

The Sir Robert Garran Oration

Delivered by Mr Noel Pearson — Founder, Cape York Partnership — at the 2014 IPAA National Conference held in Perth on 29 October 2014.

Good afternoon, and thank you very much, Terry, for that very kind introduction. I'd like to acknowledge the Noongar people and the indigenous people of Western Australia. I bring greetings from Cape York Peninsula. I've been very honoured by the Institute, for being afforded the privilege of giving this year's Garran oration, and I wish to thank the members of the board for this opportunity.

I want to speak about the question of constitutional recognition, and the empowerment of indigenous Australians. And to the rhetorical question, are we Australian Aboriginals or Aboriginal Australians, my consistent answer to the suggestion that there may be a separatist alternative, is we are Aboriginal Australians. That is, we are citizens of the Commonwealth of Australia.

However, this answer faces three objections that have force. The first is that Aboriginal and Torres Strait citizenship, insofar as it concerns the Commonwealth's Parliament's power to make laws, is currently based on the problematic, and indeed fatefully wrong basis of race.

The second is there is no recognition of the fact, and the implications, of Aboriginal and Torres Strait Islanders being the indigenous peoples of Australia.

The third is the extreme minority status of Aboriginal and Torres Strait Islanders, 3% of the nation. It gives rise to a Democratic problem. We do not have a say in the laws and policies that applied to our people. In this scare and oration, I will argue that the current agendas for constitutional recognition and empowering indigenous communities to take greater responsibility for their lives, offers us the opportunity to provide solutions to these weaknesses in the current arrangements of indigenous citizenship in Australia.

Let me return to the beginning of the history of the modern Australian nation, with the acquisition of sovereignty over this country, and the advance of the common law. We now know from the high court's decision in *Mabo*, The true legal history of the colonial acquisition of the antipodes on behalf of the British crown. We now know that with the settlers came, on their shoulders, the common law of England, which fell to the soil and became the common law of the land. And that English law, which was the heritage of the settlers, recognized the procession of the native inhabitants. According to English legal theory, the acquisition of sovereignty meant that the indigenous peoples in possession of their traditional homelands became British subjects and entitled to all of their protections of British law. So, at the moment of sovereignty, all of the lands in the new colonies were the legal entitlement, under English law, of its traditional owners. The entire of Australia was held under native title by the Aboriginal and Torres Strait Islander tribes, that had occupied and possessed of those lands for millennia before the coming of Europeans. Native title burdened to the entire country at the beginning of white settlement. And the High Court described in *Mabo*, a process of parcel by parcel extinguishment of that original title.

The court explained that the British Crown had certain powers to issue titles that could compromise the existence of the native title. And so, the acquisition of titles by the colonists brought out from the initial settlements right across the nation, extinguishing or partially extinguishing the original titles of the indigenous peoples. That truth of the law of this country had been obscured for 204 years. There was no illumination of this legal truth for the best part of two centuries, and the actual history that played out across the country was done both in ignorance of

and in contradiction of that legal right. It was only when Eddie Mabo and his fellow plaintiffs in the Maori islands took the case before the high court that the truth became known. Australia was not, as assumed, a terra nullius, what it was like all other British colonies across the globe. It was a colony that recognized the pre-existing rights of the natives under the law of the colonizers.

The difficulty facing the highest court in Mabo, of course, was how to reconcile the truth of the law with the facts of history. How was it that the truth of the legal history was going to be reconciled with the fact of bloody and miserable dispossession. The High Court proposed a three-point plan for that reconciliation. And two of those points were really at the heart of the Mabo decision. The first point said that the titles acquired into those two centuries, through the process of dispossession, were indefeasible. They could not now be taken off the settlers. The first principle of native title in the Mabo case, was to recognize the validity of all of the titles and privileges that had been accumulated through two centuries of dispossession. If we know anything from Mabo, it was that land rights were secure and could not be challenged as far as they were held by the whites.

The second principle in Mabo, which was a logical flow on from the finding of native title, was that the remaining lands that had not been alienated were the legal entitlement of the traditional owners. Mabo meant that the leftover lands, the remnant lands, was the entitlement of the indigenous peoples. That was how the High Court sought to reconcile the original fact of comprehensive ownership, and two centuries of history. It was a proposition to the effect that the white fellow should keep everything that they'd gained, and the black fellow should get that which was left over. And in a subsequent case in which I was involved, called the Wick People's case in Cape York Peninsula, a third principle was articulated. And this principle applied in respect of pastoral lands, mining leases, and national parks, and other forms of tenure, whereby native title could coexist with the Crown title. And so, with Wick, we had the third principle of native title law. Coexistence. Entity that coexistence according to the High Court, the Crown title prevailed over the native title, to the extent of any inconsistency. That was the promise of Mabo, and Wick. Promise to a nation wracked by colonial grievance, a promise that enabled the nation to put paid to historical grievance through the peaceful processes of the law. A proposition that said the settlers could keep everything they'd gained, no matter how bloody that history might have been. The blacks would get whatever was left over, and there were categories of land, in relation to which coexistence was the rule.

We then came to the story of Federation. And the construction of the compromise between the colonies that comprised Federation. I want to say two things about the process of the construction of the Australian Commonwealth, under what we generally have a consensus is a profound achievement. The Australian Constitution is a profound achievement of democracy. However, I will speak this afternoon about some fundamental flaws in that Constitution, as far as it concerns the indigenous peoples of Australia. Of course, it is common knowledge that the indigenous peoples of Australia were excluded from that Federation. They were excluded from the lawmaking powers of the new Commonwealth Parliament, and they were not counted in the Australian citizenship. So, the original nation, discriminated against those peoples who had been in possession of this country for the previous 53,000 years. That is the first aspect of the Federation's story, of which we are well aware.

The second aspect and has become obscured in the mists of time is one that is less well-known and that is the inside that the federal compact was not just a majoritarian arrangement. It was not just a one vote one value democracy. It was an arrangement that made special provision for the small colonies comprising very small populations, concerned about being outnumbered when they consented to the larger nations. Western Australia, and Tasmania, benefited from the rights they received in the Senate arrangements. And today, those privileges continue. It is not just a

one vote one value democracy with a live in. It is a democracy that takes into account a minority status of the populations of Western Australia and Tasmania, and it has ever been thus.

The question that arises in my mind is why was not there a similar provision in relation to the Aboriginal and Torres Strait Islander societies that had preceded the Commonwealth? What if they had received democratic recognition of their status at the time the federation was put together? The indigenous peoples were quite significant in number in the Northern Territory and in Queensland, at the time of Federation. Had Senate arrangements been made at that time in their favour and in recognition of their interest, we would have had fair representation in the new Commonwealth Parliament. And of course, questions about the democratic implications of an extreme minority, aborigines and Torres Strait Islanders, making up 3% of the Australian population. Those implications about how is it that we make provision for such an extreme minority, to at the least have a say in relation to the laws and policies that apply to them. It may be one thing to say that they can be subsumed within the Democratic polity in relation to every other question, but surely when it concerns questions affecting indigenous peoples, the laws that apply to them and the policies that apply to them, surely they have an entitlement to some Democratic contribution in relation to those laws and policies.

Prime Minister Gillard established an expert panel to consider proposals for the recognition of indigenous peoples in the Australian Constitution. It was a recognition that the citizenship vote of 1967 had not finished this business. In 1967 as you will recall, an amendment was made to count indigenous peoples in the Australian census, as citizens, and the lawmaking function of the Commonwealth Parliament was amended to finally include the power to make laws with respect to Aboriginal and Torres Strait Islanders.

But the mechanism for the power, in retrospect, was fatefully wrong. The entry door into the new citizenship for Aboriginal and Torres Strait Islanders was through the door of race. The Commonwealth's common power in relation to indigenous peoples is a race power. The assumption being that the indigenous peoples constitute a separate race. A distinct race from other peoples in the Australian nation. And I became persuaded during the process of expert panels considerations about how fateful, and ultimately how detrimental, that characterization has been for indigenous policy these past 40 years.

Race, in this country as the world over, carries heavy baggage. It is freighted with heavy meaning. All of the assumptions about the innate inferiority. The suspicion that the aborigines of the antipodes, in particular, somehow represented the lowest form of human likeness across the globe. We are all aware of this history. We are all aware, as Australians, that the concept of race, as it pertains to Aboriginal and Torres Strait Islander peoples, is particularly tainted with that old idea of inferiority. And it still today casts a large psychological shadow over the minds of Australians when it comes to thinking about its indigenous peoples and their predicaments. These egregious problems, encountered by and suffered by the indigenous Australians, may be put down still in our minds to some questions of inferiority.

I became convinced by the arguments of my colleagues the expert on all of that that 1967 accommodation, as right motivated as it was, gave rise to a poor solution. The entry into the national citizenship should have been on the same basis as everybody else. It shouldn't have been through the door of section 51-26, the race power. And indeed, we should, today in 2014, put behind us all concepts of race. We are a human race, and we should carry with us no longer any suggestion that they are distinct races. Yes, we have different ethnicities, and we have different languages and religions and cultures, but we are not distinct races. And I believe the day we put the concept of a race behind us is the day a great psychological freedom will be reached.

I've been reading and rereading the papers of Sir Paul Hasluck, a great Western Australian thinker, and policymaker in relation to indigenous affairs in particular. And I'm struck how the argument in relation to race was one very much at the centre of Paul Hasluck's thinking. It is extraordinary for me to reflect on Hasluck's determination that concepts about treating indigenous people as a separate race was evil at its core and should have been rejected.

The expert panel came up with a proposal, a set of proposals that included changing the Commonwealth's power, or the race's power, to a power to make laws in respect of Aboriginal and Torres Strait Islander peoples. The expert panel also proposed the removal of section 25 of the Constitution, which contemplates the possibility that state governments could legislate to exclude certain races from voting. It is an archaic provision that I accept would never be contemplated being put into effect today, but nevertheless, is an anachronism in our Constitution that should be removed.

There was also a proposal for a guarantee of non-discrimination to be put into the Constitution. A new section 116A, that would make it unlawful for the Commonwealth and state parliaments to do anything that would discriminate amongst citizens. And finally, a proposal to recognize English as a national language of Australia, and the traditional languages of Aboriginal and Torres Strait Islander peoples as languages of this nation.

The launch of the expert panel's proposals met with certain objections from certain quarters. In particular, there was a conservative objection to the non-discrimination proposal, notwithstanding the fact that Pauling suggested that it was the most popular of all of the expert panel's ideas. There is strong cross-party support for guarantee against racial discrimination in the Constitution. But of course, constitutional conservatives and conservative political leaders are very much opposed to a non-discrimination provision. In particular, the line that was used against the idea is that it would constitute a one-line Bill of Rights. This objection is very firmly held on the part of constitutional conservatives, and I anticipate that it will become of the focus of various strenuous objections as we move forward.

Disappointing for me is the lack of traction on a proposal that I was in particular very much in favour of. The recognition of Aboriginal and Torres Strait Islander languages. These languages are very diverse. They represent the heritage of all Australians. They're extremely interesting. For one such as I who speaks two of those languages, they are beautiful languages. They are languages that are attached to the landscape. All of the lands of my childhood, belonging to my mother and my father's ancestors are lands infused with these languages. These languages have ancient provenance, and they constitute my most precious sense of possession. And I feel that my own anxieties about the recognition of those languages is shared by every indigenous Australian who has febrile anxieties about their future.

This country is a named continent. Sandhills, mangroves, beaches, swamps, rock formations, rivers, creeks, a mere stone, have names. And the Anglicized names that we use in common parlance today, Noosa, Tewantin, Eumundi, Coolum, all of these names that many young Australians don't even recognize as indigenous names, are but the small tip of an iceberg of names that cover the entire continent. My own estimation is that probably less than 5% of the names of Australia are officially recognized. In some parts of Cape York, there is a named place every 50 meters. That little creek has a name. And that intimacy of the Australian landscape will be lost if we don't, as Australians, take care of it. That the proper nomenclature of the continent is preserved and recognized for our future.

I told a story of every trip I take to my homeland beach house, at Hope Vale, at a place called Yugubarraalbigu. I pass a hill that on the map is called Round Hill. And its proper ancient name, probably hundreds, possibly thousands of years old, is Dhamal Nubuun. Not Round Hill. Dhamal

Nubuun One Foot. And it's a terrible indictment of the country, that the official maps of the Guugu Yimidhurr lands, do not have at least a co-name of Dhamal Nubuun, next to Round Hill.

The conservative objection to some of the proposals in the expert panel's report, have got to be taken seriously. I understand how fervently and how seriously the idea that the non-discrimination clause is objectionable. I understand it in a way that I didn't understand when we reported to Prime Minister Gillard in 2011. I understand now the conservative idea that they insist that Parliament be supreme. That judges shouldn't be left to decide what policy and law should be. Their objection, that the proper government of our society, should be in the hands of the supreme Parliament and not in the hands of the courts, is a serious objection which I have endeavoured to take proper account of.

And it seems to me that this whole issue of how is it that we ensure that in the future, Aboriginal and Torres Strait Islanders are not subjected to the kind of discriminations that we endured in that first century of nationhood, discriminations that were adverse and hostile and blatantly harmful, had been added to, in recent times,, that were helpful in intent, but which amounted to, in those singularly profound phrase of George Bush's, they amounted to the soft bigotry of low expectations.

It is not just adverse discrimination that has been the problem in my view, it has been benign discrimination, aimed at helping people, that has also contributed to our problems. And how is it in the future that we can ensure that we have a proper say in relation to the laws and policies that are made. And it seems to me that there are two options. One is, as proposed by the expert panel, a judicial proposal, let's leave the high court to supervise a principle of equality or as non-discrimination.

The second alternative, if you're opposed to judicial supervision, is a democratic alternative. How is it that we afford the Aboriginal and Torres Strait Islanders a say in relation to the laws and policies that apply to them. Shirley, if we're not going to allow the high court to supervise a non-discrimination principle, surely, we should make democratic provision, for Aboriginal and Torres Strait Islanders to have a say.

This raises in the minds of some objectors the idea that special provision for the indigenous peoples is antithetical to ideas of liberal democracy. And Greg Sheridan from the Australian newspaper, raised this very objection. However, proper objection of the arrangements that have been made across various liberal democracies throughout the West, discloses that there is no template liberal democracy.

Liberal democracies are not cut out by cookie cutters. Each is a unique response to the circumstances face saying the nation at hand. New Zealand has dealt with its citizenship questions in a certain way and has made accommodation for its indigenous peoples. The United States, no less, lauded by Sheridan, as the exemplar liberal democracy, is, in fact, a liberal democracy that recognized the domestic sovereign dependent status of its native peoples, since the 1820s. Indian tribes in the United States have sovereignty. A domestic form of sovereignty and are not subject to provincial law.

So, this whole question of how is it that liberal democracies accommodate the particular position of minorities in particular, indigenous minorities, those peoples who pre-existed the Commonwealth, every nation has come to their own solution. The question for Australia, is whether at this stage of the Australian nation, we will be prepared to make a more complete Commonwealth.

I believe, like Terry, that we should be positive about the possibilities. I believe like Terry, that optimism about our prospects for solving the indigenous problem as we think about it, is within

our reach. We can solve Aboriginal problems. These are not intractable problems. These are not problems beyond our ken. These are problems that Australians can reach forward and solve. However, in order to do that, we have to bring together the great dialectical conflict that there has always been around indigenous policy. Between how it is that we have a one united citizenship and yet recognize that there are amongst that citizenship, peoples who were indigenous to this nation.

We have to come to grips with the idea that to be indigenous is not to contradict the idea of a one united citizenry. We also have to contend with the more dishonest suggestion that the recognition of indigeneity equates to race. It's a revival of the race problem. And Andrew Bolt and other commentators seek to make the equation between indigeneity and race, as if our demand that there ought to be recognition of the indigenous status of Aboriginal and Torres Strait Islanders, is a demand to revive the problem of race. But indigeneity is not a race. Indigeneity is about original peoples with an original heritage, particularly connected to the country. There are white people who are indigenous to various places on the planet. It's not a question of race. This is a question of the connection between a particular people and their culture, and the place upon which the nation has been founded.

If we're going to come to terms with this, we're going to have to come to terms with that argument. It is a dishonest argument in my view, to equate indigeneity with race. We will also need to come to account, in relation to the basic question of development, and indigenous heritage. There were two agendas we must concern ourselves with. How do we recognize the indigenous heritage of Aboriginal and Torres Strait Islanders, their existential anxiety about their culture, about their languages, about their connection with their traditional homelands, and the imperatives of development?

In my view, Australians have demanded that indigenous people choose one or the other. That we cannot have that two. Australians have demanded absolute assimilation in order for development to take place. Indigenous Australians have been asked to renounce their heritage, in favour of social and economic equality and participation and development.

On the other hand, there is the argument that in order to maintain our indigenous heritage, we needed to renounce the imperatives of development. Plainly we are now at a juncture in our history where the two things have to be synthesized. The two imperatives are necessary. There is no contradiction between the idea of a people maintaining their heritage, while at the same time, participating in development. We have to want two roads to achieve that vision.

I call the road of Adam Smith, the road of development. The road of the indigenous peoples, pursuing in their own self-interest, a better life, and that road is a universal road. It is a road shared by all people seeking better for themselves, in individual and social progress. The Adam Smith road is a well-worn road. It is not a culturally specific road. It demands of all peoples the same. And Aboriginal Australians in my view are not exempt from its demands. If we want social and economic progress, we must walk the Adam Smith road. We must as individuals and families clutching our children to our breasts, walk with our own legs, towards something better for ourselves. We must climb the stairs of social progress in pursuit of a better life, like everyone else does. That is the road of development, and it is what I call the Adam Smith road.

But there is also another road we must walk. It is the Johann Herder road. The great German nationalist philosopher, who reminded us that men cannot just live by bread alone. There are things important to human beings that transcend material wealth and progress and contentment. When we've satisfied all of our liberal and social democratic desires and agendas, we will still have a hunger in our hearts. We will have a hunger for some inner meaning, that only our culture can give us. That only our heritage can support us in. That is why I've continually been

motivated by the example of the Jews. Because there represent a people walk two roads. They walk the Adam Smith road, of professional, academic, political, business, cultural, creative roads, as well as pursuing their communal road of preserving their identity, their languages, their heritage, and their traditions and rituals. Their sense of community. There is no contradiction there. They have made it work.

And the other cultures and ethnic groups that have similarly made a way through the world by preserving and sustaining their heritage, whilst at the same time participating at the very cutting edge of development. People say it's grandiose of me. I hear the suggestion that perhaps the most powerless people should not set before them the example of such an exemplary people. But I say, why not? Why don't we place ourselves to learn from those who've succeeded in keeping an identity and a communal heritage alive for millennia, whilst at the same time participating in the wider world of development.

This is a reconciliation of two things. The imperative that we get into the Australian business of opportunity, that we seek social and economic uplift of our people through the normal rules of engagement. And those rules of engagement are readily identified. It is the pursuit of self-interest. The liberal power of people choosing a better life for themselves. And insisting that having a jealous concern for one's own family is a power. It is a great power for progress. But that does not contradict the idea that that same person also contributes to a community, and that contributes to the sustenance of languages and traditions and contributes to a community.

This whole debate, I'm very struck by dialectical debates. The whole Adam Smith and Johann Herder dialectic. The Nugget Coombs and Bill Stanner dialectic with Paul Hasluck. Hasluck was not entirely wrong. And neither was Stanner. But the proper reconciliation of those who were concerned about the preservation of our indigenous heritage, and those who were concerned about the imperatives of development, is a dialectic that runs through the whole history of indigenous policy. In many ways, it's the dialectic between Paul Keating and John Howard.

Paul Keating nailed to the national mast, to the correct principle of Aboriginal rights. When he embraces the Mabo decision with the native title act in 1993, he committed the country to the correct principle of land rights. And of course, John Howard in his own way, nailed a complementary principle to that masthead, and it was the principle of responsibility. And in my view, we now have an opportunity at this stage of our history to bring those two principles together, in a synthesis. For all of us Australians to accept that in the indigenous policy field, we can sustain rights and responsibilities as complementary principles rather than alternatives.

And the great issue before us, with constitutional recognition of the empowerment of indigenous peoples, so that we finally solve the Aboriginal problem. The challenge that lies before us is one of recognizing that the opportunity is at our fingertips. The planets are aligning. The stars are looking good. We have a conservative leader who can lead the country to a successful referendum if we as a nation understand how profound the opportunity is that now lies before us.

Thank you.