**Chapter Seven**

Reflections on the Aboriginal Crisis

***Ray Evans***



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We find ourselves here today in Adelaide debating major constitutional and political issues. To my knowledge no one here today holds high executive office, although some members of The Samuel Griffith Society have held such office in the past. But we see nothing untoward, at all, about such conduct. It is a part of our political life which we all take for granted, and in carrying this debate forward we assert the legitimacy, indeed the importance, of such participation in the way in which political decisions affecting the future of our nation are taken. This is something which happens in very few other nation states, and we should all be aware of that fact and its importance for us.

We are members or citizens of a nation state whose legal origins we trace back to 1770 and the annexation by Lieutenant James Cook on August 22 of that year of the eastern part of Australia. Two hundred and twenty six years later Australia exercises sovereignty over the mainland, Tasmania, a large number of small islands, and has claimed a large slice of Antarctica. We comprise about 18 million people, and we are recognised throughout the world as a still prosperous, albeit small, nation whose influence on world affairs has been greater than our numbers might suggest.

What characterises and distinguishes Australia as a sovereign nation is its legal system and its Constitution; its parliamentary institutions and how those institutions maintain their legitimacy; its military capacity to defend our borders and to participate in defence alliances; and above all, something intangible which the overwhelming majority of Australians share, the sense of belonging to a country whose place in the scheme of things is morally secure.

Those Australian citizens, and they change from time to time, who are entrusted with the governance of this nation, have important responsibilities to discharge. The first is the defence of the nation's borders and to exercise control over who comes here either temporarily or permanently; this is the essence of sovereignty. Second is the representation of Australia's interests within the global matrix of many other nation states. Third, they have a responsibility for the nurture of our political and legal institutions. It is these institutions which provide the framework within which we pursue our work and our cultural and religious activities.

A nation state which is successful for many generations can only prosper because of the commitment of the great majority of its citizens to a fundamental set of common values which enable the political life of the nation to continue peacefully and efficiently. Australia is one of the oldest democracies in the world. I think it is beyond argument that the overwhelming majority of Australians are committed to our political arrangements and our established way of doing things. They are particularly committed to federalism, and to the dispersion of political power which federalism prescribes. And it is this wide commitment which makes our country such an enviable place to live and work. We have made mistakes. All nations, being human institutions, have made mistakes. But we are capable of facing up to those mistakes, and capable of changing course in order to mitigate the consequences of past mistakes.

Despite our fortunate past, my theme today is that we are facing a crisis in our political life which, if not properly resolved, could cause great problems for us as we grow older and, more important, for future Australians. I quote the Oxford English Dictionary on the word "crisis". *A crisis is a critical and often unstable stage in a chain of events. It is often associated with a period of deep trouble or danger in politics.*

In discussing political crises it is helpful to begin by referring to Michael Oakeshott, and I quote the famous tin-opener passage from the celebrated 1951 Inaugural Lecture at the London School of Economics:

> "A tradition of [political] behaviour is not a fixed and inflexible manner of doing things; it is a flow of sympathy. It may be temporarily disrupted by the incursion of a foreign influence, it may be diverted, restricted, arrested, or become dried up, *and it may reveal so deep-seated an incoherence that...a crisis appears*."

- "And if, in order to meet these crises, there were some steady, unchanging, independent guide to which a society might resort, it would no doubt be well advised to do so. But no such guide exists; we have no resources outside the fragments, the vestiges, the relics of our own tradition of behaviour which the crisis has left untouched. For even the help we may get from the traditions of another society...is conditional upon our being able to assimilate them to our own arrangements and our own manner of attending to our arrangements. The hungry and helpless man is mistaken if he supposes that he overcomes the crisis by means of a tin-opener: what saves him is somebody else's knowledge of how to cook, which he can make use of only because he himself is not entirely ignorant. In short, political crisis...always appears *within* a tradition of political activity; and `salvation' comes from the unimpaired resources of the tradition itself."(1)

Having quoted the great scholar, my contention is that we have in Australia a crisis concerning the place of Aboriginal people within contemporary Australian society. Aboriginal people I take to be those who are descended, in full or in part, from the people who lived on the Australian mainland and Tasmania in 1788, when Captain Arthur Phillip and the soldiers, sailors and convicts under his command established the first European settlement in Australia, at Sydney Cove.

How is this crisis manifest? The obvious answer is to point to the column-inches devoted to Aboriginal issues in the press and the media generally, and to the amount of money spent on Aboriginal policy by the various governments in Australia. A more important manifestation of the problem is the palpable decline in the quality of life for very large numbers of Aborigines. The Governor-General referred to this fact three weeks ago. Although the evidence is never complete, it now appears beyond argument that over the last twenty years or more, life expectancy for Aborigines, both men and women, has fallen significantly. Other common indices of social morbidity - suicide, chronic alcohol and drug abuse, domestic violence, criminality, imprisonment, sexually transmitted diseases, as well as other diseases such as leprosy, trachoma, etcetera - have increased to an alarming extent. A recent report commissioned by the Northern Territory Government and compiled by Aileen Plant, entitled *Northern Territory Health Outcomes*, identifies in some detail the tragic decline which has taken place in recent years.

In 1971 Professor Colin Tatz, a prominent publicist and advocate in the Aboriginal cause (for better or worse is a matter of argument), visited 77 Aboriginal communities in the five mainland States and the Northern Territory. In 1991 he revisited these same communities, and in a report entitled *Aboriginal Violence: A Return to Pessimism* he wrote the following(2)

"We all must face up to a set of realities for which there is, regrettably, abundant evidence."

Tatz listed eight of these realities:

(1) The great deal of personal violence within Aboriginal groups, even within families;

(2) The great deal of child neglect, as in hunger and lack of general care;

(3) The considerable amount of violence and damage committed in sober states;

(4) The marked increase in Aboriginal deaths from non-natural causes;

(5) Much destruction of property, both white - supplied and own - acquired;

(6) Increasing numbers of attacks, often violent, on white staff who work with the groups;

(7) The vast amount of alcohol consumed, commonly and generally offered as the sole and total explanation of the above; and

(8) The constancy about the way Aborigines externalise causality and responsibility for all of this.

An even more tragic account of the crisis in contemporary Aboriginal life was written by Rosemary Neill in *The Australian* of June 18, 1994. Entitled *Our shame : How aboriginal women and children are bashed in their own community - then ignored*, it describes the epidemic of domestic violence and rape which has spread throughout Aboriginal communities in recent times. It is an awful story. I will quote just one paragraph:

"The book *Through Black Eyes*, published by the Secretariat of National Aboriginal and Islander Child Care, states that:

***** Up to and over 50 per cent of Aboriginal children are victims of family violence and child abuse.

***** In the early 1990s, a survey carried out among 120 Aboriginal households in Adelaide found 90 per cent of the women and 84 per cent of the young girls had been raped at some stage in their lives.

***** A related statistic says that, in most States, more than 70 per cent of assaults on Aboriginal and Torres Strait Islander women are carried out by their husbands or boyfriends."

These words refer to terrible human suffering and brutality which is taking place in Australia today. Further, and this is the important point, this violence and brutality has increased significantly during the last two decades or so. This tragedy is of recent origin.

Another important manifestation of crisis is the Hindmarsh Island story. A useful summary of that quite extraordinary affair is given in Chris Kenny's recent article in *The Independent Monthly:*(3)

"When Commissioner Iris Stevens delivered the report of the Hindmarsh Island Bridge Royal Commission to the South Australian Government she found:

***** The whole of the `women's business' was a fabrication.

***** The purpose of the fabrication was to obtain a declaration from the Minister ... to prevent the construction of a bridge between Goolwa and Hindmarsh Island.

***** The involvement of Aboriginal people in the anti-bridge lobby in October, 1993 was the direct result of approaches made by existing interests who had been unsuccessful in their efforts to stop the bridge.

***** Not only was the `women's business' unknown and unrecognised in the relevant literature, the existence of the `women's business' was not known to other Narrindjeri women. It was unknown to the 12 dissident Narrindjeri women who gave evidence, and all were credible witnesses. They had no interest in whether the bridge was or was not built. Their concern was for their culture.

***** There were, from the start of the Commission, indications and complaints of threats and of pressure being applied to witnesses."

I trust that a full account of this sorry tale will soon be written. But some immediate observations can be made. The first is that Australian anthropology is now under a serious cloud. Apart from Dr Philip Clarke and some of his colleagues of the South Australian Museum, who carried an enormous burden of professional responsibility in this issue, Dr Ron Brunton of the Institute of Public Affairs, Dr Les Hiatt, former Reader in Anthropology at the University of Sydney, and Professor Ken Maddock of Macquarie University, the entire anthropological profession was either silent, or joined in the attack on the so-called dissident women.

From a mining and resource industry perspective, it is clear we have a developing crisis manifest in the increasing incapacity to obtain secure title to mineral discoveries, or to obtain easements to build pipelines for gas or for mineral slurries. This loss of title security is the result not so much of the decision in *Mabo No.2* but of the effect of the Commonwealth *Native Title Act* (*NTA*), whose validity was upheld by the High Court in *Western Australia v The Commonwealth.*(4)

The ongoing delays with the Century project have focussed attention on the problem of title security, although some of our political leaders still seem to feel no real sense of urgency about the matter. This indifference may change in the next twelve months or so. Because of the *NTA*, construction of the Teneco pipeline in south-west Queensland has suffered continuing delay and I understand that, as a consequence, Brisbane may run out of gas within a year or so. We will then have a real political crisis. This crisis will be the consequence of the fact that the law of property in Australia, which had been slowly constructed over many centuries, was thrown into disarray by *Mabo No.2* and the passage of the *NTA*.

The Australian mining industry is facing an historic watershed. The inability to obtain secure title in much of Australia has resulted in exploration expenditure going off-shore, and a new mind-set emerging within the Australian mining industry which is overseas rather than domestically oriented. There is no doubt that some of this would have happened even if we still had pre-1992 security and predictability concerning mineral titles. But the Minerals Council's annual survey has cited problems with the *Native Title Act* as a cause for this phenomenon and the Industry Commission has commented similarly. This change in attitude and exploration expenditure will, a few years down the track, affect job opportunities in Australia, export income, the value of the Australian dollar, the current account deficit, and so on.

The tragedy in the lives of many of our Aboriginal Australian fellow citizens is much more immediate and personal than future economic decline and, I believe, impossible to continue to pretend away. But all of this personal tragedy, the growing political danger, and the future

economic decline are, I am convinced, merely different facets of the same crisis, and I wish today to take Oakeshott's advice, and try to find some hint of "salvation" to this crisis from within the "unimpaired resources" of our political traditions.

When we look back over 208 years of European settlement of Australia, we can find two opposing attitudes towards the Aborigines. One attitude was enshrined as policy by the British Government in the commission given to Governor Phillip. This commission was read out at the proclamation of his office on 7 February, 1788. I quote:

> "You are to endeavour, by every possible means, to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence. You will endeavour to procure an account of the numbers inhabiting the neighbourhood of the intended settlement, and report to our Secretary of State in what manner our intercourse with these people may turn out to the advantage of this colony."

The Aborigines, then, from the very beginning, were invited, encouraged and, regrettably, at times compelled, to enter into the benefits which Western civilisation affords. For nearly two hundred years, up until the late 1960s, an enormous amount of official, and private, time and money were expended in projects and programs designed to bring Aboriginal Australians into full partnership of European-Australian society.

It is worth noting that Phillip's commission excluded any notion of enslavement. Slavery within Britain had been declared illegal by Chief Justice Mansfield in 1772. The English Quakers presented an anti-slavery petition to Parliament in 1783. In 1807, the Imperial Parliament abolished the slave trade in British colonies. When England annexed Eastern Australia in 1770 and settled it in 1788, enslavement of the inhabitants was never considered. "Intercourse", "conciliation", "amity", "kindness" and "protection" were the key words in Phillip's instructions.

In our present state of cultural despair and pessimism we should recall that slavery, as an institution, has been part and parcel of human affairs everywhere, except in Western society, and that only recently. It was first found to be unacceptable in the British Isles, and Phillip's instructions are evidence of that fact.

In our own times, ongoing endeavours to welcome Aboriginal people into the mainstream of Australian life, begun by Phillip, were discharged most ably by the late Sir Paul Hasluck. A book has just been published which discusses Hasluck's career and influence in Aboriginal policy in Australia.(5) The author is Geoffrey Partington and his book is entitled *Hasluck versus Coombs: White Politics and Australia's Aborigines*. I quote from it what is arguably Hasluck's most important articulation of his policy. It was adopted at a conference in Darwin in 1963 by the Commonwealth and all State Governments, irrespective of party complexion.

> "The policy of assimilation means that all Aborigines and part-Aborigines will attain the same manner of living as other Australians, and live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, hopes, and loyalties as other Australians. Any special measures for Aborigines and part-Aborigines are regarded as temporary measures, not based on race, but intended to protect them from any ill effects of sudden change, and to assist them to make the transition from one stage to another in such a

way as will be favourable to their social, economic, and political advancement ... The whole tendency in Australia ... is to eliminate laws that apply especially to the Aboriginal people."

Hasluck used the word `assimilation'. It is a word which I believe has been given new connotations, taking the word far away from Hasluck's understanding of it, to the point where it is now resented by many Aborigines. In recent debates, `assimilation' has often been taken to mean the enforced or coerced obliteration or submersion of all traditional Aboriginal cultural identity. There is no evidence that I am aware of that Hasluck ever sought to obliterate, through compulsion or coercion, traditional customs which were consistent with the law. Nevertheless the word `assimilation' has been damaged by misrepresentation. I therefore wish to use the word `inclusion' as conveying a much broader and more liberal sense than the meaning now often imputed to the word `assimilation'.

`Inclusionism', therefore, does not seek an enforced transition to modernity, and seeks to accommodate the customs and traditions of Aboriginal people to the degree of their consistency with Australia's legal structure. But at the same time `inclusionism' rejects for Aborigines an enforced, or financially compelling, on-going immobilisation in time within a hunter-gatherer culture. It rejects the proposition that taxpayers' money should be spent in supporting a hunter-gatherer lifestyle.

The best way of illustrating this is by example. One such example, this time an example of sacrifice and devotion, not just words on paper, is described by Theodore Strehlow in his great book *Journey to Horseshoe Bend*.

The scene is the Hermannsburg Mission in Central Australia. The year was 1922. Pastor Carl Strehlow, aged 52, who had worked at the Mission since 1894, and who had never had a day's sickness before, was suddenly struck down, first with pneumonia and then with pleurisy. He ignored the early symptoms but found himself getting weaker. He was a proud man and did not think it possible that he could be seriously ill. If he had left early to seek medical assistance he would have survived without difficulty, but when at last he agreed to go, it was too late. The journey was a long and arduous one, and he died 100 miles or so south-west of Hermannsburg, at a place on the Finke River called Horseshoe Bend.

He was at the height of his powers as a linguist, missionary and pastor, and his death was a terrible tragedy.

His son Theodore, who accompanied his mother and father on that tragic journey, grew up to be a famous Aboriginal linguist and anthropologist. He wrote a book about that journey, and his boyhood amongst the Aranda people, the book called *Journey to Horseshoe Bend*.

One of the most poignant scenes in this book is the description of the departure of the dying pastor from Hermannsburg. He had been painfully lifted onto the buggy, and the crowd of sad and silent Aranda people pressed around. The driver of the buggy said to them, "Sing a farewell hymn".

A voice in the crowd began to sing 'Karerai wolambarinjai," the Aranda translation of the great Lutheran chorale, *Wachet auf, ruft uns die Stimme* (Sleepers Wake). The whole congregation joined in and soon the tears were running down from the missionary's red and pain-worn eyes. At the end of the hymn Strehlow said softly, "May God bless you all, my friends", and the horses began the journey in the vain attempt to carry the sick man to medical care. Strehlow's persistence with the translation of the scriptures and liturgy into Aranda, and his policy towards traditional ceremonies and practices, are important in this context of the meaning of inclusion, and I will refer to this below.

I will briefly mention two other important examples of inclusionist sentiment, practice and policy. First is the Aboriginal Cricket Team, under the leadership of Charles Lawrence, George Smith and G W Graham, which toured England in 1868! Save for the white entrepreneurs, who came from Sydney, the rest of the team, all Aborigines, came from around Edenhope in the Western District of Victoria and around Naracoorte in South Australia.(6) I commend John Mulvaney's enthralling account of that enterprise.

Second is the fact that, prior to the rise to power of the Australian Shearers Union which became, in due course, the Australian Workers' Union (AWU), Aborigines played an important part in the shearing industry. The story of Aboriginal participation in this vital industry is told by Patsy Adam Smith in her book entitled *The Shearers*. Aboriginal women in particular were very successful shearers, although very slow compared with other shearers of the day.

I have picked out just a few examples of inclusionist sentiment and policy. It would take very many books to describe in detail the full story. I wish now to consider some examples of the history of exclusionism, the opposite sentiment, in Australian life since 1788.

We should note first of all that one can find both inclusionist and exclusionist attitudes in the same people. Even Phillip, when exasperated by the failure of his attempts to successfully engage the local Aborigines in the life of the new colony, was prone to swing to an exclusionist attitude. Today, we can often find quite contradictory sentiments in the same paragraph of policy or rhetoric.

Much has been made, in recent years, of the murders of Aborigines by criminal sadists such as Constable William Willshire, who was beyond any doubt responsible for deaths of many Aborigines in central Australia a century ago. Although subjected to an enquiry, he escaped conviction. Contrariwise, such a miscarriage of justice did not happen after the Myall Creek massacre of June 10, 1838. After drawn-out proceedings, instigated by Governor Gipps, Judge William Burton, a firm believer in the strict application of English law to colonial conditions, with tears in his eyes, sentenced seven of the defendants to be hanged. The sentence was carried out on December 18, 1838.

It is not the policy of exclusionism as an idea used to justify criminal activities that concerns us today. Nobody, today, defends Constable Willshire, and we greatly admire Pastor Carl Strehlow, who maintained his mission at Hermannsburg as a sanctuary for refugees from Willshire's murderous expeditions. What is of concern, however, is the ambition, often found amongst anthropologists, to preserve aboriginal society as they believe it was at some time in a perceived golden past, or as they found it at a very early stage of contact with European society. Baldwin Spencer, arguably the greatest of the Australian ethnographic pioneers, provides a good example in this regard. He was strongly, even bitterly, opposed to Pastor Strehlow's work at Hermannsburg. An example of this exclusionist sentiment is found in Spencer's report of the Horn expedition of 1894:

> "To attempt ... to teach them ideas absolutely foreign to their minds and which they are utterly incapable of grasping simply results in destroying their faith in the precepts which they have been taught by their elders and in giving them in return nothing which they can understand. In contact with the white man the Aborigine is doomed to disappear: it is far better that as much as possible he should be left in his native state and that no attempt should be made either to cause him to lose his faith in the strict tribal rules, or to teach him abstract ideas which are utterly beyond the comprehension of an Aborigine ..."(7)

In our own time Dr Nugget Coombs has, since the late 1960s, written many thousands of words, and exercised great influence on Aboriginal policy. His basic position is that mainstream

Australian society is unworthy of including Aborigines within it, and he has persistently argued for separatist policies and programs. His disciples have argued for Aboriginal self-government, financed from the rents levied as a consideration for the occupation of the rest of the continent by the descendants of European and other immigrants.(8)

It is well known that the early trade union movement was violently opposed to Chinese workers in our mines and horticultural industries. It is not so well known that the trade union movement also drove the Aborigines out of the shearing industry in the 1890s. The early trade unionists thought it completely justified to engage in violence, including threats of murder, to achieve their ambitions of monopoly control of labour in the pastoral industry. There was no place for the Aborigines in their rigid world. Many years later, in the early 1980s, the AWU sought to drive Maori shearers out of the industry in the wide comb dispute. They failed in that enterprise, but it was a close run thing.

One of the most destructive decisions taken by white Australians against their black fellow-Australians was that by the Commonwealth Conciliation and Arbitration Commission in the 1966 *Northern Territory Cattle Station Industry Case*.(9) It was this decision, under the chairmanship of President Sir Richard Kirby, which made unlawful the employment of many thousands of Aboriginal stockmen on Northern Territory pastoral leases on terms and conditions which were beneficial to both parties, but which were far removed from the terms and conditions mandated for non-Aboriginal employees. The destruction of Aboriginal society in the Northern Territory which followed that decision was both predictable (indeed it was foreshadowed in the Commission's decision) and morally culpable. It was entirely exclusionist in sentiment because it knowingly made unlawful the inclusion of Aboriginal people in a major Northern Territory industry, and in so doing, brought to an abrupt and tragic end a process of slow but steady transformation of a hunter and gatherer society into communities coming to terms with the contemporary world.

It is a paradoxical fact that this decision took place when Sir Paul Hasluck was still a leading figure in the federal Government as Minister for Foreign Affairs, and that his department was, I understand, a strong supporter of the Commission in its decision because it feared foreign accusations of exploited Aboriginal labour.

The great dilemma which inclusionists have to resolve is what policy should be adopted when the Aborigines do not want to enter into mainstream Australian society, or want to enter on terms which are impossible to fulfil? Arthur Philip answered that dilemma by kidnapping Benelong and forcing him to engage, at least temporarily, with the newly arrived Europeans. Pastor Strehlow handled what was for him the most difficult problem of all by refusing to attend their corroborees and ceremonies, although he had gained the respect of the elders to the point where they entrusted him with the care of their most sacred *tjuringa* and knowledge of their most secret information. Hermannsburg was a place where many Aborigines crossed over from their society into the new world in order to escape from payback killing, or from promised marriages, or from other demands of tribal law. Strehlow's authority was such that within Hermannsburg they were safe.

The inevitability of the collapse of hunter-gatherer society was discussed by Pastor Carl Strehlow's son, Professor Theodore Strehlow in a letter which he wrote just before he died to Justice Michael Kirby, now of the High Court. He wrote:

> "I believe that in 1978 no completely untouched Aboriginal communities exist anywhere in Australia. All Aboriginal Australians, even in the furthest regions of the outback, have by now come into contact with European ideas, with white Australian cultural notions, and with

white Australian legal notions. I believe that this is a process that can be neither arrested nor reversed; for even Aboriginals living in some form of tribal organisation wished to live on the white man's foods - flour, tea, sugar and beef; and everywhere the young people, *i.e.* the future `black' folk, are demanding also access to liquor. It seems therefore that in another 50 years or so there will be no Aboriginals at all whose beliefs, languages or cultures have remained even relatively unaffected by `white' ideas, concepts and values; and the original indigenous traditions in consequence are irretrievably on the way out.

" ... I [am] left with the impression that few, if any ... experts and spokesmen ha[ve] any deep knowledge of Aboriginal customary laws anywhere ... I know that the modern young Aboriginals and part-Aboriginals who have never been trained by any of the old local group elders in Central Australia are so unconversant with the old norms that they always use the term `Aboriginal law' when talking about matters in which they feel `black' behaviour differs (or ought to differ) from `white' behaviour. Others talk about `The Law'; but few of them seem to know much about the old terms in which breaches of `The Law' used to be defined. These terms themselves would at least indicate what breaches of `The Law' were regarded as meriting death, which breaches could be punished by the infliction of what *we* might term `grievous bodily harm', and which breaches could be left to be dealt with by private persons (provided their `punishments' were kept within certain limits).

"The loose use of `The Law' or `Aboriginal law' so freely indulged in nowadays by people who have only the haziest notion of what it is all about I find completely misleading and just as obnoxious as the universally promulgated term `The Dreamtime' - a completely misleading white man's term substituted originally for the Aranda word *altjira* (which meant `eternal' or `uncreated' or - used as a noun - `eternity'). Single legal definitions do demand clarity rather than prevarication. I think that experts giving explanations before a legal commission should first be clear in their own minds what they are talking about. I note that ... you say `The Law, no doubt, as in ancient Hebrew times, is religious Law'. This is true, but ... what happens when the old religion dies?"

A more pungent expression of the same view was recently put by Barry Cohen, former Minister for the Environment in the Hawke Government:(10)

"The romantic myth is perpetuated that some Aborigines can continue to maintain the hunter-gatherer life style they enjoyed prior to the advent of European civilisation. No one has the courage to say publicly that hunting kangaroos, eating bush-tucker and painting bark pictures will not prepare Aborigines to compete in a 21st Century that will require sophisticated technological education just to keep pace ... to suggest they remain frozen in time for the amusement of anthropologists and tourists is absurd."

The difficulty with inclusionism as a sustained policy is what to do when Aborigines do not want to relinquish those aspects of their traditions which are in conflict with our Australian legal framework.

We can look at every major piece of legislation since 1976 as an attempt to grapple with this problem. For example, the Woodward Royal Commission of 1974 and the Commonwealth's consequent 1976 *Northern Territory Aboriginal Land Rights Act*, sought to set aside what was officially estimated at the time to be 8 per cent of the Northern Territory for the purposes of enabling members of traditional communities who wished to continue to live, in significant degree, according to their customs and practices, to do so. The inalienability prescribed to this

land by the Act is an example of benevolent paternalism, but also of intellectual confusion, because by prescribing inalienability the legislators have actually built a prison. Inalienability has tied the traditional communities to a particular area, land over which they have no legal control, and prevented them from using that land as a vehicle for moving into contemporary life. The people in these communities have been forced into the role of living exhibits in a walled museum. That museum now occupies approximately 50 per cent of the total land area of the Northern Territory.

Similarly, the views expressed by Brennan J in the High Court's *Mabo No.2* judgment can be interpreted as an attempt to provide legal protection to those traditional Aboriginal communities who wish to retain at least some aspects of a hunter-gatherer lifestyle, and to do so on areas of land on which they and their forebears grew up. In seeking to achieve this outcome the law of property in Australia, however, has been thrown into complete confusion. Since June, 1992 several legislative attempts have been made in an effort to resolve this confusion. In this process the confusion has been compounded rather than resolved.

In early December, 1993 the WA Parliament passed the *Land (Titles and Traditional Usage) Act*. That Act sought to resolve the difficulties embodied in *Mabo No.2* by replacing the common law native title in WA with an equivalent statutory title. The statutory title was well defined and enabled all parties with interests in land to enjoy their rights within a secure legal framework. The rights accorded to Aboriginal people under this Act not only enabled them to live in a traditional lifestyle, if they chose, but also gave them the option to move more rapidly into mainstream Australia by provision of an alienable title.

Three weeks later the Commonwealth *Native Title Act*, amidst tumultuous applause in the Senate from the press gallery, was passed at midnight on December 23, 1993.

In the subsequent constitutional battle the High Court found the WA Act, through Section 109 of the Constitution, to be inoperative. The vote was 7 to nil. I wish to quote from Justice Dawson's opinion:

> "However, notwithstanding my own views from which I do not resile, I think that I ought now to follow the decisions of the majority in *Mabo No.1* and *Mabo No.2*. The issues which were determined by those cases are of fundamental importance and deal with questions of title to land. It is desirable that the law now follow a consistent course in order to achieve maximum certainty with the least possible disruption. No good purpose is to be achieved by my continuing to follow a line of reasoning which has been rejected. In my view, the doctrine of precedent, notwithstanding that it is not rigidly applied in this Court, requires me to adopt the course which I propose to take. No interpretation of the Constitution requiring fidelity to the text rather than to judicial decision is involved and the words of Gibbs, J., in *Queensland versus the Commonwealth* have even greater force here than in that case:
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> `No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.'"

Those words of Justices Dawson and Gibbs require the most careful attention.

The *NTA* has formally divided Australian citizens into Aborigines and non-Aborigines with respect to property rights in land, and has set them one against the other in a process with a potential for virtually unlimited litigation. The WA Act sought to provide security for Aborigines who did not want to relinquish key aspects of traditional customs, but it did not seek to discourage those who did. The *NTA*, contrariwise, promotes and encourages separatism. It entrenches a black against white mentality. It is as if the class warfare of a century ago, and the industrial relations legislation of 1904 which entrenched and encouraged hostility and resentment between employers and employees, has been replicated ninety years later with Aborigines replacing the oppressed working class, and non-Aboriginal Australia replacing the exploiting employers, of the socialist rhetoric of the 1890s.

It has taken decades of argument and the pressures of economic decline to turn opinion into support for major reform of our nineteenth Century industrial relations arrangements. I don't think we can afford to wait for decades to deal with the problems created by the *NTA*.

We have already seen the beginning of a strong current of public indignation against such policy. The election of Pauline Hansen in the seat of Oxley with a swing of 23 per cent, and the defeat of the former Minister for Aboriginal Affairs, Robert Tickner, in the suburban seat of Hughes with an unrivalled swing (in the Sydney metropolitan area) of 13 per cent, suggests to me that the overwhelming majority of Australians have rejected exclusionist ideas. Oxley and Hughes in particular are not seats in remote country areas. They are located in the suburban heartland of contemporary Australia.

All of the problems we face in Aboriginal policy arise from the great difficulties which arise when people born into and brought up in a hunter-gatherer society, try to adapt to a world characterised by a very high degree of specialisation in the labour market, and a high degree of freedom and responsibility in the choices one has to make in life.

The dilemma is this. A hunter-gatherer life is not really attractive when compared to life in mainstream Australia. Even those older Aborigines who do retain something of the old way of life and traditions generally recognise the force of Barry Cohen's argument. But crossing the gulf between one society and the other is not easy. Since the 1970s the difficulties have been greatly exacerbated because official policy has moved from the assimilationism of Paul Hasluck to the separatism of Nugget Coombs. Aborigines have been told, over and over again, that mainstream Australian society is morally deeply flawed and they should regard that society with resentment and contempt.

In this complete intellectual and policy confusion it is no wonder that the plight of Aborigines has become much worse. Charles Perkins captured this on March 18, 1993 when he complained bitterly, but in my view with total justification, that:

> "Aboriginal Affairs policies are not properly debated and, as such, are impossible to articulate. We are a captive people as never before in our history."

Official insistence and exhortation, including that of the former Prime Minister, Paul Keating, that Aborigines should disdain and resent mainstream Australian society as being responsible for their poverty, have been all too frequent. These arguments were ubiquitous during the preparations for the Bicentennial. A characteristic example was John Stevens, writing in *The Age* in February, 1988:

> "Our guilt, shame, concern or whatever, is this - that the wealth now enjoyed by so many whites has been gained by dispossession of the blacks".

It is a short step from arguments of that kind to demands that Aboriginal children should learn their tribal languages at school, should practice their tribal customs and live within their customary law. Such arguments are clearly part of a policy of separatism and exclusion. It is at the same time a policy for extending and entrenching Aboriginal poverty. In every part of the world where the problems of aboriginal peoples trying to adjust to contemporary life have been exhaustively studied it has been shown, beyond argument, that policies of reservations, exclusion, separation, have been disastrous for the health and well-being of those people entrapped by such policies.

It is important to understand the distinction between respecting the wishes of people, all our people, to live as they wish to live, within our legal framework, on the one hand, and providing not merely official exhortation, but also very large sums of public money, which is used to deter, rather than encourage, Aboriginal people from becoming fully part of contemporary Australia, on the other.

The logical end of exclusionism as a sentiment and a policy is a separate Aboriginal nation-state. This is openly advocated by many Aboriginal activists.

After a conference entitled Koorie 2000, held in Melbourne on March 18, 1993, an SBS reporter said:

> "For the so-called Aboriginal Provisional Government, the Koorie answer to the challenges of the next Century is the creation of a sovereign state, which they say could survive on the income from mining and tourism."

Geoff Clarke, spokesman for the Aboriginal Provisional Government, responding to this comment, said:

> "It may be $2 billion, $3 billion, who cares. The fact is it would be an economy derived from the resources that, you know, is owned by the people."

- Now that we have a new federal Government, and debate about amendments to the *Native Title Act* 1993 is running strongly, I do hope that this opportunity to return to fundamentals will not be dismissed. It is a tribute to the new Government that some of the rancour and vitriol of former argument has dissipated. But, if we do not take steps to resolve the current impasse, then division, resentment and violence will increase. The wretched plight of many thousands of our fellow citizens, who are Aborigines, will further deteriorate. The warning signs are impossible to ignore.

The immediate solution to the problems that have been created by the *Native Title Act* is, in my view, to follow the example set by the WA *Land (Titles and Traditional Usage) Act* of the same year. That WA Act is, I believe, illuminated by inclusionist sentiment and thinking. It accepted the common law rights discovered in *Mabo No.2*, but sought to replace those rights with statutorily defined rights of a usufructuary kind which enjoyed the same legal protection as other titles issued by the Crown. The High Court, however, said the WA Act was inconsistent with the *Racial Discrimination Act* and the *NTA* and it thus failed through the operation of section 109 of the Constitution.

The *Racial Discrimination Act* (*RDA*) has been elevated by some into a quasi-constitutional document. It is, nevertheless, just a Commonwealth statute, neither more nor less, and its standing in our polity should surely be judged on what it has actually achieved for Australia, not on the symbolism which its supporters claim to see within it.

It seems to me clear that, 21 years after the acrimonious passage of the *RDA*, racial tension and acrimony have increased within Australia, not diminished. It is beyond argument that the plight

of Aborigines has worsened, not improved since 1975. The March election results in seats such as Hughes, Oxley, Kennedy and Kalgoorlie should be taken as evidence that there is an important political issue here which requires cool, careful analysis.

One of the problems has been that debate has been suppressed. The terms "redneck" and "racist", for example, have been used indiscriminately, and people have been frightened off from expressing a viewpoint and engaging in open debate. This is not healthy in a democracy. If the *RDA* has in fact contributed to the increase in racial division and tension then it should be judged accordingly. It should be put to the test of argument and evidence, not placed on an elevated pedestal beyond the reach of criticism.

- In my view the future unity, cohesion and well-being of this great nation are of far more consequence than a technical legal opinion on a complex piece of legislation which was empowered, constitutionally, only by an international convention drafted by far away people, none of whom were accountable to us.

At the same time the political problem of unfulfillable expectations, now ubiquitous amongst many Aboriginal groups, has to be faced. The *Northern Territory Land Rights Act* of 1976 was supposed to solve the problems resulting from the 1966 Northern Territory Cattle Stations Industry Award. We had a number of *Aboriginal Land Rights Acts* passed in various State jurisdictions during the 1980s. The High Court gave us *Mabo No.2* in June, 1992 and then the Keating Government gave us the *NTA* in December, 1993. All of these measures were presented to us as providing a solution to the very real problems of Australia's Aborigines. Nevertheless the problems have increased, not diminished.

I conclude by going back to Oakeshott. We can only solve this crisis by referring to the traditions and modes of thought that we have. There is no other recourse. We do have a long history of inclusionist sentiment and policy. We also have a long history of exclusionist sentiment and practice which, in its darkest form, was manifest in murder and massacre. Many, although not all, of these murderers escaped from any judicial process. Our difficulties in carrying out inclusionist policy have always arisen when customary law has clashed, irreconcilably, with our law.

There are obviously situations where we cannot compromise. Payback killings, for example, cannot be recognised as anything but murder. We cannot condone the violence now increasingly meted out to Aboriginal women as just another manifestation of blackfella' law, which has, therefore, to be condoned. But within the framework of our legal system and our economic activities we can accommodate, in large measure, the desires of those of our citizens who wish to continue to live, in some degree, the life of a hunter-gatherer. But it is one thing to accommodate in that regard. It is another to pursue policies and maintain a rhetoric that such a life is a more noble thing than life in mainstream Australia, and that it ought to be preserved, if necessary by the expenditures of very large sums of taxpayers' money, and the winding down of Australia's most internationally competitive industries, the pastoral and mining industries.

I do believe we can change course and begin a process of amelioration of the contemporary tragedy of Aboriginal life. But it will not be possible to move forward if the bitter rhetoric and invective, and the intellectual confusion, of recent years, continues. Contemporary failure has to be acknowledged. Clarity of vision has to be upheld. The economic consequences of past mistakes has to be recognised. If these things can be done I am confident that we will be able to find, within our political traditions and modes of behaviour, a resolution to the crisis.

Endnotes

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5 Partington, Geoffrey; *Hasluck versus Coombs*: *White Politics and Australia's Aborigines*, Quakers Hill Press, Sydney, 1996.
6. D. J. Mulvaney, *Cricket Walkabout: The Australian Aboriginal Cricketers on Tour*.
7 Quoted by Mulvaney and Calaby, *So Much That is New*, 1985, Melbourne University Press, p.126.
8 See for example, Greg Crouch, *Visible and Invisible: Aboriginal People in the Economy of Northern Australia*, published jointly by the North Australia Research Unit and the Nugget Coombs Forum for Indigenous Studies.
9. See Sir John Kerr in *Arbitration in Contempt*, Vol. 1, Proceedings of the H R Nicholls Society, 1986.
10. *The Australian*, May 11, 1996.