

# **A Fair Place in Our Own Country: Indigenous Australians, Land Rights and the Australian Economy**

## **Castan Public Lecture, Noel Pearson 2 June 2004**

It was late in the long campaign against the 10 Point Plan and many indigenous leaders who had been involved in the politics of the Native Title Act in 1993 were absent from Canberra in the crucial weeks and days before the passage of the Howard Government's legislation in response to the Wik decision. I arrived in Canberra with ominous indications that Brian Harradine would make a deal with the government to pass the legislation. Earlier we thought we had won the day when the delegation of Wik People led by Richard Ahmat, the Chair of the Cape York Land Council, together with other indigenous leaders working the corridors of Federal Parliament, had persuaded the Senator to oppose the government's Bill. When I heard the news back in Cape York Peninsula and saw the images of the Senator dancing with the Wik People on the lawns of Parliament House, I was ecstatic. I had no problem with the failure of the Bill leading to the much-feared double dissolution 'race election'. But then Harradine recommenced negotiations with the government.

The afternoon I arrived in Parliament House I was walking down the corridors with Ahmat and Terry O'Shane from the North Queensland Land Council, when we bumped into the Senator. He was to inform us, no doubt thinking that it was the very news we wanted to hear, that he had made a deal or was very close to concluding a deal with the government for the passage of the Bill. We were non-plussed. The game was over and the 10 Point Plan was heading for the statute books with some ameliorations extracted by Harradine. The concessions secured by Harradine did not make an unjust Bill just, and the Senator was responsible for allowing a fundamental tilt of the pendulum away from the native title rights of indigenous people, which continues to this day.

Faced with the inevitability of the passage of the Bill that evening in the Senate, I decided on a last desperate strategy. Invited to appear on the 7.30 Report I decided to endorse the passage of the Bill and to give the impression that Harradine had won huge gains for indigenous people. My hope was to incite the lunatics from the far right of the Coalition - Senators O'Chee, Lightfoot et al - so that they would reject the Bill, in much the same way as they had done to our advantage, in 1993. The metaphor that was in my mind was like trying to push some livestock into a pen. I thought a sudden scare just as the stock were at the mouth of the pen would have two possible consequences: there was a chance they would take fright and run off down the paddock, or they would run straight through the gate and into the pen. I was prepared to take the risk in the hope that we could snatch victory from the jaws of the defeat which Harradine had sprung for our own good: to supposedly save us from a race election. Barry Cassidy knew what I was trying to do, Kerry O'Brien did not, and when I did the interview with Kerry he was bewildered by my support for the passage of the Bill later that night.

Alas my gamble did not work. The coalition senators knew they had secured victory for the Australians they felt they represented - and they dutifully voted in unison. All I had achieved was that I had defused the whole debate following the passage of the 10 Point Plan. Federal politics moved on to the next issue on the very next day.

Let me now turn to another story going back to the 1997-1998 when the 10 Point Plan and commitments by government leaders to secure 'bucketloads of extinguishment' consumed the nation.

Ron Castan QC had long spoken to me about the need to move the momentum from Mabo from the plane of litigation and the courts, to the plane of a larger political and economic settlement. Ron had warned that reliance upon the law alone was not sufficient. The furore that arose in the wake of the High Court's Wik decision in December 1996 underlined Ron's view and the bitter debates that raged during 1997 underlined the need for an alternative solution.

At the same time the former, notorious leader of the CLP in the Northern Territory, Ian Tuxworth, and his colleague who had become a good friend to us in far northern Queensland, Jim Petrich, commenced a discussion on the far right of rural Australian politics questioning whether the 10 Point Plan would deliver the kind of resolutions that were needed, particularly in the relationship between traditional owners, pastoralists and resource developers. It was the workability of any imposed legislative regime which they doubted.

Ron, Ian and Jim decided to bring together the parties that were furthest apart from each other in the raging national debates about Wik and the 10 Point Plan. Ron brought together key indigenous leaders from the Land Councils, and Tuxworth and Petrich brought together key leaders from the National Party and farmers' representatives. They secured Michael Costello, former diplomat and then CEO of the ASX, as the facilitator who would help the two sides see if they could find common ground.

We did. And this common ground was set out in a number of principles which were set out in a draft Heads of Agreement. The preamble to these Heads of Agreement began as follows:

For tens of thousands of years the Aboriginal people settled and owned this land. They were part of it in a unique and primary way. For the Aboriginal people, the land was the essence of their culture, and their culture was the essence of their being. To deny their ownership of the land is therefore, to deny their very existence. It is for this reason that of all the wrongs done to the Aboriginal people over the centuries since European settlement, none has been more profound than the assertion of the doctrine that this land had been owned by no-one before 1788.

The confirmation by the High Court that the concept "terra nullius" was a myth and that the Aboriginal ownership of land was reality, was a defining moment in the nation's history...

The document went on to say:

In order to give effect to these principles of recognition; security and certainty; a stake in the country; and empowerment; we have agreed to seek a resolution of native title and related issues by negotiation in accordance with the following framework:

1. Recognition of prior settlement and ownership by Aboriginal people.
2. Recognition of valid Crown titles, such as freehold and leasehold, and agreement on the necessity for a fair procedure to ensure any necessary validation of post-1993 grants of title.
3. Existing Aboriginal land including Aboriginal Reserves be recognised and placed under appropriate title as soon as practicable.
4. Acknowledgement of Aboriginal interests in national parks, and development of principles for appropriate Aboriginal involvement in their management and development.

5. Recognition that native title can only have continuing effect where that native title is consistent in whole or in part with a validly granted Crown title. Native title therefore has no effect for example where a valid freehold or exclusive leasehold title exists, but native title has full effect over unalienated Crown land.

6. Common law has recognised that native title can co-exist with a pastoral lease, but only to the extent that it does not interfere with the rights of the leaseholder under that lease.

7. We agree to separate economic rights on pastoral leases from non-economic (or cultural) rights held or claimed by Aboriginal people.

We therefore agree on the following principles for co-existence:

8. We agree to separate the provision of compensation for the relinquishment of economic rights from the provision of resources to address the "citizenship" entitlements of Aboriginal people in health, education, housing and welfare. The first is based on justice for economic rights foregone. The second is based on the strict needs of Aboriginal people as Australian citizens.

We therefore agree:

(a) That in compensation for the relinquishment of economic rights an annual payment will be made to Aboriginal people for the following [x] years. The amount of this annual payment will be [either (\$x) or (calculated according to an agreed formula, for example annual mineral production or GDP)]

The payment will be made in such a way that it provides a long term capital base for all Aboriginal Australians through which they can participate more fully in the economic development and prosperity of the broader economy, and can sustain their culture

(b) That "citizenship" entitlements will be properly funded and administered through arrangements to be agreed.

It is agreed that fairer, and more efficient procedures for native title claims need to be devised as soon as practicable to ensure that legitimate claimants are treated fairly and that the uncertainties of multiple or frivolous claims are avoided.

We agree that a document of reconciliation in the form of a domestic treaty between the First Australians and the Commonwealth and State/Territory Parliaments on behalf of the Australian people, is the desired goal of the reconciliation process.

We recognise that the settlement will be one between citizens of the one,, united Australia and that our futures are inescapably intertwined and we are, at a fundamental level, one people.

The outcome of negotiations under this framework should be incorporated in a Treaty and put to a referendum in the centenary year of Federation. We believe this is necessary to confirm there is overwhelming support of the Australian people for the outcome, and to provide certainty against any potential legal challenge or change of legislation.

We also believe it will provide a great opportunity for the Australian people to show that we are able to move forward as a nation united, where all Australians can live their culture, achieve respect and realise their aspirations.

These principles, referring to the establishment of a "long term capital base" for indigenous Australians culminating in a "document of reconciliation in the form a domestic Treaty" to be put to a referendum - were the product of an informally convened and conducted dialogue between key indigenous leaders and key leaders from the regional and rural Right of Australian politics. These were the people whom I described as coming from "just this side of One Nation".

Having identified the basis for common ground between rural and indigenous interests, the next challenge was to see if the same principles could gain the support of the miners. Ron and I met with the then Chair of the Minerals Council in Brisbane, but the miners were banking on the 10 Point Plan to deliver certainty and workability for them. Similarly, representatives from the teams that had developed these Heads of Agreement briefed members of the government and the opposition in Canberra, but without the miners there was little prospect of the Federal Government changing course. So what was at the time called the Bennelong process - not be confused with what was later to become the rightwing thinktank on indigenous policy, The Bennelong Society - was put aside, and the parliamentary process of the 10 Point Plan continued.

Ron Castan taught me a critical lesson in 1998. He illuminated for me what I have since called the "80-90% strategy" of indigenous advocacy, as opposed to the "51% strategy" with which I was familiar. I used to say to him: "You look after the law Ron, I'll look after the politics" - but it was Ron who would get me to see that there is more common ground between indigenous people and people from the right of Australian politics and society than conventional politics would have it. People from the rural and regional right of Australia firstly have many interests in common with indigenous people. Secondly, they have an understanding of the issues and problems. Thirdly, they have many genuine friendships and relationships with indigenous people - and they may be unsentimental or inelegant in their demeanour, but many of the ones to whom I am referring are fundamentally decent and have goodwill. What I understood is that much of the Right's objections to Aboriginal aspirations were rooted in their objection to these aspirations being identified as Leftist moralizing. I came to see how much the form in which indigenous issues were presented disproportionately determined the responses of the two sides of Australian politics and society - rather than necessarily the substance.

Who would have thought that you could get leading figures from the far Right of Australian politics endorsing a set of principles which included the establishment of a long-term capital base for indigenous people and their support for a domestic treaty to be put to a referendum? The Bennelong process allowed both sides, for a brief time, to explore common ground with clear eyes.

For many of you here tonight you will take from the legacy of Ron Castan QC AM true succour for the cause of human rights, because there was no more deft an advocate nor one who had achieved so much for the cause of human dignity and equality than he. But let me speak testament to another side of this man: he was an unreserved believer in the need for and entitlement of indigenous Australians to share in the wealth of their own country. There was not a skerrick of equivocation about this in him whatsoever. Coming as he did from a privileged background - Ron used to joke to me "you have to pick your grandparents Noel and I was lucky" - he harboured no double standards in relation to black people and wealth.

Ron Castan was unusual; he was a great champion and fighter for Aboriginal people's rights, but he was, completely free of romantic foolishness about Aboriginal people. Unfortunately, the vast majority of those who have seen themselves as allies in the political struggle have had utopian tendencies in their thinking about indigenous people.

One such romantic idea is the idea about the Aboriginal struggle being just one aspect of an environmentalist agenda. It is of course excellent if Aboriginal advancement can go hand in hand with good environmental and conservation policies, but the problem is the idea that Aboriginal people desire to take themselves and their lands anywhere else than to the forefront of economic development in the global economic marketplace.

A second romantic idea is one that has most clearly been expressed by Frank Brennan: the notion that about Aboriginal people must find a way other than the "secularism, materialism and individualism".

Ron Castan was all about opportunity and entitlement. He understood the material needs of people stuck in poverty and disadvantage.

It is this contrast that most strikes me upon reading Frank Brennan's disappointing recent 2004 Ozanam Lecture, "The Church's Voice and State Powers for Justice and Peace: Seeking Decency, Harmony and Equality for All" (20 May 2004). If I were asked to aphorise my fundamental opposition to Brennan's approach it would be this: yes, Man cannot live by bread alone, but he does need bread.

Frank Brennan's speech is disappointing because after a long absence from commentary on indigenous affairs, he reappears not having changed or challenged his basic outlook - which is founded on the traditional "social justice" perspective on which he was nurtured, which I for one will not allow to be regurgitated without objection.

For one thing Brennan dismisses the partnerships we are developing with the private sector in Cape York. But he knows nothing of the fact that these partnerships are helping to solve some of the most mundane but critical issues facing families in our communities: putting in place banking facilities so that families can manage their meagre income and mothers can feed their children. Yes, they may not be able to live by bread alone, but they do need bread.

Only a person living large, careless to the realities confronting ordinary members of our community, would so casually dismiss the importance of the building blocks we are putting into place to confront the real material needs of people - without first bothering to find out the facts.

And anyway our partnerships include partnerships with governments: the cornerstone of our enterprise in Cape York Peninsula is based on a conviction shared in common with the Queensland Premier, Peter Beattie, that we must confront substance abuse if any of our efforts to improve the position of our people are to have any chance of success.

My sense is that Brennan has a strong, underlying allergic reaction to our criticism of the progressivist Left. Brennan is part of an old Catholic, Labor "social justice on a just-hearted Catholic plate" tradition. They won't face up to their legacy even in the light of our critique.

Brennan was junior counsel in the Alwyn Peter Case at Weipa South (now Napranum) in the early 1980s, a book about which was written by criminologist Paul Wilson. The Alwyn Peter became a cause celebre, and Brennan made his mark with it. The whole approach was to paint Alwyn Peter (who had murdered his girlfriend whilst drunk) as a victim of history, trauma, Mapoon removal etc etc. The symptom theory underpinned the whole view - and has underpinned the whole "social justice" approach to indigenous problems with the criminal justice system from the Peter Case to the Royal Commission into Aboriginal Deaths in Custody and to this day. Where has this whole approach take us in the last 25 years in terms of the breakdown of social order and the spiralling problems? For a start we in Cape York have launched a

considerable critique of the "symptom theory" approach to substance abuse and sought to get policy-makers to understand that whatever the reasons for people being highly susceptible to developing substance abuse problems - it is the substance abuse that becomes a problem in its own right, and must therefore be confronted as a problem in its own right.

All that was achieved by presenting a deeper historical understanding of the background to indigenous crimes and dysfunction was that the criminal justice system became sensitive to this background - and sentences became increasingly lenient. After a couple of decades we then reached a point where judges and observers - not the least Aboriginal people - started to wonder whether the loss of Aboriginal life was less serious than that of non-Aborigines. The criminal justice system may have tried to accommodate an understanding of the factors which Brennan and those who followed him had illuminated in the Alwyn Peter case, but it did nothing to abate offending and the resultant "over representation" of indigenous people in the criminal justice system. In fact I would say that it made this problem worse.

At one point in his lecture Brennan talks about "the minimisation of substance abuse" as if this is separate to indigenous people being "entitled to the building blocks for the rejuvenation of their spirituality, the protection of their culture and the preservation of their indigenous identity". He has completely ignored our argument that one of the main "building blocks" to the preservation of culture is the eradication of substance abuse. The use of "minimisation" is instructive as well: even a cursory read of our policies would reveal that we in Cape York are not in the business of minimising harm when it comes to substance abuse - we want to prevent it.

Elsewhere Brennan writes "Noel Pearson welcomes the decision by a community such as Aurukun to limit access to grog, observing that 'the reduction in the violence alone is in itself precious.' It is, but then again I remember when Aurukun was dry back in the 1980s". What does he mean by this? If Brennan means that when Aurukun was dry it was little better than 2 years ago - he is clearly wrong. Things were much better, before 1985 before the canteen was introduced against the community's will. As the anthropologist Peter Sutton pointed out in his Berndt Lecture, the suicide and homicide statistics in Aurukun started after 1985, when the canteen was introduced.

The most troubling statement from Brennan's lecture is the following: " I had always thought that the work for land rights and self-determination was worthwhile because such laws and policies could provide the time and space for Aboriginal Australians to find and make their place in modern Australia, and on terms that were not dictated solely by the descendants of their colonisers. I have always regarded the next part of the task as the far more difficult. It is not political or national in character; it is spiritual and individual. The secularism, materialism and individualism of Australian society are now more the cause of the problems of identity and well being rather than the wellsprings of any solution." This last sentence basically says that unless Aboriginal people can find a way other than "secularism, materialism and individualism" then we are bugged. No matter that Frank Brennan's siblings and nephews and nieces are successful and high-earning lawyers and professionals - this is impliedly not the way for our people because it involves materialism etc. This is the social justice lobby's equivalent prescription to that of the unthinking sections of the green movement: indigenous people should not engage in capitalist society unless they have found solutions to all of the dilemmas and problems of materialism, individualism and secularism. But white fellas, including presumably those near and dear to Brennan, should continue to enjoy the privileges in the meantime.

In our work in Cape York Peninsula we have many strategies that superficially resemble the romantic environmental and spiritual notions about the development of Aboriginal society. We are working for environmental goals and we seek a spiritual and cultural revival of our communities. But our fundamental

goal is complete and equal social and economic inclusion in the Australian mainstream and in the global economy. We do not see it as our main mission to be an environmental conscience or a custodian of spiritual values in a materialistic world.

What plan does Frank Brennan have for the secularists, materialists and individualists who occupy the long and depressing rows of Aboriginal people who have their own land, languages and their cultures considerably intact, playing poker machines in the Alice Springs casino, and in RSL clubs from Cooktown to Broome?

I have no problem with meddling priests - indeed we need more of them - what I have issues with is the quality of the meddling, and what is achieved by it. There are things that I would agree with in Brennan's critique of what the present Federal Government is doing with indigenous affairs - but regurgitating social justice platitudes is not good enough.

Let me now conclude with an overview of the policy shifts of the past three to four decades, which I believe people who value human rights and social justice need to take more seriously. Australians of the social justice era have grown up with declarations of goodwill towards indigenous people and official attempts to extend the benefits of the modern world to us without forcing assimilation upon us. The ideological shift has been so dramatic that people need to be reminded how different things were forty years ago.

Discriminatory laws and practices continued to affect indigenous people. The idea that Aboriginal people were inferior was still influential. It today seems incomprehensible that even in the 60s and 70s, Australia allowed some of our nation's languages to disappear forever insufficiently recorded. Such facts cannot be explained away; white Australian ideology and attitudes had the function of justifying the dispossession of the original owners of this land. Prime Minister Howard was wrong to argue that white Australians should reject the notion that "we're all part of a sort of racist, bigoted history".

Things seemed straightforward for progressive people: discrimination should be removed and Aboriginal people would become equal. Decision makers did in fact know that in remote areas, equal pay would cause a comprehensive transfer to a welfare economy, but they made a conscious choice; equality was the first priority.

Dismantling of formal discrimination culminated with the referendum of 1967. After 1967 there have been two stories of indigenous affairs.

The first is the official liberal/progressive story of positive advancement by means of a rights agenda and government service delivery. This programme had two components.

The first component was based on the thesis that indigenous people still suffered unofficial discrimination and disadvantage. To remedy this, there was legal aid to deal with bias in the criminal justice system, health services, community development, and other indigenous-specific programmes.

These efforts were not explicitly anti-assimilationist. The second component of the official programme however went further than removing formal discrimination and addressing unofficial discrimination and disadvantage: Aboriginal culture and Aboriginal society were advanced as being as valuable as Australia's British institutions and perhaps morally superior.

The most important components of this programme were land rights and attempts at the incorporation of indigenous languages and culture in education and many other aspects of government policy.

In recent years, the entire complex of progressive indigenous policies that I have outlined above has sunk into disrepute. It must nevertheless be said that many of these policies and ideologies were both necessary and successful, or could be successful if subjected to reform. Even ATSIC had successes, for example with indigenous home ownership.

Abstudy was better before the Government allowed Pauline Hanson's One Nation to influence policy. Land rights could be a foundation for economic development.

However, the true story of what has happened in indigenous affairs bears little relationship to the narrative constructed by the liberal/progressive reconciliation movement.

During the last forty years, the following factors became completely dominant in the real life of the communities: passive welfare; withdrawal from (unequal, exploited) participation in the market economy; collapse of the local subsistence economies; idleness; supply of legal and illicit addictive and psychoactive substances; gambling; libertarian social values, and bewildered and at best hesitant government policies in the areas of social order and substance abuse.

The presence of these factors led to substance abuse epidemics, and an outlook shaped by passive welfare. Results are a gap in life expectancy of twenty years between indigenous and non-indigenous Australians that is not narrowing; illiteracy; sexual violence, and epidemic foetal alcohol syndrome.

These facts have been discussed within the liberal/progressive reconciliation framework - albeit belatedly. However, the reconciliation movement has failed to reach two necessary conclusions.

First, the chaos and misery has incorrectly been attributed almost entirely to the legacy of dispossession and racism. It has not been acknowledged that many elements of the abolishment of formal discrimination and the liberal/progressive advancement programme have inadvertently been major causes of Aboriginal disadvantage.

The liberal consensus during the social justice era was that Aboriginal disadvantage was caused by the denial of self-determination and denial of rights and services, and by discrimination. Many reforms that have had deleterious consequences (such as the right to drink and equal pay in the cattle industry which led to unemployment) were unavoidable consequences of equality, but there was no discourse about Aboriginal responsibility in this new situation. Nor was there any awareness that many elements in the positive advancement programme were flawed. Policies for recognition of culture and language - correct in principle - marginalised indigenous people instead of making them fully integrated citizens with a strong cultural identity. Legal aid policies and criminological theory did nothing to reduce crime or help the victims of crime.

One item on the anti-discrimination agenda is still unfinished business: government misuse of confiscated Aboriginal wages was a crime even during the era of "protection" and discrimination, but has not yet been adequately rectified. However, the situation has deteriorated to a point where even the just act of handing back illegally withheld wages presents a dilemma. One of the reasons why we initiated Cape York Partnerships with governments and the private sector was that we saw how any kind of money supply - including restitution of stolen wages - was likely to facilitate substance abuse and gambling.

The second necessary conclusion is that the numerous official documents articulating the official reconciliation programme are diversions. The Royal Commission into Aboriginal Deaths in Custody and

other like reports, and the vast academic literature - all these piles of paper give no guidance to our work in Cape York Peninsula.

Today, the real story of indigenous affairs is no longer containable. The liberal/progressive interpretation of indigenous affairs is not standing up to scrutiny: it is half right, but also half wrong.