DRAGGING THE CHAIN 1897-1997

Gough Whitlam

The Second Vincent Lingiari Memorial Lecture

Northern Territory University,

Friday 29 August 1997

At the outset, I acknowledge the Larrakia people who are the traditional owners of the land on which this University stands and I thank Bill Risk, their representative, for the welcome he has expressed. I thank Patrick Dodson, chairperson of the Council for Aboriginal Reconciliation, for inviting me to deliver the second Vincent Lingiari Memorial Lecture. I rejoice in the presence of representatives of the Gurindji people whom I first met at Daguragu 22 years ago and a third time one year ago.

The Constitution of the Commonwealth of Australia was flawed from the beginning by its references to the Aborigines of Australia. The Federation itself was founded on the assumption that the Aborigines would, quite literally, disappear. The two mentions they received in the Constitution were both negative.

First, "the aboriginal race in any State" was excluded from the Federal Parliament's power to make laws "with respect to the people of any race for whom it is necessary to make special laws". The six words were inserted without explanation by Sir Samuel Griffith in his draft Constitution and approved without debate at the first Sydney Convention in 1891. The whole phrase became paragraph (xxvi) in Section 51 of the Commonwealth of Australia Constitution Act passed by the British Parliament on 9 July 1900.

The second mention, the second exclusion, said that in reckoning the number of the people of the Commonwealth or of a State, "the aboriginal natives shall not be counted".

The insouciance with which the Constitution-makers approached the issue may be gauged from the brevity of the debate. The provision received barely a minute's attention at the 1897 Adelaide Convention. The belief that the Aborigines were a dying race, that any perceived problem would, like them, simply disappear, was pervasive and. indeed, it was deemed progressive.

The debate in Adelaide on 20 April 1897 on what became Section 127 was started by Dr John Cockburn, the very liberal minister from South Australia. The debate reads in full (p.1020):

Dr Cockburn: As a general principle I think this is quite right. But in this colony (S.A.), and I suppose in some of the other colonies, there are a number of natives who are on the rolls, and they ought not to be debarred from voting. Mr Deakin: This clause only determines the number of your representatives, and the aboriginal population is too small to affect that in the least degree.

Mr Barton: It is only for the purpose of determining the quota.

Mr O'Connor: The amendment you have carried already preserves their votes.

Dr Cockburn: I think these natives ought to be preserved as component parts in reckoning up the people. I can point out one place where 100 or 200 of these aboriginals vote.

Mr Deakin: Well, it will take 26,000 to affect one vote. (i.e. one electorate)

Mr Walker (N.S.W.): I would point out to Dr Cockburn that when we come to divide the expenses of the Federal Government per capita, if he leaves out these aboriginals, South Australia will have so much less to pay, whilst if they are counted, South Australia will have so much more to pay.

Clause, as read, agreed to.

And that was it. Barton and O'Connor were appointed in October 1903 as justices of the High Court of Australia under Chief Justice Griffith. The significance of the interjection by O'Connor is that Section 41 protected the right to vote in Federal elections of persons who acquired that right in their States. Even though it aimed to safeguard South Australian women, rather than its Aborigines, it is wrong to assert that Aborigines gained the right to vote only as a result of the 1967 referendum.

The elimination of the Aborigines, by assimilation or other means, envisaged by even the most enlightened of the Federation generation, did not occur. The Aboriginal people failed to disappear. The approach of Australians in general to the Aboriginal people is the preeminent example of the institutionalised procrastination in all constitutional matters in Australia.

These particular flaws in Australia's Constitution were not brought to the attention of law students in my time at the University of Sydney before World War II. I was alerted to them in December 1942, a year after the outbreak of the Pacific War, when a

Constitutional Convention was held in Canberra to plan for post-war reconstruction. A committee of the Convention unanimously agreed on a list of 14 powers which the Commonwealth Parliament should be able to exercise for five years from the cessation of hostilities. The 14th on the list was "the people of the aboriginal race". The committee comprised H.V.Evatt, the Attorney-General in the Curtin Government, W.M.Hughes, the leader of the UAP in the Opposition led by A.W.Fadden, and the six Premiers. The Convention, wanting to avoid, if possible, a referendum during the War, drafted a Commonwealth Powers Bill which each State was asked to pass in order to refer the 14 powers to the Federal Parliament in accordance with section 51(xxxvii) of the Constitution.

Only the Premiers of NSW and Queensland were able to persuade their legislatures to pass the draft bill. The Legislative Councils in the other States, with Tasmania in the vanguard, rejected or unacceptably amended it. The Curtin Government was coming to accept the necessity of holding a referendum and was encouraged to do so by its successes in the elections for both Houses in August 1943. In January 1944, on home leave for the birth of our first child, I attended the Summer School held by the Australian Institute of Political Science in Canberra on the subject of "Post-War Reconstruction in Australia". Papers were given by R.G.Menzies, who had been restored as Leader of the UAP and the Opposition, "Nugget" Coombs, D.B.Copland,

Lloyd Ross and H.V.Evatt. Harold Holt was the third MP to take part in the summer school. Before breakfast on 16 March 1944, having sat all night, the House of Representatives passed the bill for a Post-war Reconstruction and Democratic Rights referendum by 44 votes to 18; it was supported by a solitary member of the UAP, Percy Spender from NSW. Before dinner on 23 March the Senate passed the bill by 19 votes to 17; the bill secured the absolute majority required by the Constitution because it was supported by a solitary UAP senator, Tom Crawford from Queensland.

The Fourteen Powers or Fourteen Points Referendum, as it had come to be known, was submitted to the electors in August 1944. Menzies campaigned hard against it. It obtained a majority in South Australia and Western Australia alone and an overall minority of 342 018 votes. A considerable majority in the armed forces voted in favour of the 14 powers. This was certainly the case in my squadron, where I had conducted my first political campaign. I was deeply disappointed by the overall result.

Before serving in the RAAF I had met no Aborigines. After the hospital ship Centaur was torpedoed off Cape Moreton in May 1943, the RAAF had to search for submarines along the coast of Queensland. When our squadron became involved we met Aborigines between Bundaberg and Horn Island. From June 1944 our squadron was based at a new airfield at the Cooktown Mission, where the Lutherans were later to educate one of Australia's most enlightened lawyers and effective advocates, Noel Pearson. (When France fell in May 1940 the MHR for Adelaide expressed concern that the operators of the Hermannsburg Lutheran mission were capable of giving secret information to an enemy in time of war. When the British Malay States and Dutch East Indies fell to Japan with little resistance from the local populations, the Australian authorities are said to have feared that Australian Aborigines from the Cooktown Mission might send smoke signals to Japanese submarines; they were evacuated accordingly.)

In August 1944 our squadron was moved to the new Gove airstrip at Yirrkala, where a Methodist mission had been established as recently as 1934. During the war a solitary missionary was left in charge, a Polynesian from Fiji. There was probably no place in Australia where Aboriginal society was more complete and natural and less threatened and disrupted. The inhabitants and the intruders went their own ways but their contacts were friendly and healthy. We intruders observed how best to catch fish to supplement our rations. The inhabitants were the parents of some of today's most famous Australians, with such names as Yunupingu, Marika and Djerrkura. During six months based at Yirrkala our crews had contacts with Aborigines living in Darwin and Batchelor and near other airstrips in the Northern Territory and around Truscott in the Kimberleys, the longest airstrip at that time in Australia. There was a young and keen Aboriginal member of the groundstaff in our squadron. He applied many times to join aircrew. He had the Intermediate Certificate, which was the qualification for aircrew at that time. His applications were constantly rejected. We were all convinced that his sole disqualification was his race.

Thus my first political campaign had been conducted on Aboriginal lands. It had been in the cause of reforming the Australian Constitution. I had learned how soon the national aspirations and international inspirations of the early War years could falter. I resolved to work harder to identify and pursue national goals and international standards after the War.

In preparing this second Lingiari lecture I found it salutary to uncover some attitudes expressed in the National Parliament about Aborigines in the first decades of the Australian nation. During the debate on the Franchise Bill 1902 Higgins thought it "utterly inappropriate to grant the franchise to the aborigines or ask them to exercise an intelligent vote". Isaacs declared that "the aborigines have not the intelligence, interest, or capacity to enable them to stand on the same platform with the rest of the people of Australia". In October 1906 Isaacs and Higgins were appointed justices of the High Court. In the Invalid and Old-age Pensions Act 1908 aboriginal natives of Australia were explicitly listed among the people who "shall not be qualified to receive an old-age pension". In December 1913 Granville Ryrie, a future assistant minister under Hughes and High Commissioner in London, stated "We must all agree that the unfortunate aboriginal will sooner or later disappear from Australia".

In October 1924 it was first acknowledged in the National Parliament that half-caste children had been taken from their mothers; they were accommodated in a Government home established in Alice Springs in 1914. In March 1926 statements in the press about Aboriginal boys in the Northern Territory who had been taken away from their parents at the age of 14 years were dismissed by Prime Minister Bruce as extreme. In October 1927 a debate was held in the House of Representatives but no vote was taken on a motion for the two Houses to establish a committee on the Aborigines of Australia. In December 1927 Bruce stated that the Premiers of nearly all the States were unwilling to be associated with the Federal Government in appointing a Royal Commission to inquire into the condition of the Aborigines of Australia. In September 1929 the Royal Commission on the Constitution "recognised that the effect of the treatment of aborigines on the reputation of Australia furnishes a powerful argument for a transference of control to the Commonwealth". Four of the seven members, however, thought that "on the whole the States are better equipped for controlling aborigines than the Commonwealth".

By the 1930s few Aborigines were allowed to vote at State or Federal elections in the States. In November 1933 Sir George Pearce ridiculed proposals for giving Aborigines the vote in the Northern Territory: "After the election in Arnhem Land, boiled returning officer would probably figure prominently at native feasts". In the Budget debates in June 1934 Perkins, Minister for the Interior, declined to discuss the ideas of Dr Cook, Chief Protector of Aborigines and Chief Medical Officer in the Northern Territory, "to breed all the half-castes in the Territory back into white people". In 1938 the exclusion of Aborigines from Australia's social services was seen to be increasingly inappropriate when the Lyons Government copied Britain's 1911 health insurance scheme by introducing the National Health and Pensions Insurance Bills. As late as November 1938, after representing the Northern Territory for four years, its MHR voiced his "sincere endeavour to soften the pillow of the natives' passing". In December 1938 Treasurer R.G.Casey confirmed that a full-blooded aboriginal woman could not receive a maternity allowance and that a full-blooded aboriginal man or woman could not get the old-age pension. He pronounced:

The welfare of aborigines in Australia has always been regarded as the responsibility of the States. In each State special officials have been appointed to deal with the affairs of these people. In order to provide for the well-being of aborigines, special aboriginal stations and reserves have been established in all States, medical officers have been appointed to care for their health and special hospitals have been established for them. Suitable employment is found for those capable of working and sustenance is provided when employment cannot be secured. The Government does

not believe that it would be in the interests of the aborigines to extend to them the benefits of old-age pensions and regrets that it cannot entertain any variation of the present law on this subject.

Three months before the outbreak of World War II Prime Minister Menzies still rejected the notion that the Commonwealth Government should take over control of Aborigines throughout the Commonwealth:

The conference of Commonwealth and State Ministers held in Adelaide in 1936 considered a proposal of this character and the decision reached was that it would be undesirable and impracticable.

After the outbreak of war some progress was made in extending the franchise and social services for Aborigines. Under the Commonwealth Electoral (War-time) Act 1940 aboriginal natives not under 21 years of age, who were members of the defence forces having served or serving abroad, were granted the vote at Commonwealth elections. Detribalised Aborigines were granted benefits under the Federal Child Endowment Act 1941. In April 1942 invalid and old-age pensions and maternity allowances were for the first time made available to certain categories of Aborigines. Such advances were brought to an end by the failure of the 1944 referendum. The impediments to Federal action were to remain in the Constitution for another 23 years. In 1946 Chifley put Aboriginal voting rights on the agenda of a Premiers' Conference. The ALP Premiers of Queensland and Western Australia refused to sponsor changes in the laws of their States. The Queensland Government refused to cooperate with the Federal Government in enrolling the residents of Aboriginal reserves. The best that the Federal Government could do was to extend the Federal vote to Aborigines who were or had been members of the Defence Force.

The Australian Government was able to give a lead overseas but not at home. On 9 December 1948 the United Nations General Assembly, with Evatt in the chair, adopted its first human rights convention, the Convention on the Prevention and Punishment of the Crime of Genocide. The Genocide Convention Bill was introduced by Chifley. Menzies supported the bill and added, "Legislation must follow to enact the convention". Evatt agreed, "Yes, that is true. There will have to be following legislation". Australia lodged an instrument of ratification on 8 July 1949. The Convention entered into force generally on 12 January 1951. No legislation has been introduced. I had not noticed this omission before December 1991, when the Commonwealth Criminal Law Committee, which Attorney-General Lionel Bowen established in February 1987 with former Chief Justice Gibbs in the chair, recommended that legislation be enacted on the lines of the United Kingdom Genocide Act 1989 to implement fully Australia's obligations under the Convention. In April 1992 I drew the omission to the attention of the Human Rights Subcommittee of the Joint Committee on Foreign Affairs, Defence and Trade. The Subcommittee recommended that the Australian Government introduce legislation to implement the Genocide Convention fully. In December 1994 Attorney-General Lavarch told Daryl Melham that the Convention did not have priority on the Keating Government's agenda.

In December 1996 Attorney-General Williams told Daryl Melham that the Howard Government was considering whether Sir Ronald Wilson retired as a justice of the High Court in 1989. In 1990 he was appointed President of the Human Rights and Equal Opportunity Commission. In 1995 Lavarch requested the Commission to conduct a National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families. The HREOC President, Sir Ronald Wilson, and the

Aboriginal and Torres Strait Islander Social Justice Commissioner, Michael Dodson, took primary responsibility for conducting the hearings of the Inquiry. On 5 April 1997 Wilson presented the report, "Bringing Them Home", to Williams, who tabled it on 26 May. The report states:

While Australia ratified the 1948 Genocide Convention, its provisions have not been incorporated into Australian law. The Genocide Act 1949 (Cth) merely approved ratification of the Convention and extended its provisions to external territories. Australian service personnel engaged in conflicts overseas are covered by its provisions but not those working within Australia. ... The effect of implementation would be to create a criminal offence of genocide, including attempting to commit genocide, complicity in the crime of genocide and inciting others to commit genocide. Effective penalties would have to be provided. Implementation would establish a right to compensation for victims of genocide.

The Inquiry recommended that the Commonwealth legislate to implement the Genocide Convention with full domestic effect. If the Convention had been enacted in the 1950s, most of the harrowing events which were described in evidence to the Inquiry would not have occurred.

During the Korean War Australia suffered the highest level of inflation in its history. In 1951 the Menzies Government passed the Defence Preparations Act so that it could introduce the same economic controls which the first Menzies Government and the Curtin Government had exercised during World War II. It was able to persuade the High Court that Capital Issues Regulations under the Act were justified by the necessity of being ready for mobilisation at the end of 1953. By the end of 1955, however, there was no defence pretext for introducing such regulations. Accordingly the Government decided to appoint a Joint Committee on Constitutional Review to recommend amendments of the Constitution. The Committee consisted of equal numbers of Coalition and Labor members, eight from the House of Representatives and four from the Senate. I was the junior member. The Committee considered not only Commonwealth-State economic powers but also Commonwealth legislative machinery, including amendments to section 51(xxvi) and the repeal of section 127. It made an interim report in October 1958 and a detailed report in November 1959. Not for the first time, nor the last, a Government lost interest in a committee's report after the end of the crisis which had prompted the appointment of the committee.

From 1963 I and other of my colleagues were constantly asking questions and presenting petitions seeking the repeal of the two references to Aborigines in the Constitution. In 1965 one of the references was found to require urgent attention. The population statistics showed that Western Australia, the State with the greatest number of Aborigines, would lose a seat in the House of Representatives unless they were counted. Except for four university bills, the Constitution Alteration (Repeal of Section 127) Bill was the last legislation introduced by Sir Robert Menzies in an illustrious political career which began in 1928. He introduced it, interestingly enough, on 11 November 1965. Menzies himself exposed the purely electoral basis of his bill when he said in his second reading speech:

I think I should at this point make reference to the Government's decision not to forward any amendment of Section 51(xxvi). I mention this because the Deputy Leader of the Opposition (Mr Whitlam) had a question on the notice paper about it and I am, in effect, answering that question.

In March 1966 Menzies's successor, Holt, announced that the referendum would be postponed until after the elections. In March 1967 Holt introduced the Constitution Alteration (Aboriginals) Bill to remove both section 127 and the discriminatory words in section 51(xxvi). The Bill was unanimously passed by the House on the same night and as promptly by the Senate.

The referendum was approved by 5 183 113 votes to 527 007 on 27 May. The negative passages had been excised just 70 years after they had been inserted in the draft Constitution. The electors had decisively repudiated the opposition and procrastination which had characterised the first two-thirds of Australia's history as a self-governing nation.

Prime Minister Holt is reported to have said to his adviser "Nugget" Coombs: "You know, Nugget, I've never spoken to one; I don't think I've ever met one". He appointed the Australian Council for Aboriginal Affairs composed of Coombs (chairman), Professor Bill Stanner and Ambassador Barrie Dexter. A year later Prime Minister Gorton addressed a conference of Federal and State Ministers for Aboriginal Affairs and defined the role he intended for Bill Wentworth, the Minister for Social Services and, under himself, Minister in charge of Aboriginal Affairs. Not one of his proposals depended on the 1967 referendum. In July 1968 Frank Hardy called on me to expound the Gurindji case; he had transcribed, witnessed and transmitted the petition by Vincent Lingiari and three other leaders of the Gurindji people to the Governor-General, Lord Casey. When Parliament resumed for the Budget in August I immediately raised for discussion the Government's delay and confusion in discharging the mandate given at the referendum to promote health, training, employment and land rights for Aborigines. I quoted the first international instrument which had direct relevance to the conditions of Australia's Aborigines, ILO Convention No.107 - Indigenous and Tribal Populations 1957. In 1969 the Gorton Government stated that the main barrier to its ratification was Article 11:

The right of ownership, collective and individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

At least, in the campaign for the elections in October 1969, Gorton undertook to remove all discriminatory legislation against Aborigines by 1972. In April 1971 Gorton was succeeded by McMahon, who promptly called on Premier Bjelke-Petersen in Brisbane and agreed to abandon all Federal legislative proposals and remove Wentworth from Aboriginal Affairs.

On 12 December 1972, a week after taking office, I announced that Justice Woodward, who had been counsel for the people of Yirrkala in their unsuccessful case against Nabalco before the Supreme Court of the Northern Territory, would hold a royal commission to inquire into and report upon arrangements for granting titles to land for Aboriginal groups and procedures for examining Aboriginal claims to land in the Northern Territory. Also on 12 December 1972 I announced that my Government would ratify the second human rights convention adopted by the UN General Assembly, the International Convention on the Elimination of All Forms of Racial Discrimination. The Convention was opened for signature on 21 December 1965. The Holt Government signed it on 13 April 1966 but the Holt, Gorton and McMahon Governments took no steps to implement it.

The first and most important acts which the National Parliament has passed under the power vested in it by the 1967 referendum were all based on Justice Woodward's reports. In particular the Aboriginal Land (Northern Territory) Bill had been passed by the House of Representatives and was on the notice paper for introduction in the Senate on 11 November 1975. In the 1976 Budget session

the bill was introduced with several changes and a changed title. The Aboriginal Land Rights (Northern Territory) Act 1976 was brought into operation in February 1979. After hearings before successive Aboriginal Land Commissioners, Justices Toohey, Kearney and Maurice, including a successful appeal to the High Court, the Gurindji gained freehold title to their land under this act in 1985. The act remains the best land rights legislation in Australia. The Northern Territory Government has squandered millions of dollars in two-score court challenges to the operation of the Territory legislation. It has never won a case in the High Court, the Federal Court or the Territory Supreme Court.

In the rest of Australia Aboriginal land rights have been secured through the implementation of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. The Convention was enacted by the Racial Discrimination Act, which received assent on 11 June 1975. The Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act received assent on 19 June. I deposited the instrument of ratification on 30 September 1975. The Convention had entered into force generally on 4 January 1969. It entered into force for Australia on 30 October 1975.

After the Racial Discrimination Act was passed Aborigines for the first time in Australian history were able to have evidence and arguments given about their land rights before the courts. John Koowarta and his clan were able to win a case against the Bjelke-Petersen Government in the High Court on 11 May 1982. The justices in the majority were Justices Stephen, Mason, Murphy and Brennan; those in the minority were Chief Justice Gibbs and Justices Aickin and Wilson. Eddie Mabo won his first case on 8 December 1988; the justices in the majority were Justices Brennan, Deane, Toohey and Gaudron and those in the minority Chief Justice Mason and Justices Wilson and Dawson. The judgments in Mabo (No.2) were handed down on 3 June 1992; Chief Justice Mason and Justices Brennan, Deane, Toohey, Gaudron and McHugh were in the majority and Justice Dawson alone dissented. To its enduring credit the Keating Government refused to tamper with the Racial Discrimination Act. The Native Title Act, which received assent on 24 December 1993, was a shining example of promptitude in a century-old story of procrastination. On 16 March 1995 the Court Government's countermeasure was categorically and unanimously rejected, point by point, by all the justices who had sat in Mabo (No. 2). It was 30 years since the United Nations had adopted the International Convention on the Elimination of All Forms of Racial Discrimination. It was 20 years since the Australian Parliament had made the Convention part of Australian law. The top Australian court had now confirmed that no Australian State could restore terra nullius, the doctrine that a great Western Australian, the elder Beazley, had passionately denounced as far back as 10 October 1961:

In any land policy, for God's sake, let us get over the great Australian historical assumption that you must make a decision about the lands as though there was no one living on them.

On 22 August last year, at the invitation of the Council for Aboriginal Reconciliation, the Governor-General, Sir William Deane, delivered the Inaugural Vincent Lingiari Memorial Lecture, entitled "Some Signposts from Daguragu". No Governor-General in my memory has given an address to which the Australian people have given so much attention and approval. At the conclusion of the lecture, in some extemporary comments, the Governor-General noted that the lecture had been given under the auspices of the Council for Aboriginal Reconciliation. He paid tribute to the Council

and its members for all that they have done. He expressed the strong hope that the work of the Council would continue. The Governor-General added: "I would also respectfully suggest to the Members of the Commonwealth Parliament, and State and Territory Legislatures, that they give consideration to affirming their support for true national reconciliation, again for most but for the first time for some, by passing formal resolutions expressing that support".

Prime Minister Howard introduced a motion which was passed on 30 October. Formal expressions affirming support were passed by the legislatures of NSW on 12 September and 14 November 1996 and 15 May 1997, South Australia on 16 October 1996, Victoria 12 November, Northern Territory 20 November, ACT 5 December, Tasmania 29 April 1997 and Queensland 9 May 1997. The legislature of Western Australia has not passed such a resolution. It is apposite to recall, as another great Western Australian, Sir Paul Hasluck, authoritatively recorded half a century ago, that the Imperial Parliament denied self-government to the colony of Western Australia until 1890 because British officials did not trust locally elected and appointed persons to safeguard the condition and status of Aborigines and that the Imperial Government retained control of Aborigines in Western Australia until 1897.

In June 1993, a year after the decision in Mabo (No.2), the Wik Peoples commenced proceedings in the Federal Court against the State of Queensland, the Commonwealth of Australia and two aluminium companies. They claimed traditional title rights over pastoral leases of some 28,000 square kilometres in the western part of Cape York Peninsula. Similar claims were made under the Native Title Act 1993 when it came into force on 1 January 1994. In effect, the Wik claimed that native title co-existed with the interests of the lessees. In January 1996 the Federal Court held that the leases conferred on the lessees rights to exclusive possession and that thereby the grant of the leases necessarily extinguished the incidents of native title under the leases. The Wik appealed to the High Court, which heard the parties and interveners in June 1996,

The Rundle and Carr Governments, which have made some progress in negotiating with Aborigines on their claims to traditional title, did not intervene. The Court and Kennett Governments intervened to support the Borbidge and Howard Governments. The arguments of the Federal and three State Solicitors-General did not prevail. The greatest of Australia's Solicitors-General, Maurice Byers, appeared for the other appellants, the Thayorre People. On 23 December 1996 the Court (Toohey, Gaudron, Gummow and KirbyJJ; BrennanCJ and Dawson and McHughJJ dissenting) upheld the appeals in part. The Court held that the grant of the pastoral leases did not necessarily extinguish all incidents of native title in respect of the land demised under the pastoral leases. In Mabo (No.2) the justices examined the history of native title in general. In Wik they examined the history of leasehold estates in particular. In the former case they found that past assumptions of historical fact were false and they held that native title had always existed in Australia. In the latter case they noted that during the middle years of last century in the eastern half of Australia the Governors ceased to dispose of Crown land in the exercise of prerogative power and the Governments were authorised to dispose of it under their statutory powers. Accordingly, the Court found that leasehold estates now took a variety of forms. The rights and obligations of each grantee depended upon the terms of the grant of the pastoral lease and upon the statute which authorised it.

Within three hours of the decision Premiers Borbidge, Court and Kennett, whose respective States were immediately, most and least affected by the decision, called on the Howard government to amend the Native Title Act to preclude claims on leasehold estates, however defined, and to leave

land laws to the States. The Premiers expressed their instant and intemperate reactions without reading the four majority judgments, which cover 190 typescript pages with 600 footnotes. All seven justices found that the mining leases extinguished any Wik native title. The four justices in the majority found that there should be no further delay in a judge of the Federal Court hearing and determining the variations in place and time of the incidents of the pastoral leases on one hand and the native title claim on the other hand. To the extent of any inconsistency, the rights of the pastoralists prevail.

There have been extravagant and irresponsible allegations of judicial activism and innovation by the High Court. Professional historians who had failed to research Aboriginal history and State politicians who had continued to neglect the welfare of

Aborigines have vilified justices of the High Court as interlopers or trespassers. Some Premiers are clearly inadequate for their own responsibilities. Federal and State Governments, of both sides of politics, from time to time seek to cancel or reduce the jurisdiction of the courts and tribunals which their Parliaments have created. For the foreseeable future, however, Australia will have a federal system. In Australia, as in USA, Canada and Germany, there is a court which has the function of deciding jurisdictional disputes between the Federal and State Parliaments and Governments. The Federal Parliament cannot cancel or reduce this function of the High Court. Parliaments and Governments can, and as I have shown in this lecture often do, delay decisions in the hope that problems will disappear or diminish. Courts do not have such options, least of all the High Court. If the Howard Government could persuade the Federal Parliament to suspend or excise parts of the Racial Discrimination Act or the Native Title Act in a way which discriminated against native title holders and in favour of pastoral leaseholders, then the Government would have to compensate Aboriginal clans for taking away rights which had been repeatedly acknowledged under the common law and international law which the High Court has applied in Australia.

I myself have said from time to time that the High Court, like nature, must abhor a vacuum and had since Koowarta's case done the job which legislators should already have done. I was too glib. The justices do not choose their cases. They cannot put problems off, as legislators sometimes do. They have a complaint by a litigant that a particular law is unconstitutional. They have to decide that challenge. They must do so by reference to an unchanging constitutional text written in the 1890s. They must yield their personal opinions to that text and the earlier decisions upon it. They are just not able to turn the problem over to the politicians or popular opinion. They have to decide each case on the evidence and arguments put before them. I repeat that, before Koowarta's case in 1982, the High Court had never had evidence and arguments put before it on behalf of Aboriginal litigants.

Three months ago one of the many members of the Council for Aboriginal Reconciliation who are here tonight was told by the Attorney-General that Australia's 10th report under the Racial Discrimination Convention, third report under the International Covenant on Economic, Social and Cultural Rights, second report under the Torture Convention were all due in 1994. The third report under the International Convention on Civil and Political Rights had been due in 1991. All these reports were still being prepared. Sometimes the delay was due to the failure of the Federal Government to coordinate the operations of the Federal departments and agencies responsible. Sometimes the delay was due to the failure of State Governments to supply information promptly.

In the last two months Australia has come under fire at international conferences in New York, Geneva and San Francisco for failing to fulfil or promote its international obligations on the rights of women, children and Aborigines. The conference in San Francisco was the Second World Congress on Family Law and the Rights of Children. The HREOC Aboriginal and Torres Strait Islander Social Justice Commissioner, Michael Dodson, was taken to task by the Minister for Aboriginal and Torres Strait Islander Affairs for his remarks at the conference. Mr Dodson replied that human rights are not a matter of domestic sovereignty but of international concern. In the US he spoke in the context of a wider discussion. It is helpful to the understanding of problems which touch all people - black and white, Australian and American - for the HREOC report to be discussed in a forum such as the conference in San Francisco. To suggest that it would have been better had Mr Dodson not gone to the conference or spoken as he did is ridiculous.

Australians who have been upset by Mr Dodson's projection of the domestic debate over "stolen children" in an international forum should get used to the idea of having the world examining such questions. All Australians want the 2000 Olympics to show the nation at its best. But, like it or not, a large part of the world's media attention on Australia in 2000, when it is not fixed on the sporting events themselves, will be on the relationship between black and white Australians. That does not mean Australia has to trim domestic policies to world opinion. But it does mean Australia must think harder about such policies and about how to explain them better to others. Above all, it is futile to wish, as some Australians seem to do, that the world would not show an interest.

The same Member of Parliament who had received an answer from the Attorney-General three months ago had put a question on notice for the Minister for Foreign Affairs on 5 February last:

1. Has Australia reported to the Committee on the Elimination of Racial Discrimination regarding High Court judgments concerning discrimination against Aborigines: if so, (a) when, (b) in what form and (c) were the reports tabled: if so, when.

2. Is Australia required to report to UN bodies on the Wik case; if so, (a) when, (b) to which bodies and (c) will the reports be tabled in Parliament.

I had hoped to use the answer tonight. The Minister has not yet provided it.

Have we forgotten what Hasluck said on 28 March 1950, in the first thorough speech on Aborigines in the National Parliament:

When we enter into international discussions, and raise our voice, as we should raise it, in defence of human rights and the protection of human welfare, our very words are mocked by the thousands of degraded and depressed people who crouch on the rubbish heap throughout the whole of this continent.

Have we forgotten what Beazley senior said on 14 May 1964:

Irrespective of who has control over Aborigines only one government is answerable before the forum of international opinion - the Government of the Commonwealth of Australia. In the forum of international opinion - the United Nations - no one will raise Western Australia's policy or Queensland's policy but the delegates of the Government of the Commonwealth of Australia will have to answer for Australia's attitude.

How can we direct attention to the treatment of racial or religious minorities in neighbouring countries and at the same time deflect attention from the treatment of minorities in Queensland, Western Australia and other Australian States? Or in the Australian Territories?

The Australian Government secured national responsibility for the people of the Aboriginal race from the electors at the referemdum in 1967 and from the Parliament after the election in 1972. It accepted international responsibility for Australia's Aborigines from the United Nations in 1975. It accepted the High Court's endorsement of its international responsibility in 1982. It sought the High Court's endorsement of its international responsibility in 1988 and 1992. It had its international responsibility reaffirmed by the High Court in 1996. Is an Australian Government in 1997 to persevere with all ten points of legislation when some of them can cause infinite delay, and the indefinite postponement of justice?

Under Australia's federal system the High Court of Australia is required to interpret the Constitution; elected representatives do not interpret it. Justice will ultimately prevail. In the meantime, unless there are negotiations now on the basis of the law laid down by the High Court, we shall have submitted ourselves to endless litigation before our courts and shame before the world.

end.