelty in her heart; her heel is of iron and his helpless countrymen beneath her feet.'

I also note the presence of my sister Madeline Brennan QC, a member of the Queensland Bar who shares Roma Mitchell Chambers in Brisbane together with her husband. I recall the last time I spoke here in Bonython Hall was in the presence of Dame Roma. After the event we walked down North Terrace and Roma showed me her statue. We joked that there was not much more to do in life once your statue was unveiled on North Terrace. Madeline and I share considerable familial pride that the lead judgment in *Mabo* was penned by our father 25 years ago. As a barrister, Gerard Brennan had served as senior counsel for the Northern Land Council during the Royal Commission into Aboriginal land rights set up by the Whitlam government and chaired by Sir Edward Woodward. Prior to *Mabo*, he had spent a decade in the High Court delivering numerous judgments on the interpretation of the Northern Territory land rights legislation. When Prime Minister Paul Keating rose in the House of Representatives to move the second reading of the *Native Title Bill* on 16 November 1993, he commenced with these words:

> Today is a milestone. A response to another milestone – the High Court's decision in the Mabo case. The High Court has determined that Australian law should not, as Justice Brennan said, be 'frozen in an era of racial discrimination'. Its decision in the Mabo case ended the pernicious legal deceit of terra nullius for all of Australia – and for all time.'[54]

When the Chief Justice of Australia, Sir Gerard told an international audience of judges in Canada:

> The modern development of Australian law governing Aboriginal title to land is part of that post-colonial jurisprudence that has been developed in other countries to protect the relationship between the descendants of the Indigenous inhabitants and their traditional lands … The post-colonial relationship of the Indigenous population with their traditional land is not only, or even chiefly, a problem for the courts. But the courts, sensitive to the demands of justice for minorities and the disadvantaged in society, are likely to remain a forum in which Indigenous peoples will seek to right what are now perceived to be historic wrongs.[55]

Fred Chaney, a former Minister for Aboriginal Affairs in pre-*Mabo* Australia and

later the Deputy President of the National Native Title Tribunal, has recently said: *Mabo* 'has transformed the status of Aboriginal people from perpetual mendicants to stakeholders. *Mabo* and the *Native Title Act* represent the biggest single shift in the power equation since 1788.'[56]

I pay tribute to Lowitja O'Donoghue who personally invited me to deliver this Oration. I have been privileged to work with Lowitja and to be inspired by her over many decades, particularly when she chaired ATSIC and led the team which negotiated the Native Title Bill with Prime Minister Paul Keating in 1993. There have been many times when Lowitja, Pat Turner and I have turned to each other seeking the way to enhance the place at the table for Indigenous Australians. I thank Lowitja for her national leadership, for her trust, for her hopeful example, and for her friendship.

On this 50th anniversary of the 1967 Referendum, it is appropriate to recall the years of hard labour put in by those Australians who contributed to FCAATSI and its predecessors. This evening that is best done looking through the prism of Lowitja's early political involvements. Having left the Colebrook Home, she first became involved with the Aboriginal Advancement League here in South Australia because it was the only organisation working for Aboriginal rights at the time. Lowitja recalls that there were many white people from the churches involved. She would take Thursdays off and meet up with like-minded people near what is now Rundle Mall. Looking back on those days, she recalls a strict religious upbringing so that even going to the cinema was not well regarded. She was sent to the country to work after her 16th birthday. She observes, 'I'm not a radical but I certainly wasn't to be walked over.'

When she took up nursing as a career, she had less time to dedicate to the Advancement League. But on her return from India in 1962, she got involved with the Aborigines Progress Association (APA). The APA was affiliated with FCAATSI. Lowitja used to travel to Canberra for the annual Easter Conference. One attraction of the APA in contrast to the Advancement League was that the executive positions were held by Aborigines. Lowitja then found a more natural home in the newly established Aboriginal Women's Council. She was the first Secretary. She found her political voice, working locally with these fledgling Indigenous organisations in South Australia, and participating in the annual FCAATSI meeting at which Indigenous and non-indigenous Australians worked together. Their great achievement was harnessing support for the 1967 constitutional Referendum. This involved sustained effort over many years, with close collaboration of key Indigenous and non-indigenous leaders representing many varied communities and sectors of society. Their efforts were rewarded with the highest 'Yes' vote ever in a Referendum campaign.

Once the Referendum was carried, FCAATSI splintered, culminating in the 1970 meeting at which Aboriginal members walked out and established their own National Tribal Council. Barrie Pittock, a Quaker scientist who had some exposure to the

American approach to Indigenous affairs, was very involved with FCAATSI and by 1970, was one of the non-indigenous members supportive of Aboriginal desires to be self-determining. He proposed the amendment to the FCAATSI Constitution that all executive members 'be of Australian Aborigine or Island descent', with a power to co-opt members 'irrespective of racial descent'. The meeting was a fiasco, resulting in a vote of 48-48, whereupon Pastor Doug Nicholls and Kath Walker called on those supporting the amendment to gather on one side of the hall. They immediately resolved to form an interim body controlled by Aborigines and Torres Strait Islanders. This became the National Tribal Council. Reflecting on the Conference, Pittock wrote:

> The (1970) Easter Conference of FCAATSI showed that a lot of white Australians, often sincere and dedicated, believe they know what is best for Aborigines better than Aborigines themselves. For the sake of Aboriginal advancement, let us hope they will listen more closely in future and think again.
>
> The National Tribal Council wants, needs and welcomes genuine friends and allies, but not people who attach conditions to their friendship or who believe they have the right to dictate 'solutions' to other people's problems.

Contemplating constitutional recognition of Indigenous Australians five decades later, we are all needing to respect the place of Indigenous Australians in the complex processes of constitutional change given that the amendment process of our Constitution is one of the most democratic on earth, requiring not just the vote of both Houses of Parliament but also the vote of a majority of voters nationally, as well as in four of the six states. We have only amended our Constitution eight times out of 44 attempts. Australians are very cautious about constitutional change. No voter under 58 years of-age has ever voted for a successful change to our Constitution. No voter under 71 years of-age had the opportunity to vote for the 1967 Referendum. I have previously expressed my views on how Indigenous recognition might best be achieved. But I come this evening willing to 'listen more closely in future, and think again' in light of the ongoing deliberations by Indigenous Australians. I am one of those non-indigenous Australians wanting to respond to last week's invitation at Uluru to 'walk with us in a movement of the Australian people for a better future'.

So I salute Pat Anderson, the Chair of the Don Dunstan Foundation and the co-Chair of the Referendum Council appointed by the Turnbull government to propose a way forward on constitutional recognition of Indigenous Australians. Last week, Pat oversaw the National Constitutional Convention of Indigenous Leaders gathered at Uluru, the culmination of 12 consultations with Aboriginal and Torres Strait Islander Australians conducted by the Indigenous members of the Referendum Council. Pat's co-Chair of the Referendum Council, Mark Leibler, told ABC *Q & A* on 8 May 2017:

> Aboriginal and Torres Strait Islanders have only now completed 12 dialogues. They were not formulated or devised by me or by the non-indigenous people sitting on the council.

> They were designed by the Aboriginal and Torres Strait Islander representatives on the council. They needed that time, they needed to consult widely. This is an absolutely unique phenomenon. This is the first time that we've had this sort of thing actually designed by and culturally acceptable to our Aboriginal and Torres Strait Islanders.

Now that the national convention of Indigenous leaders at Uluru is complete, it is for the Referendum Council to consider the Uluru Report which is the culmination of the 12 First Nations Dialogues and to make recommendations to the Prime Minister and the Leader of the Opposition. And it is for us to heed Pat's call: 'Australia has to hear us for goodness sake. How many times do we have to tell you?' Last night on the ABC *Q & A* Pat told us that it is now time 'to put meat on the bones'. With her gentle but firm wisdom, Pat observed that there has to be truth-telling, and 'there might be a bit of blood-letting'.

The Way Forward

This is a critical time for all Australians who are seeking the due place for Indigenous Australians at the table, acknowledging that we are all, and always will be, on Aboriginal land which is shared with all who call Australia home. I am particularly appreciative of this invitation, knowing that a couple of past Lowitja O'Donoghue Orators have had cause to criticise me in my role over the years as 'the meddling priest' – as Prime Minister Keating once described me. I make no claim to infallibility, only to having an unswerving commitment to seeking a place at the table for the First Australians.

On 27 May 1967, fifty years ago last Saturday, Australians voted overwhelmingly to amend the Australian Constitution, deleting the two adverse references to Aborigines in the nation's founding document. The amendments were seen at the time to be modest and largely symbolic. Ironically, one result of the successful Referendum was that the Australian Constitution would no longer mention Aborigines. One amendment gave the Commonwealth Parliament power to make laws with respect to Aborigines, just as it had always given the Commonwealth Parliament power to make laws with respect to the people of any other race for whom it was deemed necessary to make special laws. Given the White Australia policy and the discriminatory policies visited upon Kanaka cane farmers in Queensland and Chinese miners on the goldfields, it was always expected prior to the 1967 Referendum that this special Commonwealth 'race' power would be exercised adverse to the interests and liberties of the targeted race.

Given the way the 1967 Referendum was conducted, it was assumed that this special Commonwealth race power would be exercised for the benefit of Aborigines, if at all. Mind you, Prime Minister Robert Menzies who was a good constitutional lawyer and no great fan of this amendment had always warned that the power could be exercised adverse to the interests of Aborigines. Prime Minister Harold Holt was surprised by the overwhelming vote in support of the amendments and was prompted into action

by this expression of the popular will. He appointed a three-member Council for Aboriginal Affairs chaired by Nugget Coombs. These three wise white men – Coombs, W.E.H. Stanner and Barrie Dexter – were instrumental in transforming a modest symbolic constitutional change into a lever for substantive policy change and legal reform. Looking back on their achievements in the light of the present debate about Indigenous recognition in the Constitution, I published my book *No Small Change*.

In that book, I argued that it was time to learn the real lessons which followed the 1967 Referendum. That Referendum contained proposals which nowadays would be called 'symbolic' rather than 'substantive'. It is, and remains, my contention that the modest constitutional changes contributed to substantive change. They kick-started the changes from *terra nullius* to land rights, and from assimilation to self-determination. Prime Minister Harold Holt appreciated that a modest Referendum carried overwhelmingly provided the political mandate for policy changes. The catalyst for change was the Council for Aboriginal Affairs which he then set up to advise government and to engage daily with public servants and politicians when considering policy and administrative changes. Any modern equivalent would not restrict its membership to 'three wise white men' even of the eminence of Dr H.C. Coombs, Professor W.E.H. Stanner and Barrie Dexter. Aboriginal Australians are entitled to their place at the table, especially when it comes to decisions about their lands and cultures, and social policies which single them out for special treatment or which impact on them more heavily and more often than on other Australians.

The problems with a constitutional ban on racial discrimination

One reason for my writing *No Small Change* was that I thought the expert panel set up by Prime Minister Julia Gillard had proposed measures for constitutional recognition which were unachievable or unworkable. I was particularly concerned about the proposal that the Constitution include a provision:

> Section 116A Prohibition of racial discrimination
>
> (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
>
> (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

I understand the desire to put in place strong measures against racially discriminatory Commonwealth policies. I believe the Constitution is not the best place to do this. I will provide an alternative suggestion how best to achieve this aim.

If the Expert Panel's recommendation of, and the Indigenous leaders' demand for, a constitutional ban on racial discrimination were to have any prospect of success,

we would need to clarify a number of issues. In the absence of a Bill of Rights, why would the Australian voters contemplate a comprehensive constitutional ban on racial discrimination by the Commonwealth and the States, but not a constitutional ban on sexual discrimination or discrimination on the basis of sexual orientation or religious belief?

A constitutional ban on racial discrimination is not as simple as it seems. When legislating for native title in 1993 and 1998, both the Keating Government and then the Howard Government were unable to agree to the demand by Indigenous leaders that all provisions of the *Native Title Act* be strictly subject to the *Racial Discrimination Act 1975*. In the Senate, the Democrats and Greens had proposed such an amendment both times but the major parties, in government and in opposition, agreed to oppose it because of its 'so-called clause busting capacity'. It was essential that the *Native Title Act* allow both the States and the Commonwealth to validate existing land titles and future approved land use, especially on pastoral leases. To provide absolute legal certainty, both the Commonwealth and the States had to be able to validate those titles regardless of the effects of the *Racial Discrimination Act.* Both the Commonwealth and the States had to be able to legislate and act in a way which was not necessarily completely consistent with the *Racial Discrimination Act*. That is why Section 7 of the *Native Title Act* provides:

> This Act is intended to be read and construed subject to the provisions of the *Racial Discrimination Act 1975*.
>
> Subsection (1) means only that:
>
> – the provisions of the *Racial Discrimination Act 1975* apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and
>
> – to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the *Racial Discrimination Act 1975* if that construction would remove the ambiguity.

Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.

It has become a fashionable shorthand to claim: 'While the states and territories cannot escape the effect of the *Racial Discrimination Act*, the Commonwealth can.'[57] The argument then runs that all that is needed is for the same restriction to be applied to the Commonwealth as its legislation applies to the States. With the 1993 and 1998 *Native Title Act* exercises, it was critical that both the Commonwealth *and* the States be able to avoid any ambiguity or uncertainty caused by the *Racial Discrimination Act* when it came to ensuring the certainty of past titles. It is more correct to state that the Commonwealth Parliament presently can suspend the operation of the *Racial Discrimination Act*, both for itself and for State Parliaments. That option would be

removed were a non-discrimination clause to be inserted in the Constitution. It is not correct to claim:

> The biggest change with a non-discrimination clause being added to the Constitution is that federal politicians would agree to wear the constraint they have seen fit to apply to State politicians for the past 40 years.[58]

The even bigger change would be to take away the capacity of all parliaments and all executive governments to validate titles and land use with certainty, regardless of the complexity and uncertainty of the common law of native title as it is developed by the courts.

Anyone serious about a constitutional ban on racial discrimination should clear the decks by trying to convince both the Coalition parties and Labor to amend the *Native Title Act* as previously suggested by the minor parties. They would first need to convince the Business Council of Australia, the National Farmers' Federation, and the Minerals Council of Australia to agree to native title amendments which previously were thought to put in doubt future pastoral and mining activities. Without this deck clearing, a constitutional guarantee of non-discrimination would be a clause buster of nuclear proportions. It would put in doubt the legal validity of many mining and pastoral activities. Given these legal doubts which have been conceded in the past by both Liberal and Labor, in government and in Opposition, this proposed constitutional change is not politically achievable. Even I would vote against it. It is too uncertain in its application, and it would occasion years of litigation in the High Court, delivering little benefit but occasioning considerable financial uncertainty.

There is another significant problem when it comes to considering a one-off constitutional ban on racial discrimination. The advocates for the constitutional ban argue that the High Court's interpretation of the new constitutional provision would be much the same as the court's interpretation of the key provisions of the *Racial Discrimination Act* over the last 40 years. It might be, but then again it might not be. Strangely the key provisions of the *Racial Discrimination Act* (sections 9 and 10) do not include the word 'discriminate' or 'discrimination'. But they do refer to a list of rights and freedoms which are contained in the International Convention on the Elimination of All Forms of Racial Discrimination. A constitutional provision would not refer to any such catalogue of rights listed in an international convention. When considering constitutional change, voters want to be assured that the proposed words have a certain meaning and application. No lawyer could attest that the non-discrimination clause proposed by the 2012 Expert Panel would have exactly the same outcomes as the application of the *Racial Discrimination Act*. It would take the High Court some years to develop the novel Australian jurisprudence of a constitutional non-discrimination clause limited to race, while permitting exceptions for the purposes 'of overcoming

disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group'. For example, would alcohol bans or restrictions, income management or cashless welfare cards be permissible in remote Aboriginal communities? Would such measures require consent from the persons affected, or only consultation? I pay tribute to those members of the expert panel like Noel Pearson who appreciated the insuperable problems with a constitutional racial non-discrimination clause and abandoned it once the expert panel report was published and subjected to public scrutiny.

Those wanting to ensure greater coverage by the *Racial Discrimination Act* should look outside the Constitution. In light of the concern expressed by Indigenous leaders that 'current and future parliaments (are able) to enact discriminatory measures against Aboriginal and Torres Strait Islander people and given that their option of 'a stand-alone prohibition of racial discrimination' is not a possibility, I suggest an amendment to the Acts Interpretation Act specifying that all future Commonwealth legislation be subject to the *Racial Discrimination Act* except when the later statute specifies that it is to prevail. I suggest an amendment in these terms:

> 15AAB. In interpreting a provision of an Act, the interpretation that would best achieve consistency with sections 9 and 10 of the *Racial Discrimination Act* 1975 is to be preferred to each other interpretation, unless the Act specifies that sections 9 and 10 of the *Racial Discrimination Act* 1975 are not to be considered when interpreting a provision of the Act.

Especially when our Parliament includes strong Aboriginal leaders as members, it would be a very brave or foolhardy Executive which would propose to the Parliament a new law that specified that the key provisions of the *Racial Discrimination Act* were not to be considered by a court when interpreting the provisions. The only imaginable instance would be where a court has expanded the common law rights of Indigenous Australians in such a way that there is a need for a legislative compromise accommodating fairly those newly explicated rights and the rights of others as those rights have been justifiably presumed to exist in the past. You will recall that in 1993, Prime Minister Keating marketed the *Native Title Act* as a special measure under the *Racial Discrimination Act*, arguing that the adverse provisions in the Act (those provisions validating other titles and extinguishing any competing native title) were outweighed by the benefit of the benign provisions which enhanced the prospects for the recognition of native title and which boosted the rights of proven native title holders whose native title was not extinguished.

A Symphony in Three Movements: A First Nations Voice or a First Nations Symphony under Numerous Conductors?

First Movement

The 1993 native title debate was the first time in Australian parliamentary history that Aboriginal people had real bargaining chips to bring to the table of political deliberation. The High Court had determined that Aboriginal native title existed in areas undefined, with rights undefined. Any native title which survived until 1975 was thereafter buttressed by the *Racial Discrimination Act*, ensuring that it could not be treated in a less advantageous way than any other form of land title. Miners and pastoralists wanted certainty when planning future activities on lands which might be subject to native title. It was imperative that government fashion legislation which was seen to be fair to Aboriginal people as well as to miners and pastoralists. Prime Minister Paul Keating needed to cut a deal with Aboriginal Australians knowing he could not expect unanimity among Aboriginal leaders. Keating needed an Aboriginal group with whom to work. As Keating said in his 2011 Lowitja O'Donoghue Oration:

> Had Aboriginal and Torres Strait Islander leaders not stepped up to the plate, the substance and equity of the subsequent *Native Title Act* may never have materialised. In an instant, I was struck by the opportunity of the High Court decision and was determined to not see it slaked away in legislative neglect. But determined as I was, I needed the partnership with Indigenous leaders to get it done and get it done fairly.[59]

This was Lowitja's finest hour. As the chair of ATSIC she had the opportunity to bring a group of key Indigenous leaders into the tent. It was not all plain sailing. On Black Friday, 8 October 1993, negotiations had broken down and Keating let fly as only Keating could. He said, 'I am not sure whether Indigenous leaders can ever psychologically make a change to decide to come into a process, be part of it, and take the burdens of responsibility which go with it.' In his own Lowitja Oration, he added that he was not sure 'whether they could ever summon the authority of their own community to negotiate for and on their behalf'. Looking back in 2011, he said:

> I like to think those remarks helped galvanise Lowitja O'Donoghue's view as to what needed to be done. But as it turned out – only she could do it. She was the chair of ATSIC. This gave her a pulpit to speak from but no overarching authority, much less power. But this is where leadership matters: she decided, alone decided, that the Aboriginal and Torres Strait Islander peoples of Australia would negotiate, and I emphasise negotiate, with the Commonwealth government of Australia – and that the negotiators would be the leaders of the Indigenous land councils. She decided that. And from that moment, for the first time in the 204-year history of the settled country, its Indigenous people sat in full concert with the government of it all.[60]

Keating had the good fortune not to control the Senate. If he had controlled the Senate, some Aboriginal people and their supporters would have had the perception that Keating had cut a deal with a handful of Aboriginal leaders who had gone to water behind closed doors. Not controlling the Senate, Keating had first to negotiate the

settlement with Aboriginal leaders who for the first time came in and sat at the Cabinet table cutting a deal. They were the 'A' team. The deal then had to pass muster in the Senate where Keating had to negotiate with the minor parties who took their riding instructions from another group of Aboriginal leaders – the 'B' team, which included sovereignty advocates like Michael Mansell, who ultimately endorsed the deal.

Without these complex checks and balances not controlled by the government of the day, Keating would never have won the well-deserved adulation for the final outcome. Through all these complexities and intrigues, Lowitja O'Donoghue held a steady course with an unerring instinct about where to find true north. She did it, not by treating ATSIC as the primary consultative body for Aboriginal Australia, but by using ATSIC as the clearing house or hub to bring the key local and specialist representatives to the table. But having done so, she knew there would be other Indigenous leaders who would want their own place at the table, and that was a different table – the table of Senate deliberation and horse trading, rather than the cabinet table of negotiation.

If 'a First Nations Voice (is) enshrined in the Constitution' as sought by the Uluru Convention last week, there will be times that body has to act more as a clearing house or facilitator for the channelling of advice from diverse Indigenous groups rather than giving the advice itself. There will be other times when it will have to butt out, having done its best negotiating with Executive government and leaving it to other more independent Indigenous groups to try their hand with the cross bench in the Senate.

With his customary intellectual insight and passion, Noel Pearson has suggested that 'the Constitution could be amended to create a non-justiciable guarantee that Indigenous people themselves get a say in the laws and policies made about them' which could create 'an ongoing dialogue between Indigenous peoples and the parliament, rather than the courts and parliament'.[61] He has proposed 'that Parliament should remain supreme, but it should be constitutionally required to hear Indigenous views before making laws about Indigenous interests'.[62] Noel's suggestion won appeal at last week's summit at Uluru. Warren Mundine has suggested the need for a plurality of local land-holding advisory groups.[63]

When considering whether to include an Indigenous advisory body or bodies in the Constitution, many voters will have an eye to past experience with earlier Aboriginal advisory bodies. In the 1970s, there was the National Aboriginal Consultative Committee; in the 1980s, the National Aboriginal Conference; and in the 1990s, the Aboriginal and Torres Strait Islander Commission (ATSIC). Whatever its shortcomings, ATSIC was well resourced with a series of local and regional councils in addition to its national commissioners. The art of national Indigenous representation is matching local and specialist Indigenous concerns with national policy positions ensuring that there is a two-way communication between those speaking with a national voice and those working at the grassroots. A national Indigenous body without elected local and

regional councils will have its work cut out in maintaining local legitimacy. After the demise of ATSIC, the National Congress of Australia's First Peoples was established. Very deliberately, it was not made a creation of statute.

When parliamentary committees are considering proposals for legislation, they may be well assisted by receiving submissions from a national Indigenous advisory council. No doubt they will also be attentive to local Indigenous groups and specialist Indigenous bodies impacted by proposed legislation, such as land councils, community councils, and service delivery organisations. There will be a need to consider any co-ordinating role which the First Nations Voice might play, in much the same way as ATSIC was able to help convene and resource Indigenous groups in the historic native title debates in 1993 and 1998. Let's remember that contested legislation like the *Native Title Act* undergoes a lot of horse-trading in the Senate. Though a constitutional advisory body sounds attractive, it might not be the most appropriate/effective means of engagement in some of that horse-trading.

Second Movement

There has been much criticism of the way that Senator Brian Harradine in 1998 secretly negotiated the final compromise on native title with John Howard after the government had twice rejected Senate amendments to Howard's Bill. The wily Harradine picked his moment after the Queensland election when Queensland Premier Rob Borbidge lost office, and when Pauline Hanson's One Nation won 11 seats in the Queensland Parliament. Borbidge, together with Western Australian premier Richard Court, had vetoed Howard's approval of Harradine's earlier offer during the first two Senate debates. Harradine knew that Howard would no longer contemplate a double dissolution election, and thus would be more open to cutting a deal without obstruction from Borbidge. This cleared the way for an unprecedented third Senate debate. The key plank of Harradine's proposal had been drafted by the National Indigenous Working Group and their lawyers. Harradine delivered, and once the deal was cut he apologised publicly to Aborigines saying, 'I was concerned that if others were involved there might be leaks and the horses might be frightened and they'd bolt'. Gatjil Djerrkura acknowledged that the deal was 'an advance on the government's original bill'. He said, 'we suspect Senator Harradine has taken the Prime Minister as far as he could to avoid a race-based election. I think he has demonstrated courage and integrity throughout this debate.'

I don't see how the consultation process or the ultimate legislation could have been improved at that time if ATSIC had been established by legislation envisaged specifically by the Constitution rather than by legislation without any mention in the Constitution of an Indigenous advisory body. That's one reason I have regarded the insertion of a constitutional provision for an advisory body as more symbolic and

minimal than real and substantive.[64] You will recall that the *Aboriginal and Torres Strait Islander Commission Act 1989* included as an object: 'to ensure maximum participation of Aboriginals and Torres Strait Islanders in the formulation and implementation of government policies that affect them.' But I defer to the Indigenous groups who think there would be a real value-add with such a constitutional provision. I remain wary that the addition of such a provision may make any Referendum less appealing to the general voting public. But these prudential calls are not mine to make. I can only offer well intentioned observations. We have all heard loud and clear the Uluru call for 'the establishment of a First Nations Voice enshrined in the Constitution'.

Third Movement

In recent times, Indigenous participation in the law-making processes of Parliament have been enhanced by the presence in the parliament of Indigenous members of both houses. Consider the present debate about technical amendments to the provisions of the *Native Title Act 1993* in relation to Indigenous land use agreements (ILUAs). Incidentally, credit is rarely given to the Howard government for introducing the legislation which created these novel agreements which have done so much to give Indigenous Australians a place at the table of economic participation and land use deliberation regardless of whether they can ultimately prove a native title claim. While there have been 318 successful determinations of native title registered on the national native title register, there are 1,170 Indigenous land use agreements (ILUAs).[65] One of the great breakthroughs of *Mabo* and *Wik* has been not only convincing both sides of politics of the moral truth and political entrenchment of land rights but also having the conservative side of politics champion a legal device to enhance economic participation by Aboriginal Australians even before they are able to prove a native title claim. I think credit should be given where it's due.

It is one thing to have a non-justiciable consultative body outside the Parliament, it is another to have strong Indigenous representation inside the Parliament. We saw this early this month when the Senate delayed the native title amendments to ensure that all relevant Indigenous groups had been consulted about the amendments. Senator Patrick Dodson, the Shadow Assistant Minister for Indigenous Affairs and Aboriginal and Torres Strait Islanders, was able to tell the Senate:

> I have personally met with representatives of native title claimants' groups across Australia and I have listened to their issues, their concerns and their hopes. Aboriginal people have a right to object if they believe their native title rights are at risk, especially by extinguishment, and they should be heard. Importantly, Labor has blocked the government's attempt to give itself unfettered power over Indigenous Land Use Agreements. We have insisted on amendments that make sure that control rests with native title holders, not politicians in Canberra. This is about respecting the decisions of Aboriginal and Torres Strait Islander people and giving certainty to the agreements that native title holders have entered into.[66]

Dodson assured the Senate that his side of the chamber would be 'informed by the views of the native title claimants and owners across Australia, rather than just by the views of the powerful and privileged.'[67] These views on complex legal and policy issues can be sought without being channelled through one Indigenous advisory body. But such a body might play a useful co-ordinating role. Perhaps the way forward is to set up a Parliamentary Joint Committee on Aboriginal and Torres Strait Islander Affairs which would develop a working relationship with the peak Aboriginal and Islander advisory bodies.[68]

Responding generously but thoughtfully to the *Uluru Statement from the Heart*

The consultations conducted in Indigenous communities under the auspices and with the financial support of the Referendum Council have yielded a constant message that Indigenous Australians want substantive constitutional change and not just symbolic or minimalist change. In the past, I have proposed changes which I think would lead to substantive reform and which are achievable, were they attractive to Indigenous leaders.

In addition to the repeal of section 25, I have suggested two additional changes to the Constitution: the addition of an Acknowledgement (as distinct from a preamble) and the amendment of section 51(26). The first additional change draws on the words proposed by the Expert Panel in the first three paragraphs of the introduction to their proposed section 51A. The key words of the proposed Acknowledgement have already found unanimous endorsement in the Commonwealth Parliament's *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013*, with the parliament speaking 'on behalf of the people of Australia.' We could add this Acknowledgement at the commencement of the Constitution immediately prior to 'Chapter I: The Parliament':

Acknowledgement

> We, the people of Australia, recognise that the continent and the islands of Australia were first occupied by Aboriginal and Torres Strait Islander peoples.
>
> We acknowledge the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.
>
> We acknowledge and respect the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.

We could amend section 51(26) so that the Commonwealth Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

> The cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples and their continuing relationship with their traditional lands and waters.

Those who regard these suggestions as minimalist, symbolic poetry would be on stronger ground if they thought there was some realistic prospect of having the major political parties and the majority of voters in a majority of states adopting more substantive reforms. I think it arguable that there are some options that are worse than minimalist, symbolic changes. One is: no change whatever to the Australian Constitution, with the result that we maintain a Constitution in which Aborigines and Torres Strait Islanders are not even mentioned. If there be agreement amongst Indigenous groups about substantive reforms to be achieved in the future or outside the body of the Constitution, would it not be better to work from the base of a Constitution which actually mentions you, your history, your continuing relationship with the land, and your continuing cultures, languages and heritage? Rather than from the base of a Constitution which does not mention you at all?

I readily concede that there is no point in proceeding with a Referendum on a question which fails to win the approval of Indigenous Australia. So let me now walk the fine line between substantive change and popular acceptance. This evening, I am delighted to have the opportunity to recast my thinking in the wake of the 'Uluru Statement from the Heart'.

When Prime Minister, Tony Abbott used to speak about completing the Constitution rather than changing it. He thought the only prospect of constitutional change was if there was something in it for everybody – with some reference to Aboriginal history, the British heritage, and the modern reality of multicultural Australia with immigrants from every land on earth. In his contribution to last year's book on *Indigenous Arguments for Meaningful Constitutional Recognition and Reform*, Noel Pearson embraced the Abbott approach and wrote about 'the opportunity to formally bring together these three parts of our national story: our ancient Indigenous heritage, our proud British inheritance, and our multicultural triumph.' Pearson thinks, 'Indigenous constitutional recognition provides an opportunity for a long-awaited reconciliation that could perfect our constitutional union, and make ours a more complete Commonwealth.' So here is my amended threefold suggestion.

First, we repeal Section 25 – that's just low hanging fruit.

Second, we place an acknowledgement at the beginning of the Constitution:

> We, the people of Australia, include Aboriginal and Torres Strait Islander peoples and peoples from all continents who have made Australia home, having migrated to be part of a free and open society.
>
> We recognise that the continent and the islands of Australia were first occupied by Aboriginal and Torres Strait Islander peoples.
>
> We acknowledge the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.

> We acknowledge and respect the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.
>
> We acknowledge the foundation of modern Australia, through British and Irish settlement and the establishment of parliamentary democracy, institutions and law.
>
> We espouse respect, freedom and equality under the law for each other.

Third, we then amend section 51(26) so that the Commonwealth Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

> the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples, and their continuing relationship with their traditional lands and waters
>
> the constitution and functions of an Aboriginal and Torres Strait Islander Council which may request the Parliament to enact a law or advise the Parliament of the effect of a law or proposed law relating to any of these matters.[69]

Those wanting minimal symbolism and simple substance might consider deleting section 25 and omitting any special acknowledgement, while simply amending section 51(26). The acknowledgement could be included in the preamble of the already passed legislation setting up the First Nations Voice.

In 1958 W.E.H. Stanner delivered his presidential address to the Australian and New Zealand Association for the Advancement of Science. He spoke of the Dreaming and the Market. He observed that the things of the market 'are among the foremost means of social disintegration and personal demoralisation' for Aboriginal Australians, and concluded: 'If we tried to invent two styles of life, as unlike each other as could be, while still following the rules which are necessary if people are to live together at all, one might well end up with something like the Aboriginal and the European traditions.' Most Indigenous Australians maintain a foot in both the Dreaming and the Market. Some end up without a foothold in either. For the majority in the third century since the assertion of British sovereignty, the Market is now more determinative of their identity than the Dreaming, with the result that there is less strained straddling to be done. The happiest Aboriginal Australians I know are those with a firm foothold in both the Dreaming and the Market. In the 'Uluru Statement from the Heart' last week, Aboriginal leaders said, 'When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.'

Perhaps it is my own religious impulse, but I think it is impossible for most human beings to straddle two such different worlds without a deep, nurtured and nurturing spirituality. Let's recall that the Indigenous leaders in last week's Uluru Statement described sovereignty not primarily as a legal or political idea, but as 'a spiritual notion'. Those of us who have never had to straddle two such diverse worlds are not

those best placed to advise how to overcome the 'social disintegration and personal demoralisation', especially in a society as secular and materialist as Australia. Governments that place a deep faith in the Market and in community 'interventions' enforced by instrumentalities of the state may be well intentioned, but unless they consult and work collaboratively with local Aboriginal leaders, who carry the deep spiritual insights of the Dreaming, they will be sure to make big mistakes, waste precious resources and forfeit trust.

It is heartening to hear Aboriginal Australians like Stan Grant rejecting 'a definition of Aboriginality predicated on community endorsement', claiming a connection to 'the history of dispossession, suffering and injustice', while arguing that 'history need not be destiny'. Grant writes:

> The rise of the Aboriginal middle class is raising urgent – undoubtedly uncomfortable – questions about the nature of identity, culture and community. Like many, I demand the right to define myself. Appropriating others' suffering to bolster authenticity is offensive. I have no need of a vicarious identity framed around unending grievance and intractable poverty. I have many layers to my identity – none of them exclusive.[70]

With an increasing and secure land base, and with increasing access to the Market (through employment, education and the fruits of Indigenous land use agreements) and increasing engagement with mainstream Australia, those Australians claiming their Indigenous heritage will need to reflect on how best to provide realistic life choices for their young people, including the provision of government services equitably delivered and the enjoyment of culture and heritage. These will be particularly acute questions in regional and remote areas, especially where the spiritual commitment to land has waned in the face of readily available alcohol and destructive drugs, and other life options in towns and cities. Some will want to recast the balance between security of land title for future generations and utility of land title for present communities and individuals anxious to use land for economic development. I suspect the time has come for an Indigenous Land Bank which could tailor mortgages for native title holders wanting to utilise land commercially while being assured that their country will always remain under the control of its traditional custodians. Over time, Australians will come to appreciate that ILUAs under the *Native Title Act* are the legal means for agreement-making between governments and Indigenous groups who increasingly identify themselves as First Nations. Once most native title claims are determined, the National Native Title Tribunal might be replaced or augmented by a Makarrata Commission.

When proposing the first-ever motion in the new Parliament House in 1988 acknowledging Aborigines and Torres Strait Islanders, Prime Minister Bob Hawke quoted Dr Coombs:

> It's a politician's job to recognise when the will is there to do something; but they also have a responsibility to create that will. It's never divisive to correct injustice. The fact of injustice is divisive and will continue to be until we correct it and learn to live with it. People who benefit from injustice will oppose this, but you don't stop working for justice simply because people around you don't like it.

I still think it's time to amend the Constitution modestly but with the expectation that due acknowledgement of you, the Indigenous Australians, will effect the big changes needed so that you might enjoy your realistic choices of belonging to the Dreaming and the Market that constitute modern Australia. All of us are on Aboriginal land. You who are Aboriginal and Torres Strait Islander Australians are entitled to your place at the table whenever your cultures, languages, heritage and your continuing relationship with your traditional lands and waters are being considered by our Parliament.

The question is: How much should we attempt to put in the Constitution now, and how much should we sit alongside the Constitution, or delay for constitutional inclusion until another day? There's certainly one thing worse than minimal symbolic constitutional change accompanied by substantive change outside the Constitution, and that is no mention in the Constitution, either because we judged it all too hard or too compromised, or because we tried to achieve too much, too soon. Given that Indigenous Australians have spoken, it is now for the Referendum Council to recommend to government a timetable for constitutional change with maximum prospects of a 'Yes' vote. Australians will not embrace a constitutional First Nations Voice until they have first heard it in action. The work needs to begin immediately on legislating for that First Nations Voice, so that it is operating as an integral part of national policy making and legislating, attracting national support for constitutional recognition. Presumably it would replace the existing National Congress of Australia's First Peoples.

Lowitja, we still need your leadership, inspiration and experience. You are the only Aboriginal Australian to have worked closely with our present Prime Minister Malcolm Turnbull when he was full of idealism for constitutional change as Chair of Paul Keating's Republican Advisory Committee. As a member of that committee, you recommended a constitutional preamble recognising your people and you convinced Mr Turnbull to back it.[71] In the wake of the Uluru declaration, I think you have one more national task to perform, Lowitja. After the 2015 Lowitja Oration delivered by Marcia Langton you compared the situation in 1967 with the contemporary situation:

> There was a different movement to what it is now. The only way I can explain it is that black and white were together, walking towards the path to Referendum. I think there's another element to it now because I think there are activists out there who want things to happen before the Referendum. They're really more keen about getting action now and not waiting until what, hopefully, is a successful Referendum. At the beginning I had confidence … but we don't have the unity and we have to get the unity.[72]

Lowitja, bring us together behind a proposal for constitutional recognition that is both achievable and principled, providing constitutional recognition of a First Nations Voice on distinctively Aboriginal policy issues, while leaving open the future extra-constitutional question of a Makarrata following upon a Makarrata Commission. Together in the spirit of the pre-1970 FCAATSI members, let's join hands and sing together the Freedom Songs, committing ourselves to the unfinished business of the 1967 Referendum, recalling last week's *Uluru Statement from the Heart* that 'in 1967 we were counted, in 2017 we seek to be heard'.

Possible Constitutional Changes:

Repeal section 25

Insert an Acknowledgement (not a Preamble) at the commencement of the Constitution (leaving the Preamble of the Imperial Act untouched until Australia becomes a Republic):

> We, the people of Australia, include Aboriginal and Torres Strait Islander peoples and peoples from all continents who have made Australia home, having migrated to be part of a free and open society.
>
> We recognise that the continent and the islands of Australia were first occupied by Aboriginal and Torres Strait Islander peoples.
>
> We acknowledge the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.
>
> We acknowledge and respect the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.
>
> We acknowledge the foundation of modern Australia, through British and Irish settlement and the establishment of parliamentary democracy, institutions and law.
>
> We espouse respect, freedom and equality under the law for each other.

Amend section 51(26)

> The Commonwealth Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
>
> the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples, and their continuing relationship with their traditional lands and waters;
>
> and (b) the constitution and functions of an Aboriginal and Torres Strait Islander Council which may request the Parliament to enact a law or advise the Parliament of the effect of a law or proposed law relating to any of these matters

Possible changes outside the Constitution

Enact legislation for the establishment of the First Nations Voice for advice to Parliament as envisaged in s. 51(26)(b)

Amend the *Act's Interpretation Act*:

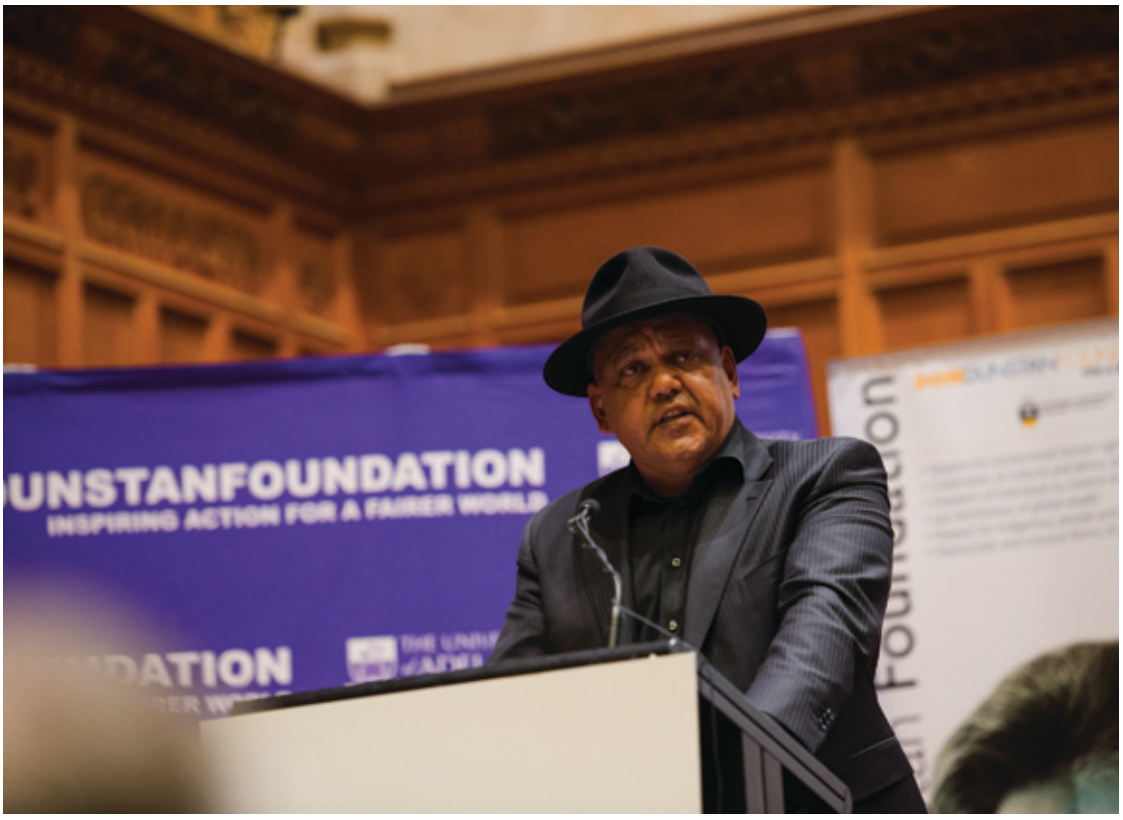
5AAB. In interpreting a provision of an Act, the interpretation that would best achieve consistency with sections 9 and 10 of the *Racial Discrimination Act 1975* is to be preferred to each other interpretation, unless the Act specifies that sections 9 and 10 of the *Racial Discrimination Act 1975* are not to be considered when interpreting a provision of the Act.

Set up a Parliamentary Joint Committee on Aboriginal and Torres Strait Islander Affairs.

2018

The Uluru Statement from the Heart: One Year On

PRESENTED BY NOEL PEARSON



I thank the Kaurna people for your kindness. I bring greetings from Cape York Peninsula to you and all our First Nations here tonight. I thank the Don Dunstan Foundation for giving me this privilege. I met Don when I was 23 when he visited my village in Cape York Peninsula. He was undertaking an inquiry of some sort and met with the local council of which I was a member. I knew well his legacy as the most progressive politician this country has produced, particularly his appointment of one of my boyhood heroes, Pastor Sir Doug Nicholls, the great Yorta Yorta leader, as Governor of this state. My school principal at Hope Vale State School showed me biographies of Sir Doug and Charlie Perkins' *A Bastard Like Me,* and reading them; from an early age these great leaders loomed large in my life.

Women and men of Adelaide, and the young among us tonight – Lowitja should have been our 23rd Governor-General. She had the ballast for that post at that time in our history. Absent the presidency, it would have been fitting and right for her to have taken up the vice-regal role, with strong prescience of our eventual turn to a republic. Our country is susceptible to showering tokens upon indigenes to serve some goal of patronage and inclusivity – while keeping us out of the main game – but loathe to accord to one such as Lowitja, the patron saint of twice as good, – recognition of her true merit. Who today would not concede she was twice worthy as the ill-starred Hollingworth in 2001? This lost opportunity cost the country woe.

To be sure Lowitja needs no expression of regret about her contribution to public life. Her prodigious accomplishments and place in the firmament of Aboriginal and Australian leadership are undisputed. I just think our nation still needed her in her last phase of public life. She is our greatest leader of the modern era, the finale of which was her chairmanship of the Aboriginal and Torres Strait Islander Commission from its inception to the end of the Keating government in 1996. These were ATSIC's best years. They were years of great coherence in Indigenous affairs, before the National Commission's egregious poor leadership played into the hands of the Howard government's antipathy. There were two ATSICs, one under Lowitja and the other after. It failed at the national level after Lowitja's term as chair expired, but it was always a force for good at the regional level. Without Lowitja's ATSIC we would never have defended Eddie Mabo's great legacy and negotiated the *Native Title Act* and Indigenous Land Fund.

Let me acknowledge the Kaurna people of this fine city and thank you for hosting us on your traditional homelands this evening. I especially thank you for providing a home for this lady, our leader, safeguarding her and giving her a place of rest and succour in the bosom of your ancestors. For she gave her all in the service of our people the continent over. In the twilight of a life spent in long, self-less service; I know I speak for all of us whose gratitude flows brimming from our hearts, in telling her we love and honour her so. It was my great privilege to witness her leadership of the *Native Title*

Act negotiations with the Keating government in 1993. Paul Keating's 2011 Oration correctly identified Lowitja as our leader in that drama. She was the rock who steadied us in the storm. Resolute, scolding, warm and generous – courageous, steely, gracious and fair. She held the hardest leadership brief in the nation and performed it bravely and with distinction.

Tonight I speak to the *Uluru Statement from the Heart*, the culmination of the First Nations Dialogues on Indigenous Constitutional Recognition of 2016 and 2017 that led to the Uluru National Convention, issued at Mutijulu on 26 May 2017. The 'Uluru Statement from the Heart' was an act of Indigenous self-determination, the like of which this country has not seen in terms of its scope, rigour, and inclusion. How can such diverse Indigenous peoples from all compass points of the country participate in a process and achieve that which everyone said would never be possible: to achieve a broad and real consensus? No consensus is real without dissent, but the dissent never detracted from the truth of Uluru's accord. I doubt that any polity in any community in this country has achieved the breadth of unanimity as our people achieved with Uluru.

Uluru is the achievement of all those Aboriginal and Torres Strait Islander men and women who contributed on behalf of their people. It was led by two remarkable women formed in the Lowitja mould and worthy successors to her leadership. Professor Megan Davis of Cobble in Queensland, a constitutional lawyer from the University of New South Wales, designed the process and guided an expert legal team facilitating the Dialogues that led to Uluru. Dr Pat Anderson, Alyawarre of the Northern Territory, and chair of the Lowitja Institute, captained the Dialogues as they wended their way around the continent. The work of Megan Davis and Pat Anderson was a *tour de force*: leadership the like of which Lowitja showed in our time of need in the early 90s. I attended 7 of the Dialogues and these women attended all 12 of them. They carried the Dialogues to their destination at Uluru. These three women from three different generations remind me of the stupendous quality and strength of our leadership women. Our respective achievements, I believe, would not have been possible without them.

If self-determination means anything for the First Nations of Australia, then the process and outcome of Uluru is its very meaning. It is and will be a benchmark of hard work and rigour. Indeed Uluru sets the model for future national conference, policy debate and decision-making, where we seek common ground on matters of high deliberation for us as Indigenous peoples.

Let me turn to the words of The Uluru Statement. They bear the reminder: 'We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart: "Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors

did, according to the reckoning of our culture, from the Creation, according to the common law from time immemorial, and according to science more than 60,000 years ago".'

This sovereignty is *a spiritual notion:* 'the ancestral tie between the land, or mother nature, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty'. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown. How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years? With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is '*the torment of our powerlessness*'. We seek constitutional reforms to empower our people and take '*a rightful place*' in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country. We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination. We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history. In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.

Let me deal with the main elements of the statement. Uluru calls for a 'First Nations Voice enshrined in the Constitution'. The First Nations Dialogues made clear the choice of Aboriginal and Torres Strait Islanders to have substantive constitutional reform, rather than mere symbolism. Remember John Howard's symbolic preamble failed in the 1999 Referendum. Paul Keating's view needs to be understood. He has asked why Indigenous constitutional reform advocates would want to be recognised in such a desultory colonial document, an enactment of the British Parliament, which is essentially a rule book governing our system of government and law. I agree with Keating's characterisation of our Constitution, what former Chief Justice Murray

Gleeson prefers to call our basic law. I agree the Australian Constitution is not the place for symbolic words. It would be like putting some poetic flourish in the front of the Rules of Cricket. The Keating aversion to the Constitution as an appropriate instrument for symbolic recognition coincides with the objection of constitutional conservatives, who abjure symbolic words lest they give rise to unintended consequences in constitutional interpretation. The Constitution is the place for substantive rules, the establishment of institutions and the distribution of power. Which is why establishing the institution of an Indigenous Voice is rightly done in the Constitution.

The representation, functions and powers of the Voice would be established under parliamentary legislation. It would not be as claimed a 'Third Chamber of the Parliament', and would indeed sit outside of the parliament. It could not have legal veto over the functioning of parliament and all of its functions would be conferred by legislation. The Voice would contribute to the national policy debate, and seek to influence policy and laws affecting Indigenous people.

When power was allocated under the Federal compact of 1901, First Nations were excluded. Yet there were more Indigenous peoples than Tasmanians. Even today there are more Indigenous peoples than Tasmanians. And yet because the colonies were the historic parties to the federation – and the pre-existing polity of Indigenous peoples was ignored in the constitutional negotiations and excluded from the compact – 500,000 Tasmanians have 12 Senators in the Federal Parliament.

First Nations are a different polity to the former colonies. First Nations represent the sovereign peoples who possessed the country since the first Australians made the crossing to this continent over 65,000 years ago. How could the First Nations not have a claim to a place in the Commonwealth?

The Voice is a modest institutional proposal that would nevertheless sit within our Commonwealth's most important law. It would therefore be highly symbolic and play an important function in our system of government. And so it should. Voice is power. Voice is recognition. Voice is empowerment. Indigenous voices need to be heard if the Indigenous future is to be better than the past. The Voice must be enshrined in the Constitution.

The joint Parliamentary Committee co-chaired by Liberal MP Julian Leeser, and Labor Senator Patrick Dodson, gives us another chance at constitutional reform following the Turnbull Government's rejection last year. I don't think there is any alternative to *what* recognition proposal should be adopted. The Voice is 'the what'.

If the window of opportunity is to be seized, the joint Parliamentary Committee will need to come up with a model of *how* a Voice might be constituted, that answers the objections raised by the government and the Prime Minister. Leeser has a strong view about upholding the Constitution but he believes that you can do that whilst at the same time addressing the historic challenge we have for Indigenous recognition.

The argument is made that the Voice might have some kind of moral veto, that its presence and the advice it provides to the parliament might oblige the parliament to follow its every advice. One would hope such advice would be taken very seriously, that is why we want to create it. But at the same time parliament is a very robust place, and Australian politics a very robust scene. I don't think I have ever seen Australian governments follow word for word what Aboriginal leaders have ever said in our history and I don't think that's going to change in the future. First Nations will be involved in the national politics of the day. It will be a matter of how persuasive their arguments are as to whether the parliament and governments will adopt them, and that is the way it should be.

The second element Uluru calls for is a Makarrata Commission to supervise a process of agreement-making between governments and First Nations. The Yolngu word 'makarrata' means coming together after a struggle. A Makarrata Commission could be an independent commission of inquiry or a tribunal, like the Waitangi Tribunal in New Zealand. It would be an independent umpire body, of balanced Indigenous and non-indigenous membership, empowered to facilitate and mediate reconciliation, agreement-making and truth-telling between First Nations and Australian governments, in an orderly and mutually respectful way.

The Commission's function would be to supervise local and regional agreement-making between governments and First Nations: a process of local and regional treaty-making under the terms of a national framework treaty. The national framework treaty would provide the over-arching terms within which substantive regional and local treaties would be settled.

The third element Uluru calls for is 'truth-telling about our history'. This proposal came out of the Dialogues. It was not an option put forward in the consultation document produced by the Referendum Council. But the universal view was that we needed a process to tell the truth of our history. So the concept of the Makarrata Commission would include the function of truth-telling in relation to our national history, but as importantly local and regional histories of First Nations.

When re-reading Paul Keating's 2011 Oration I found this apposite articulation of the crucial importance of truth. Keating said:

> … above all that, I saw the approach of using the High Court's native title route as possessing an even greater attribute – and that was truth. There is, especially in public life, no more beautiful a characteristic than truth. Truth is of its essence liberating; it is possessed of no contrivance or conceit – it provides the only genuine basis for progress. By overturning the lie of terra nullius, the notion that at sovereignty the continent was possessed by no one, the High Court not only opened a route to Indigenous land, it rang a bell which reminded us that our future could only be found in truth.

Truth provides the only genuine basis for progress. This is why First Nations'

representatives called for truth-telling to be part of the Makarrata process.

Finally, I want to turn to the concept of a 'Declaration of Australia and the Australian People'. The idea of a Declaration outside of the Constitution, akin to the American Declaration of Independence, was first proposed by Julian Leeser and Damien Freeman in 2015. Such a Declaration would have moral and cultural force, rather than legal. It could be set out in the Act of Parliament, but it would not depend upon its legal enactment for its force. Its power would come from history, truth, and a people's pledge to the future.

The Referendum Council's second recommendation proposed the extra-constitutional Declaration. In their 2015 paper Leeser and Freeman suggested that some form of national competition be undertaken to develop the words of the Declaration. I want to propose some 'terms of reference' for a Declaration of Australia and the Australian People, and then suggest some language that may meet these terms.

But before I do so I want to talk about the looming opportunity for our country and the urgency of leadership, posed by the 250th anniversary of Captain James Cook's 1770 voyage up the east coast of the continent. We can't just pull out the gurneys and start hosing the pigeon manure off the sundry desultory busts and statuary of the great Captain, from Botany Bay to Cooktown, and expect the country to come to proper grips with its meaning for us in the 21st Century. We can have a conflagration if we don't see what is before us, or we can use the anniversary to transcend it. To my mind the 250th anniversary of the voyage of James Cook provides us with the opportunity to do that which was not done in 1770: for us to treat with one another in relation to the 250 year-old question of finding a rightful place for an Old Australia within the New. This we did not do in 1788, 1901, 1938, 1970, 1988 or 2001, and we left history unresolved. Let us not kick the can down the road again in 2020. Let us use Cook's 250th anniversary to commence a process of *treaty* between the First Nations of this country and the Commonwealth of Australia. We will need a Voice to represent the First Nations in such a process of treaty-making. That is why a constitutional voice is imperative. Let me now set out some terms of reference for a Declaration:

- Firstly, it should bring together each of the three parts of the one Australia: its Indigenous Heritage, its British Institutions and its Multicultural Migration.
- Secondly, it should honour each of these three parts in as fulsome a manner as possible.
- Thirdly, it must deal with the events at Sydney Cove in 1788 from two perspectives, from the perspective of invasion and from the perspective of settlement.
- Fourthly, it must honestly deal with the bad and the good of history in as straightforward a way as we can muster.

- Fifthly, it should commit us to the stewardship of our land for future generations.
- Sixthly, it should commit us to making good on the 'Uluru Statement from the Heart'.
- Seventhly, it should set out our most characteristic values as Australians.
-

Let me try out these words:

> Whereas three stories make Australia: the Ancient Indigenous Heritage which is its foundation, the British Institutions built upon it, and the adorning Gift of Multicultural Migration.
>
> And whereas Aboriginal and Torres Strait Islander tribes were the First Nations of the Australian continent and its islands, possessed under ancient laws and customs, according to the reckoning of culture, from the Creation, according to the common law, from time immemorial, and according to science for more than 65 millennia.
>
> This is a spiritual notion: the ancestral tie between the land, or Mother Nature, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with their ancestors. We recognise and honour the First Nations who discovered Australia as their sovereign possession, the oldest continuing civilisation in the world.
>
> And whereas those who sailed the First Fleet landing at Sydney Cove carried upon their shoulders the common law of England, when the sovereignty of the British Crown was proclaimed. The rule of law, parliamentary government and the Australian English language have their provenance in Britain. From eyes on board ship, this was a settlement, and from eyes on shore, an invasion. We recognise the eve of the 25th and the dawn of the 26th January 1788 as a profound time for all of us, when Ancient Australia became the New Australia. We recognise and honour the Britons and Irish – convict and free – who founded our institutional heritage, making our Commonwealth from 1901, a great democracy of the globe. And whereas peoples the earth over brought their multitude of cultural gifts to Australia. That we celebrate diversity in unity makes us a beacon unto the world. We recognise and honour our New Australians. When we renounced the White Australia policy, we made a better Commonwealth. We showed that people with different roots can live together, that we can learn to read the image-bank of others, that we can look across the frontiers of our differences without prejudice or illusion.
>
> Now therefore, with earnest and open hearts and strong desire to fill the lacuna, after more than two centuries, we make this Declaration of Australia and the Australian People, to see our reflections in each other, and recognise one and all. Our history is replete with shame and pride, failure and achievement, fear and love, cruelty and kindness, conflict and comity, mistake and brilliance, folly and glory.

We will not shy from its truth. Our storylines entwine further each generation. We will ever strive to leave our country better for our children. We will honour the *Uluru Statement from the Heart* and make good upon it. Whilst English is the shared language of our Commonwealth, mother tongues named the country and sing its song-lines – and we do not want them to pass from this land. They are part of the cultural and natural wonder of our country that is the campfire of our national soul, and the pledge of care and custody we owe our ancestral dead and unborn descendants.

After the battles of our frontier wars fell silent, diggers from the First Nations joined their Settler and New Australian comrades in the crucibles of Gallipoli, the Western Front and Kokoda, and there distilled the essence of our values:

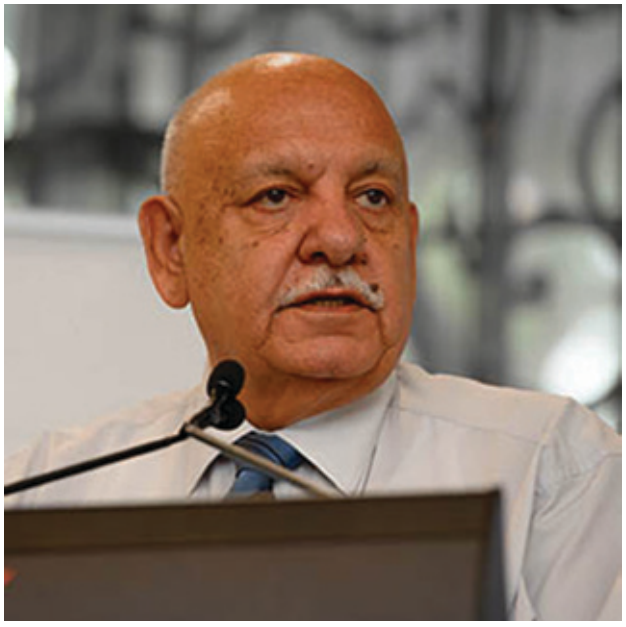
- That our mateship is and will always be our enduring bond
- That freedom and the 'fair go' are our abiding ethic
- That our virtues of egality and irreverence give us courage to 'have a go'
- That we know we can and always will count on each other

Three stories make us one – Australians.

2019

Storytelling: Culture, Truth-telling and the Arts

Presented by David Rathman AM PSM FIML



Introduction

I acknowledge the Kaurna people, and other traditional custodians.

Elders, Lowitja O'Donoghue, The Premier of South Australia, Stephen Marshall, distinguished guests and each and every one of you seated in the hall this evening.

The heart of Australia's footprint in the world is the cultural history and presence of the oldest living culture in the world.

It is my intention to speak about scene-setting, intent, relationship, partnership, mutual respect and unity in my address tonight.

I want to take a moment to thank the many people who have worked to preserve cultural heritage, worked in the Arts, Aboriginal cultural groups, and the custodians of language and country. The scientists, writers and researchers who have worked in the Universities in the city and at Adelaide University, Flinders University and the University of SA , the North Terrace institutions, the State Library, the Art Gallery and the SA Museum, History Trust and State Records.

When the Government announced the building of a centre for Aboriginal Culture and Art a group of Aboriginal people representing Native Title bodies, the Museum Aboriginal Advisory committee, Tandanya and North Terrace institutions supported by ILC and the Native Title Unit worked to constructively support the vision of the Premier for a centre on Lot 14 that represents the Aboriginal people's culture through history, story of country, and arts both visual and performing.

We have said: 'it will be a place devoted to Australian Aboriginal Cultures, truth-telling, art, history, science and contemporary life.'

As a living, breathing, cultural experience 'it must recognise and celebrate the longest continuous human culture on the planet, provide a dynamic cultural and economic hub, and be a beacon of reconciliation for generations to come.'

The Aboriginal people have cared for and respected country for over 60,000 years – weaving a story of country and place that connected all that was in their midst into one story and means of existence. This was a rich place with diverse landscapes that offered security an abundance of food sources, and knowledge passed from generation to generation. I recall an old man saying to me once, 'the land owns us we don't own it as we are just passing though.'

Australia is often dismissive of the dispossession of Aboriginal lands.

The Lutheran Missionary Teichelmann observed the Kaurna peoples' community arrangement: 'Each tribe has a certain district of the country as property received by their forefathers, the boundaries of which are fixed.'

A lack of sustained Government commitment and the continuing loss of arrangements that enabled Aboriginal people to continue the system of Aboriginal governance were ignored and this arrogance allowed the English colonials to treat our people

as irrelevant. Aboriginal peoples' attempts to build a base of traditional influence to protect the interests of the people in dealing with authorities and government was thwarted by those in power. This attitude was put in place from the very beginning when the *South Australia Act* was assented to in England.

The *South Australia Act* of 1843, an Act to empower His Majesty to erect South Australia into a British Province or Provinces, and to provide for the Colonization and Government, therefore proclaimed 'the Lands of South Australia to be waste and unoccupied lands … unfit for the purpose of colonization'.

The first Colonization Commission report by the settlement authorities was humiliating for Aboriginal people as it introduced what could be described as a form of slavery. The report stated that with settlement there would be provision for Aboriginal 'asylums' which would be 'weather proof sheds'. In the asylum Aboriginal people could receive food and clothing in exchange for labour.

In that same report the colonizers promised the ceding, for the use Aboriginal people, sixteen acres of every eighty acre allotment of land sold.

It didn't happen. I once raised the intention in the report with a Premier of South Australia, who said that if Aboriginal people called on and proved its right to recover the debt, it would send the State broke.

In the Letters Patent. a hollow vessel for covering the intent of colonizers, as detailed in the *South Australia Act* declared the land waste land.

The Letters Patent formalised the Crown's creation of the colony on February 19, 1836. The Letters Patent was full of wording to guarantee the interests of Aboriginal people and made statements of intent:

> … that nothing in these our Letters Patent contained shall affect or be construed to affect any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own Persons or in the Persons of their Descendants of any Lands therein now actually occupied or enjoyed by such Natives…

I often get told 'I didn't do these things to Aboriginal people.'

My response is to ask you the question – Who are the modern beneficiaries of the *South Australia Act* and the Letters Patent?

Aboriginal people must have a venue for truth-telling about the story of displacement to enable South Australians to understand their history.

Aboriginal people for decade after decade called for all Australians to be more open to their history and embrace the story of country, the spiritual and cultural ongoing presence of Aboriginal Australia in our lives.

History was based on exclusion, a set of demeaning government practices, put in place to create a negative impression of our people. The system considered Aboriginal people as an inconvenience to the business interests of the coloniser.

Lowitja O'Donoghue stood up against ignorance and racism whilst remaining a voice for reason and sensible co-operative progress.

She was a woman who faced being apart from her family but her inner strength allowed her to stare down barrier-makers.

She wanted to become a nurse. The Royal Adelaide Hospital refused her entry into its training course because of her Aboriginal descent. In an interview with the State Library she recalled being told: 'Go back to the place where you belong'. 'I suppose that was when I first really got my blood up', she says. 'It was completely unjust. I was deeply resentful and determined I wouldn't accept the decision.'

She joined the Aborigines' Advancement League and helped in a campaign which resulted in her being accepted in 1954 as one of a number of Aboriginal trainee nurses at the Royal Adelaide Hospital.

She graduated in 1954, was in due course promoted to charge sister; had a year in Assam, India, with the Baptist Overseas Mission, and joined the Department of Aboriginal Affairs in 1967. In 1975, she was appointed its regional director in South Australia. She was the first woman to be a regional director and she brought an inclusive quality to the administration of Aboriginal Affairs in South Australia.

The repeated expressions of *intent* in Aboriginal Affairs began at the time of occupation, and we continue to experience intent devoid of lasting action as an ever-present colonial hangover from a time when commitment to recognising the rights of Aboriginal people was a hollow promise without any substance.

The change in the way of life and the control by governments of a destiny for our people has caused enormous cultural stress; a stress which has impacted on many generations of Aboriginal people in this state and across the country. Cultural stress refers to individuals' subjective sense of the risk that their ethnic culture could be changed, and the resulting concern and worry about the development and survival of his/her ethnic cultural heritage.

Cultural stress is a critical issue faced by many people and countries in the process of social transition. Cultural stress, as a typical perceived cultural context, has become a general reality in modern society, especially for minority groups.

The systemic anti-Aboriginal sentiment and governance models is disrupted by the intervention of people who realised their dominant culture was being unreasonable and culturally bankrupt in treating Aboriginal people so harshly.

The story of people working to extend a hand of support, matched by their actions, is illustrated in a heart-warming story from the *Port Augusta Transcontinental* paper in 2018, about the late Elsie Jackson:

> Elsie went to the Neppabunna School for only a short time, but it was here that she found her passion.

> She worked on a voluntary basis as a teacher's aide, educating students about Aboriginal culture and engagement.
> David Amery, head teacher at the time, recognised the value of Elsie's work and attempted to get her employed in an official capacity with the Department of Education.
> At the time there were no Aboriginal people employed within the South Australian education sector and Mr Amery's request was denied.
> Mr Amery valued Elsie's wealth of skills so highly that he paid out of his own salary to employ her for the remainder of the 1966 school year.
> The following year Elsie was placed on the Education Department's payroll, making her the first Aboriginal Teacher Aide to be employed in a state school in South Australia.

The commitment to Aboriginal people comes from groups or the action of individuals who have taken the time to build a relationship with the community and individual Aboriginal people.

The mainstream Government Departments are generally well represented with reconciliation plans and an array of official rhetoric, but it is all PC and the commitment could be measured in a similar way to the annual vaccination programs; I have my plan injected into the strategic directions for another year until the next annual inoculation.

Most Australian departments and businesses are linear, task-orientated as opposed to Aboriginal culture which is based on building relationships, respecting country, and the spiritual connection to our Ancestors.

Eduardo Durran and Bonnie Durran are Indian American academics who decry the attitude of many in positions of influence: 'For our profession to believe that solutions can come from anywhere but from the oppressed communities is akin to professional narcissism (a state in which a person has an inflated sense of self-importance) bordering on imperialism. This narcissistic attitude merely ensures that the current problems continue and eventually the whole of society will suffer from such thinking.'

The pretenders in government roles are spread across many decades. Aboriginal people were placed under the Public Works Commissioner; and when asked why this decision was taken the response was blunt, 'no one wanted it.'

The government later created a Minister for Public Works which did nothing to give hope to the Aboriginal people that things were looking up. State Records publication 'A Little Flour and a few Blankets'–1953 commented on in the South Australian Parliament,highlights the attitude toward us as people. Minister of Works McIntosh displayed complacency in relation to Aboriginal education:

> There have been one or two cases of half caste boys coming to Adelaide and entering into apprenticeships, and although they had done well, such cases are rarities, because it is hard to turn a nomad into a stool sitter in one generation. All that can be done has been done.

The pretenders in the Federal Parliament dismantled ATSIC and left the Aboriginal people with TLC – Tender Loving Consultation, resulting in little or no commitment to self-determination.

The pretenders in the Education Department failed to take seriously the concerns of Aboriginal executives about school-targeted Aboriginal student funding being used as general-use funding in schools.

The pretenders who gathered to implement or defend themselves against the recommendations of the Royal Commission into Aboriginal Deaths in Custody, resulted in an increase in the people in prison, and today a disturbing increase in the number women in goal. Growing numbers of children are removed from their families. Why?

The cause is a cultural poverty; a failure to connect with an Aboriginal perspective, and the lack of ability to accept failure and work to improve a working relationship based on mutual respect. The idea that Aboriginal people must reach a consensus is beyond belief, and if there is a mistaken response of the powers who dictate what will and won't be tolerated, it will bring the Aboriginal self-managing structures crashing to the ground.

The idea of self-determination and self-management is something indispensable for Aboriginal people and it is a process of absolution for the system of government and the wider community.

Art has become an important economic tool for many Aboriginal people and the growth of galleries representing Aboriginal Artists is an avenue through which people from remote areas can display and sell the product to the high traffic markets such as Sydney, Melbourne and Adelaide. During my time working with the community at Gerard it was an honour to meet Ted Roberts a carver who went back to country in the north to collect wood for his carving, as he told me it was the best timber to work with.

Ted Roberts was a craftsman and business man in his own way because he did miniatures, small boomerangs, spears and shields. Ted told me he had a deal with a German bloke who wanted items people could carry in their case on the return trip home. Ted Roberts didn't comprise his craft but he adapted the product size to meet his market.

Tandanya was established to be a focal point in South Australia and remains an important location for performing and visual art expression.

There has been an increased interest in performing groups who are emerging to perform at festivals, official openings, and welcome and acknowledgement of country ceremonies. Groups from South Australia have travelled overseas and across the country to perform.

The contemporary music scene has produced some equally talented performers. The contemporary art movement is healthy and new people are attracted to take up the brush and paint to tell their story. We must be careful to ensure all artists are able to be supported in the marketplace.

Any new development must provide space and room for groups to organise and control the decision about how to market their art and develop the performing arts.

There is an opening to create a space for artists to use as studio space to build skills and produce product for the marketplace.

It is critical to grow the contemporary expression of our story of country, personal story and the history of Aboriginal people by encouraging visual, performing artists, contemporary and traditional, to make a connection with agency groups, the commercial sector and provide easier access to resources. There is a need to put in place an interface which is for groups and individuals to build an enterprise platform for all performers and artists with the public.

The history of Aboriginal people is a story lost in many cases because we failed to record the personal memories and experiences of our people.

The Aboriginal Family History Unit at the SA Museum is testament to the determination of one extraordinary woman – the late Dr Doreen Kartinyeri who was the driving force behind the unit's establishment. Doreen was an activist and historian and she published ten books.

Doreen researched and recorded the histories and genealogies of Point Pearce and Raukkan Aboriginal families. She was awarded an honorary doctorate from the University of Adelaide. She was named the South Australian Aboriginal of Year in 1994.

The Aboriginal Family History Unit at the South Australian Museum is an important unit that has worked to assist many of our families to uncover their family history.

History of each of the family groups in South Australia will ensure we have a record to share with future generations and build skills amongst our own people to enable them to author publications.

We need to remind ourselves that there are many stories we didn't record because it was seen as not that interesting. My sister Gwen was a living library because she had grown up around Kokatha elders and she had a good command of the language, but none of us worked with her to record on paper her 'library of the mind'. When I decided to write our family book *A Bush Beginning* only four of the nine in our family remained to recall the story of the family.

Another issue is convincing people to tell you their story; my Aunty would say it was their struggle and experience, and they didn't want me to become bogged down in the past. Charles Perkins famously said: 'you can't live in the past but the past lives with you.'

The record of the life people have led is often in their head. I spent time travelling with the late Rex Stuart through Arabunna country and the experience was one that opened up the story of the country as Rex told me about his and his father's story of country. The country started to talk to you as he spoke about places and sights of importance. I never found out if anyone sat with Rex and recorded his story.

Another enjoyable exchange was the talks I had with Dr Archie Barton. Archie Barton was an encyclopaedia of the mind; he would talk about a date, the weather at the time, and the conversation between people.

In our respective journeys over many years in meetings and talking one-on-one we have experienced a rich weaving of stories with a cross-section of people in our state. I recall how important gathering places were and how important they were to people's well-being.

Mrs Wilson at the Lower Murray Nungas Club provided a venue to meet formally with workers and clients, or a yarning place for a cuppa.

Agnes Rigney did the same at the Gerry Mason centre at Glossop.

Venues for rebuilding confidence and a sense of Aboriginal place and unity are needed in today's Aboriginal community.

The Aboriginal Advisory Committee at the Museum is concerned about the preservation of the 30,000 items in the Aboriginal collection. We are grateful to the Premier and the Federal Members who visited the collection. Everyone who visits is stunned by the size and history of the collection. It is important to find a permanent home for the collection that is secure and safe from potential damage. The Government has supported us to commence caring for the collection. South Australia doesn't appreciate the importance of the collection and it needs to be a centre piece on Lot 14 for display, community research, and teaching our young people about the skills required to conserve the collection.

Lot 14 gives us an important opportunity to talk, explore, and share, to achieve a central theme of reconciliation and unity**.**

The challenge is for all the parties with an interest to come as one to the table and agree to use the substantial collections at the Art Gallery, State Library, State Records, Botanic Gardens, the Museum and Universities in support of Aboriginal people being able to provide a powerful reflection of South Australian and Australian history, and story of country.

The Reconciliation Barometer survey concluded that: 'almost all Australians, particularly Aboriginal and Torres Strait Islander people, think the relationship is important.'

I remain optimistic, but the shadow hanging over our desire for relationship-building is that the level of trust continues from survey to survey, as being stagnant. There are gaps in the trust that Aboriginal and Torres Strait Islander people and non-Indigenous people have for each other. Key findings are that: 46% Aboriginal and Torres Strait Islander people believe they have high trust towards Australians in the general community (also 46% in 2016), compared with 40% who think Australians in the general community have high trust for them. 27% Australians in the general community believe they have high trust towards Aboriginal and Torres Strait Islander people, compared with 21% who think Aboriginal and Torres Strait Islander people have high trust for them (19% in 2016).

51% of Aboriginal and Torres Strait Islander people believe that Australia is a

racist country (57% in 2016), compared with 38% of the general community (39% in 2016). Aboriginal and Torres Strait Islander people and 90% of Australians in the general community feel our relationship is important. 38% Australians in the general community consider racial and cultural differences as the biggest cause of social divisions in Australia (37% in 2016), compared with 49% of Aboriginal and Torres Strait Islander people (39% in 2016).

Pride in Aboriginal and Torres Strait Islander cultures is increasing amongst Australians.

Lowitja O'Donoghue delivered the Australia Day speech in 2000, and words spoken on that day remain relevant in 2019:

> … it is still the case that many people believe that what happened to our people happened 200 years ago – and as such, it should now be put behind us.
> It is implied that to talk of the consequences of white settlement is to be negative – to be clinging to a 'black arm band' view of history.
> Sadly, these perceptions are fuelled by some of the most prominent leaders of our Nation.
> And, in economic times when many people are experiencing hardship – damaging and divisive myths are perpetuated, and become taken for granted.
> Myths such as: 'People having difficulties have only themselves to blame'.
> Or that 'Anyone can succeed simply by wanting to'.
> That 'Winners deserve to win and losers to lose'.
> What many of our political leaders have failed to understand – or chosen not to acknowledge – is that the racist policies and practices of the past continue to affect every aspect of every Indigenous person's life.
> The past is still with us.

It was said that there is no future for Aboriginal people – only the past repeating itself over and over again. I am optimistic that if the South Australian political, business and general population convert intent into action based on mutual respect and partnership, we can move to a positive space where Aboriginal people's perspective is respected and valued as a partner in building a strong, healthy, Aboriginal community of people. The wider Australian people must build a relationship with Aboriginal people, and remove the colonised mindset to reform their thinking, and close the gap amongst Australians about Aboriginal people to create a future based on transparency and a modern place for Aboriginal governance.

An Aboriginal presence on Lot 14 will shine a light on the past, demonstrate how we can work together now, and forge a path to a future which reflects the true story of country.

My work is not done, our work is not done.

References

1 Australian Bureau Statistics, 2004, *Prisoners in Australia*, catalogue no. 4517.0 http://www.abs.gov.au/Ausstats/abs@.nsf/0/8d5807d8074a7a5bca256a6800811054?OpenDocument

2 Tim Rowse, The Politics of being practical: Howard and his quiet revolution in Indigenous affairs, The Brisbane Institute 2005.

3 The Referendum was carried in every State of Australia. The proposal received 89.3% of all votes (and 90.8% of valid votes nationally). This was over 10% more than any other Referendum before or since. T. Blackshield and G. Williams, *Australian Constitutional Law and Theory* (2nd Ed., 1998 1186). See *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 408[147]; [1998] HCA 22 (*Hindmarsh Bridge Case*).

4 A reference to a *Song of Hope* by Kath Walker (Oodgeroo Noonuccal).

5 Effected by Constitutional Alteration (Aboriginals) 1967 (Cth).

6 (1998) 195 CLR 337; [1998] HCA 22.

7 (2002) 214 CLR 422; [2002] HCA 58.

8 (2009) 237 CLR 309; [2009] HCA 2.

9 This opinion was first expressed by Murphy J. in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168. It was revisited in the *Hindmarsh Bridge Case* but rejected by a majority.

10 (1998) 195 CLR 337 at 367 [44]; [1998] HCA 22.

11 (1998) 195 CLR 337 at 411-414 [155]-[158].

12 *Yorta Yorta v Victoria* (2001) 110 FCR 244.

13 *Wurridjal* (2009) 237 CLR 309.

14 (1982) 153 CLR 16; 56 ALJR 625.

15 (1992) 175 CLR 1.

16 Wik Peoples v Queensland (1996) 187 CLR 1.

17 *Native Title Act 1993* (Cth).

18 Including a conference at the University of Queensland on 31 May 2012. A feature length film, *Mabo*, premiers in Sydney on 7 June 2012 as part of the Sydney Film Festival 2012.

19 As was provided by the *Northern Territory National Emergency Response Act 2007* (Cth). See *Wurridjal* (2009) 237 CLR 309 at 372-375 [133]-[143] and 432-434 [332] – [340].

20 Told in Bryan Keon-Cohen, *Mabo in the Courts – Islander Tradition to Native Title – A Memoir* (Chancery Bold 2011, Melbourne).

21 *Mabo v Queensland* (1988) 166 CLR 186.

22 Marcia Langton, 'Koowarta and His Heroic Struggle for His Rights', in Symposium, Melbourne Law School Turning Points: Remembering *Koowarta v Bjelke-Petersen*, 11 May 2012 (Hereafter Koowarta Symposium).

23 A. Reilly, 'Queensland, the Commonwealth and the Aboriginal Land Fund Commission: The Foundations of *Koowarta*' , Koowarta Symposium, 2012.

24 Section 4(2).

25 Public Service Board of NSW v Osmond (1986) 159 CLR 656, reversing Osmond v Public Service Board of NSW [1984] 3 NSW LR 477(CA).
26 (1982) 153 CLR 16 at 20; 56ALJR 265 at 627, per Gibbs CJ.
27 Australian Constitution, s51 (xxvi).
28 Australian Constitution s51 (xxix).
29 *Koowarta* (1982) 153 CLR 16 at50; 56 ALJR 625 at 645-6.
30 *Ibid* at 646.
31 *Mabo v Queensland* [No.2] (1992) 175 CLR 1 at 42; (1992) 66 ALJR 408 at 42: [It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the Indigenous inhabitants of a settled colony, denies them a right to occupy their traditional land.] See also *Advisory Opinion on Western Sahara* [1975] ICJR, at 39 85-86.
32 Hilary Charlesworth, 'Internal and External Affairs: The *Koowarta* case in context', Koowarta Symposium, Melbourne, 2012.
33 In Australia v Japan (Whaling in the Antarctic case), 2011 (ICJ).
34 See Charlesworth *ibid*. cf *Al Kateb v Godwin* (2004) 219 CLR 562 at 589-594 [62]-[72], per McHugh J. at 617-630 [152] – [191], per Kirby J.; [2004] HCA 37. See also *Roach v Electoral Commission* (2007) 233 CLR 162 at 177-179[13]-[19], per Gleeson CJ.; 224-226[181]-[182], per Heydon J.; [2007] HCA 43.
35 See e.g. *XYZ v The Commonwealth* (2006) 227 CLR 532; [2006] HCA 25; *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614; [2006] HCA 40; *Thomas v Mowbray* (2007) 233 CLR 307; [2008] HCA 5*; R. v Wei Tang* (2008) 237 CLR 1 at 40 [84]; [2008] HCA 39.
36 See e.g. *XYZ v The Commonwealth* (2006) 227 CLR 532 at 612 [226] per Callinan and Heydon JJ.; *Thomas v Mowbray* (2007) 233 CLR 307 at 402-411 [269]-[294] per Kirby J. See also *New South Wales v The Commonwealth (Work Choices Case)* [2006] 229 CLR 1; [2006] HCA 52. The industrial relations power in the Constitution, s51(xxxv), like the acquisitions power in s51 (xxxi), is conferred subject to a condition. In the first category it is that disputes must be settled by the independent process of conciliation and arbitration. In the second, it is that property may only be acquired 'on just terms. At least since 1921, the High Court of Australia has insisted upon an ample and plenary interpretation of the grants of federal power, without inhibitions adopted by reference to implied or reserved powers of the States said to arise from federalism. See *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129; (1921) 29 CLR 406 (PC). However, previously it had been settled law that the E*ngineers* doctrine was modified where the constitutional power was granted subject to a condition. This and much else was not determinative in the *Work Choices* case. See (2006) 229 CLR 1 at 208 [494] ff.
37 Julius Stone, the *Province and Function of Law* (Maitland, Sydney, 1946). See also Julius Stone, *Social Dimensions of Law and Justice* (Maitland, Sydney, 1966), 649.
38 Tim Fischer quoted *The Age,* (Melbourne), 6 March 1997, A6; *Courier Mail* 5 March 1997; *Canberra Times*, 8 March 1997, 17. cf M.D. Kirby, 'Attacks on Judges – a Universal Phenomenon' (1998) 72 *Australian Law Journal* 599 at 605.
39 Alexander Reilly, op. cit. *Koowarta* Symposium, Melbourne 2012.
40 Coe v The Commonwealth (1994) 68 ALJR 110 (Wiradjuri claim); Coe v The Commonwealth (2001) 75ALJR 334; Coe v the Commonwealth of Australia and Government of the United Kingdom (1978) 52 ALJR 334; 53 ALJR 403.

41 Sir Anthony Mason, 'Democracy and the Law: the State of the Australian Political System' (2005) 43 (10) *Law Society Journal* (NSW) 68 at 69; Cf M.D. Kirby, 'Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman' (2006) 80 *Australian Law Journal* 299 at 312-313.

42 Nicole Watson, 'Litigation or Grass Roots Political Activism? Reconsidering Mabo', paper for *Koowarta* Symposium, Melbourne, 2012.

43 Marcia Langton, above n20, *Koowarta* Symposium, Melbourne, 2012.

44 See e.g. International Covenant on Civil and Political Rights, 1966, art 1; International Covenant on Economic Social and Cultural Rights, 1966, art 1. See also now Convention of Rights of Indigenous People.

45 Maureen Tehan, 'Practising Law and Politics in 1980's Australia: the Liberating Effect of Koowarta', *Koowarta* Symposium, Melbourne, 2012.

46 Gerhardy v Brown (1985) 159 CLR 70.

47 Such as was mentioned by Dr Mark McMillan 'Because International Law Matters', paper for the *Koowarta* Symposium, Melbourne 2012.

48 The Governor of New South Wales, H.E. Prof. Marie Bashir, convened the launch of an initiative at Government House Sydney on 2 May 2012.

49 This is pointed out by Prof. Megan Davis and Mr Sean Brennan 'Constitutional Landmark, Transition Point or Missed Opportunity?' paper for *Koowarta* Symposium, Melbourne 2012.

50 Wurridjal (2009) 237 CLR 309 at 398-399 [226]-[232]. Full consultation with the Aboriginal communities affected was a central part of the recommendation of the Northern Territory Committee of Enquiry, whose report was purportedly the trigger for the Northern Territory Intervention.

51 Some have been wondering about the quote in the Uluru statement: 'This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.' It is an adapted quote from the submission put by Mr Bayona-Ba-Meya on behalf of the Republic of Zaire in the International Court of Justice in 1975 who dismissed 'the materialistic concept of *terra nullius*' substituting 'a spiritual notion'. Judge Ammoun, the Lebanese Vice-President of the International Court, quoted the submission in his judgment in the *Advisory Opinion on Western Sahara*. This part of Judge Ammoun's opinion was then quoted by Justices Brennan and Toohey in the High Court *Mabo* decision ((1992) 175 CLR 1 at pp. 41, 181).

52 On ABC *Q&A* on 29 May 2017, Pat Anderson said, 'In the dialogues – we've been going around the country – people actually are yearning for the days of ATSIC, where regional needs and issues were dealt with pretty much on a daily basis, and there have been other national bodies that we've set up previously that also have been dismissed at the whim of a current minister or the Government … that was out of favour. So, we're looking for something now, which, we still have to put the meat on the bones, but will have some real authority. And if they want to … if the Government wants to change it or is dissatisfied with it, it's got to go to Referendum again, so we're trying to give more solidarity or give more … sorry, make a more solid foundation here, which we haven't had in the past.'

53 Sue Taffe, *Black and White Together,* University of Queensland Press, 2005, pp. 13-14.

54 1993 CPD (HofR) 2877; 16 November 1993.

55 Gerard Brennan, 'Aboriginal Land Claims - An Australian Perspective', 1995 Seventh International Appellate Judges Conference, Ottawa, 25 September 1995, at http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_canada.htm

56 Quoted by Andrew Burrell in 'Sorry Business', *Weekend Australian Magazine*, 20-21 May 2017, p. 26.

57 G Williams and M Davis, Everything You Need to Know About the Referendum to Recognise Indigenous Australians (New South Publishing, Sydney, 2015), 105.

58 See, e.g. Sean Brennan, 'Three Questions, and Three Episodes in Constitutional Deliberation', Public Law Weekend: Constitutional Deliberations, ANU, Canberra, 2 October 2015 (unpublished).

59 Paul Keating, *After Words*, Allen & Unwin, 2011, p. 78.

60 Ibid, pp 77-8.

61 Noel Pearson, 'There's no such thing as minimal recognition – there is only recognition', in Megan Davis and Marcia Langton, *It's Our Country*, Melbourne University Press, 2016, p. 174.

62 Noel Pearson, 'Foreword', in Damien Freeman and Shireen Morris, *The Forgotten People*, Melbourne University Press, 2016, at xvi.

63 Warren Mundine, Practical Recognition from the Mobs' Perspective, Uphold and Recognise, 2017.

64 Some constitutional scholars who have been proponents of a constitutional provision for an advisory body point to the precedent of the Inter-State Commission. Indeed, s. 101 of the Constitution does not provide that the Parliament may establish such a commission. It provides: 'There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary ….' Suffice to say, there is no Inter-State Commission in existence.

65 Native title had been determined to exist over 31.4% of the land mass of Australia – 11.3% of which was subject to exclusive native title; and 20.1% was non-exclusive native title where native title rights and other interests co-exist, for example, over pastoral leases. There are now over 160 prescribed bodies corporate managing native title in Australia and the number will grow as more native title applications are determined.

66 2017 CPD 23 (S); 10 May 2017.

67 Ibid, 24.

68 Presently, there is a House of Representatives Standing Committee on Indigenous Affairs, but no similar committee in the Senate.

69 A more explicit wording for section 51 might be:
(xxvi) the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples and their continuing relationship with their traditional lands and waters;
(xxviA) the constitution and functions of an Aboriginal and Torres Strait Islander Council which may request the Parliament to enact a law providing protection or support for one or more of the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples and their continuing relationship with their traditional lands and waters;
advise the Parliament of the effect which a law has or is likely to have or which a proposed law if enacted would be likely to have on the cultures, languages and heritage of

the Aboriginal and Torres Strait Islander peoples and their continuing relationship with their traditional lands and waters.

70 Stan Grant, The Australian Dream: Response to Correspondence, in *Quarterly Essay*, Issue 67, 2017, p. 131 at 137.

71 See Republican Advisory Committee, *An Australian Republic, The Options – The Report*, Commonwealth of Australia, 1993, p. 140:

> 'In its submission to the Committee, the Aboriginal and Torres Strait Islander Commission stressed the need for recognition of prior ownership, and inclusion of a specific power for the Commonwealth to legislate for the benefit of Aboriginal and Torres Strait Islander people. The Commission urged the Committee to consider as a new preamble their modification of a proposal first advanced by Father Frank Brennan:
>
> Whereas the territory of Australia has long been occupied by Aboriginal peoples and Torres Strait Islanders whose ancestors inhabited Australia and maintained traditional titles to the land for thousands of years before British settlement;
>
> And whereas many Aboriginal and Torres Strait Islanders suffered dispossession and dispersal upon exclusion from their traditional lands by authority of the Crown;
>
> And whereas Aboriginal and Torres Strait Islanders, whose traditional laws, customs, and ways of life have evolved over thousands of years, have a distinct cultural status as Indigenous peoples;
>
> And whereas the people of Australia now include Aboriginal people, Torres Strait Islanders, migrants and refugees from many nations, and their descendants seeking peace, freedom, equality and good government for all citizens under the law;
>
> And whereas the people of Australia drawn from diverse cultures and races have agreed to live under one indissoluble federal Commonwealth under the Constitution established a century ago and approved with amendment by the will of the people of Australia; Be it therefore enacted …'

72 *The Australian*, 4 June 2015.

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