SPEECH TO LAUNCH *UNSWLJ FORUM* -12 JUNE 1997

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I. INTRODUCTION

I acknowledge, with respect, the traditional owners of the land on which the University of New South Wales has been established.

I hold university students in high esteem because of people like Tony Abrahams, the Editor of this special edition of *Forum*. Yesterday I got wind of a gathering at the University of NSW, something to do with *Wik* and, if I wished to attend, would I ring Tony. He advised me that *Forum* was to be launched today, "Would I say a few words?". I agreed. A fax arrived, "Thank you very much for agreeing to launch *Forum* - with a keynote speech".

That's what I like about University students, particularly young ones - their indomitable expectations that trusted elders will respond and measure up to the occasion. Thank you Tony for your trust.

As a white Australian male of older years, who wants peace with honour, between indigenous and non-indigenous Australian citizens, I do not have as much trust in many people of my age and over. I am very distressed to see so many older white Australians supporting Pauline Hanson. They, however, are a fringe group. Of far greater concern - for all Australians - are proposals by the Federal Government to deny indigenous citizens their common law rights to property identified by the High Court in *Wik*.

In this edition of *Forum*, Richard Bartlett, Professor of Law at the University of Western Australia, writes that "The Ten Point Plan perpetuates the historic policy of subordinating the rights of native title holders". His essay title "Is Equality Too Hard for Australia?" poses the question we should all ask ourselves and our politicians.

Garth Nettheim, Visiting Professor, Faculty of Law, at this University, characterises the response of some politicians to the *Wik* decision as "quite hysterical". As I drove home last night I listened to Phillip Adams discussing

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* The opinions in this speech are those of the author. They do not necessarily reflect the views of any organisation of which he is a member For referencing, see Global Citations in "Foreword to *Forum*"

hysteria syndromes. Hysteria is defined to include "senseless emotionalism". "How apt!" as Phillip might say, especially of the response of our conservative politicians. Garth points out that myths are being propagated including the myth "that principles of racial equality require that native title be extinguished under pastoral leasehold land". That is, that the descendants of the original owners of the entire continent should not be entitled to their native title where it has happened to survive and can co-exist with other interests, because this form of title can only be held by indigenous Australians and is not available to all. This myth ignores the murder of thousands of Aborigines, their dispersal and imprisonment in Gulags, in order to clear the land to give us our titles to their property which we acquired by theft, poison and guns.

This myth of equality is a reflection of the politics of envy referred to by Bryan Keon-Cohen QC in his essay "*Wik*: Confusing Myth and Reality". In Bryan's call to us to "stand up, assert basic values and stem the tide of revenge politics which threaten to throw us backwards as a disintegrating society, not forward as one people reconciled with its past, and confident of its future", one can hear the sadness of an Australian dedicated to decency and equality for all Australians, old and new.

From *the other side of the frontier* Mark Love, a partner with Corrs Chambers Westgarth, acknowledges at the outset that *Wik* "did not fundamentally change the law". He properly identifies the difficulties of pastoralists as arising from a strict interpretation of the rights actually granted under a pastoral lease. As he put it: "[a]ny attempt to pursue activities away from 'core' activities authorised in a Crown grant (given a 'narrow' interpretation) risks infringing native title". He advises reliance on the *Native Title Act* 1993 (NTA), a review of grants and disclosure of risk potential, particularly by directors of large corporate holdings seeking public subscriptions.

In the context of future acts he advises caution and points to provisions in the NTA which can produce outcomes. I take issue with his comment in this context that the High Court decision in *Brandy*[1] throws "considerable doubt on whether the National Native Title Tribunal has power to make determinations". Right to negotiate determinations, particularly under the expedited procedure, have been made and reviewed by the Federal Court without *Brandy* impeaching the Tribunal's powers.

While I am still on the corporate side of the frontier, I also need to express a different view of the right to negotiate from that espoused by Doug Young from Blake Dawson Waldron. He writes in his contribution:

> As the right to negotiate is a statutory right and not an incident of common law native title, the Commonwealth could remove its application to statutory lease land without incurring any "just terms" compensation liability under Section 51(xxxi) of the *Constitution,* nor would it be contrary to the principles of the RDA.

The original Government discussion paper referred to the right to negotiate in similar terms as a statutory right.[2] I disagree.

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1 *Brandy v Human Rights and Equal Opportunity Commission and Others* (1995) 183 CLR 245

2 Department of Prime Minister and Cabinet, "More Detailed Explanation of the *Wik* Ten Point Plan", Media Release, 23 May 1997.

My understanding is that the right to negotiate is an expression of 'an incident of native title'.[3] Taken to its logical conclusion the right to negotiate is a common law right of veto which has already been limited by the NTA. Further erosion of traditional owners rights to negotiate will be discriminatory.

II. UNDER THE HOWARD TEN POINT PLAN[4]

Current and former pastoral leases conferring exclusive possession will extinguish native title and such extinguishment is to be permanent. This goes beyond the common law which provides that extinguishment occurs only to the extent of inconsistency and it is contrary to *Wik*, that, on the expiration of other interests, native title interests may revive.

Native title rights over other current or former pastoral leases and any agricultural leases would be permanently extinguished to the extent that those rights are inconsistent with the pastoralists' rights. It is not just a matter of native title being unable to be exercised while the grant to the pastoralists is current but extinguished forever. This includes leases from last century and goes way beyond *Wik*.

Wik did not decide that inconsistent native title rights are permanently extinguished. *Wik* held that during the currency of the lease the pastoralists rights would prevail. However, *Wik* proceeded on the basis that full native title rights would or could revive if the lease came to an end: as many leases granted last century have done. *Wik* was not concerned with former leases.

Not content with that degree of extinguishment, the Ten Point Plan proposes the upgrading of pastoral leases to exclusive leases, perpetual leases or freehold. The Government also proposes to authorise a much wider ambit of pursuits on pastoral leases, way beyond "the right to the grass".[5]

The width of those activities is covered by the definition of "primary production" in the *Income Tax Assessment Act* 1936 (Cth).[6] This device has the potential to wipe out native title to traditional plant foods and medicine along with the native title right to fish and hunt. The native title right to sustenance for families is threatened. The upgrading of the pastoral lease to permit "holiday/farm stays" and conduct tourism, which is also proposed, dispossess Australia's Aborigines of their culture.

Non-indigenous pastoralists will prevent Aborigines from taking visitors to cultural sites of significance on their pastoral holdings. Interpretation of culture will be by pastoralists and not by the traditional owners.

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3 See *Ward v Western Australia* (unreported, Federal Court, Lee J, 14 December 1995) at 30-1. See also S Flood, "Native Title. The Right to Negotiate - Common Law Right or Right Conferred by Statute" in GD Meyers (ed), *Implementing the Native Title Act Selected Discussion Papers of the National Native Title Tribunal*, 1996.

4 See Appendix A to *Forum* I am indebted to Garth Nettheim for the following points I now wish to make.

5 Northern Protector of Aboriginals (sic), Report to the Queensland Parliament, 1903.

6 See Appendix B to *Forum*

The upgrading of pastoral leases, the development of other uses on leases, the exploitation of native flora and fauna by the pastoralist, the tours conducted by the pastoralists to the rock art and other places of cultural significance to the living culture of the traditional owners, the development by the pastoralists of modern medicines, which over time could be worth billions of dollars, from the plants and material known to the Aborigines to have specific healing qualities and which are part of their native title will all be permitted by the Howard plan without any right of the traditional owners to negotiate. The Prime Minister is embarking on a course to unilaterally complete the dispossession.

All of the provisions in the Howard plan are the final act of dispossession. This is proposed to happen in our lifetime and in our names. This is more than "buckets of extinguishment"; it is massive breaches of human rights. Under the Howard plan, "all the blacks would be hunted into the sea".[7]

In stating the common law property rights of indigenous Australians the High Court has moved us further into the post-modern era, the post-colonial age, in *Mabo* and *Wik*. If the court had not shattered the *terra nullius* myth we could have slept on for another 200 years in this warm and accommodating colonial south land that belonged only to us, the non-indigenous citizens. We could have continued to boast about our fairness to Aboriginal Australians and Torres Strait Islanders pointing to the size of government handouts and programmes. The blacks would still be contained in the white man's zoo if the High Court had remained establishment, like the Barwick court. The High Court is reviled, not because of "judicial activism writ awful"[8] but because, by applying intellectual honesty, it reached a conclusion which in justice gave nearly equal rights to the

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7 Note 5 *supra*. See *Wik* at 258-9, per Kirby J.

> The Northern Protector of Aboriginals had responsibility for Aboriginals in the districts of Queensland included in the areas claimed by the Wik and the Thayorre Complaints were later recorded from pastoralists that Aboriginals, roaming and hunting over their traditional lands, sometimes frightened cattle or camped at waterholes But the Northern Protector of Aboriginals for 1903, in his report to the Queensland Parliament, asserted
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> > [T]he principle must be rigidly instilled that the Aboriginals have as much right to exist as the Europeans, and certainly a greater right, not only to collect the native fruits, but also to hunt and dispose of the game upon which they have been vitally dependent from time immemorial Were the assumption just mentioned to be carried to its logical conclusion, and all available country leased or licensed, we should have a condition of affairs represented by a general starvation of all the Aboriginals and their current expulsion from the State
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> In an earlier report, the Northern Protector had stated:
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> > It would be as well, I think, to point out to certain of these northern cattlemen (at all events those few among them who regard the natives as nothing more than vermin, worthy only of being trampled on) that their legal status on the lands they thus rent amounts only to this: There is nothing illegal in either blacks (or Europeans) travelling through unfenced leasehold runs. These runs are held only on grazing rights- *the right to the grass* - and can only be upheld as against people taking stock etc through them. It certainly is illegal for station-managers etc to use physical force and threats to turn blacks (or Europeans) so travelling off such lands. Carrying the present practice (might against right) to a logical conclusion, it would simply mean that, were all the land in the north to be thus leased, *all the blacks would be hunted into the sea* [emphasis added]

8 A quote attributed to Tim Fisher L Taylor and P Syvret, "PM Calls for Compromise on Native Title", *Australian Financial Review*, 10 February 1997, p 5.

"black fellers". The court said that the nation will now have to negotiate with indigenous Australians who have legal rights to property.

III. CONCLUSION

My message to political leaders is not to worry about guilt for the past. History will judge them and us on what we do now. Millions of Australians and the community of nations will judge every Federal MP who votes down common law rights of indigenous Australian citizens. Rights denied for 200 years although evolving and established over more than 50,000. Rights recognised in Australia only since 3 June 1992.[9]

If the nation takes away the property rights of our indigenous people, the judgment of history will confirm the view of many in Asia and elsewhere that we are indeed racist. And in this debate, God forbid that Labor should roll over.

Finally, I can say, as a native title mediator, that the discussion in Australia about native title is deepening the understanding of many non-indigenous Australians of the land and water culture and connection of Aboriginal and Torres Strait Islanders to their Australia.

Australia can never be the same again after *Mabo* and *Wik*. The High Court has made its contribution towards the shift of Australia to the post-modern world. We live in a global community, in an electronic age. We are all linked. News of what happens here now is on the net even while it is happening. We are now required to consider if we want a fairer nation that respects the rights of Aboriginal and Torres Strait Islander peoples and other minorities in our multicultural society. A nation that respects our First Peoples' rights. A nation which is governed by the rule of law rather than the rule of the mob. A nation capable of signing human rights conditions in trade or any other agreements because we are not contemplating human rights violations. A nation that starts the next millennium out of the shadows of our colonial past. A nation that listens to its First Peoples.

In the words of Sandra Schneiders, an American theologian:

> Against the runaway myth of progress constructive postmodernism is, among other things, re-evaluating native patterns of life which affirm a reverence for reality that sets limits to human projects and calls for responsibly envisioning the results of our actions, not just for ourselves and future generations but for the whole of reality. It is beginning to ask qualitative rather than purely quantitative questions about what we are capable of doing. There may be many things we can do that we ought not to do and change can be regressive as well as progressive.[10]

There are lessons here for Jabiluka.

Mabo and *Wik* have cleared the way for us to build a mature and decent Australia whose citizens, old and new, are reconciled with each other.

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9 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

10 SM Schneiders, "Contemporary Religious Life, Death or Transformation", presented at Hartford, Conference on Contemporary Religious Life, Connecticut, 14 August 1992.

I congratulate Tony Abrahams, the Editor of this edition, the contributors, Lynn Hoggard, the Editorial Board and the University of New South Wales for this publication which will contribute to a rational debate of the importance of native title for Australia's nationhood.