Chapter 4

New Ways Forward

The Hon Michael Kirby

Beginnings: Australia's Indigenous Peoples

It has become common to begin a contribution to a conference like this one for Michael Coper with words of respect for Aboriginal and other indigenous people. Some will never do it as they regard it as political correctness and a needless distraction from the task in hand. Others refuse because they suspect it is done as a mere formality, where the heart does not go with the words. Others decline because they regard it as the tokenism, when the challenges for our indigenous people (in housing, health, education and their grossly disproportionate imprisonment and detention rates) are so great and practical that mere words are exasperating as they do nothing to tackle the obvious urgencies. They only give participants a feeling that they are doing the right thing when their cold hearts are chilling to the bone.

Nevertheless, it is specially appropriate to begin with the Aboriginal people of Australia in this reflection on the contributions of Michael Coper. It is fitting for particular reasons that I will explain. He has concerned himself specially with the way the English law came to be received into Australia. How, for a long time, it expelled the pre-existing laws of the indigenous peoples. And because of his family history, Michael Coper had good reason to be alert to the dangers of dispossession and lawlessness of a people. To be suspicious of a purely formal view of law, disconnected from the realities that impinged on human dignity and civil rights.

In his work as a scholar of the law, Michael Coper puzzled over the ways in which judicial and other reasoning could follow logical thought, and yet result in outcomes that eventually seemed illogical, seriously unjust and alien to universal human values. Michael Coper has always been engaged in a view of Australia's laws with a perspective gained from beyond Australia's own borders, being aware of (and sympathetic to) the international forces that now increasingly affect many parts of Australian law.

The decision of the High Court of Australia in *Mabo v Queensland (No 2)* (*Mabo (No 2)*)[1] neatly illustrates each of these features of Michael Coper's life and his work as scholar, writer and teacher. Of course, *Mabo* was not formally a constitutional case. It did not rest for its decision upon any provision of the Australian Constitution or of a State constitutional statute or Territory law for self-government. It involved the common law. Specifically, it concerned judicial declarations on land law originating in colonial times. That law had concluded, in effect, that the acquisition of British

1 (1992) 175 CLR 1.