Noel Pearson’s 1993 Boyer lecture

Mabo: Towards respecting equality and difference

The Boyer Lectures of the eminent Australian anthropologist Professor William Stanner entitled After The Dreaming hold their own amongst this country's finest writings on matters black and white.

Today, more than ever, the series which Professor Stanner delivered for the ABC in 1968 makes compelling reading. His lectures articulate, illuminate and provide some guidance, with questions that will consume the people of this continent for as long as we need to consider them. Such questions as: the future of nationhood and the equivocal citizenship of those with whom a settlement of great grievance remains outstanding; indigenous rights and notions of new partnerships; constitutional and institutional renovation; the never-decreasing need for social reconstruction and renewal; and the great imperative for an equitable distribution of the hitherto not so common weal.

Stanner wrote one year after the 1967 Referendum which, amongst other things, finally incorporated into the Commonwealth the indigenous people of the country. In this lecture I propose to reflect on some aspects of Stanner's lectures, whilst tracing some of the developments of the past two decades, leading to the watershed decision of the High Court of Australia on 3 June 1993 on the question of native title to the Murray Islands in the case brought by the late Eddie Mabo and others.

I stood but a child of tender years when Professor Stanner spoke hopefully about our entry with a vengeance into the country's history. To tell the story of that time and the changes which have happened and the changes which, like Stanner, we still await, it is appropriate first to tell of the man who commandeered Aboriginal policy in the State of Queensland for more than two decades.

In 1989, on a bright Sunday morning, Joh Bjelke-Petersen stood at the front of the old church at Hope Vale, surveying the long wide street, framed by mango trees and frangipannis with barking dogs idly chasing horses.

Earlier the former State Premier, whose once authoritarian aspect had by now waned considerably, had regaled the congregation of black faces in the weather-board church with stories. Stories of how they had transformed dense woodland into paddocks and rows of tin shacks with wide streets, named after German missionaries now long departed. How they had built this glorious church from the timber that had stood on the paddocks where cattle now grazed. He had returned to the mission to commemorate a community milestone: it was forty years since the Guugu Yimithirr people had returned, largely through his agency as a young Country Party backbencher, from seven years' exile in central Queensland. The mission which had been established in 1886 was closed down in the war, and the people removed when the resident German missionary was interned in 1942.

After the church service, a journalist asked the former Premier about land tenure for the people of the community. With perhaps accidental candour he replied that the land had always belonged to the Guugu Yimithirr. It was just that the Government had been looking after it for them. And now they had handed the land back to the rightful owners.

It was a startling admission – that the land had always belonged to them – from one who had made an international reputation of denying Aboriginal human rights in the State of Queensland and had steadfastly

opposed the notion that indigenous people had certain inherent, traditional rights to their homelands. His Government could scarcely bring itself to mention the word 'traditional' without suffering acute political nausea.

In the early years of government policy, Aborigines were different and, because of their alleged backwardness, could be treated unequally. Discriminatory treatment of the mission and reserve inmates during those years, when it was said we lived under the Act, arose out of their constitutional perceived lack of quality: black people were innately unequal, therefore special laws where the State governed aspects of peoples' lives which were beyond the reach of law makers for other citizens were justified.

This policy of innate difference and inequality was underpinned by a policy of assimilation for, by a process of training, civilising and indeed breeding out their backwardness, the blacks could lose their difference and become like everyone else. They could come out into the mainstream society as people exempted from the Act and finally equal. The Churches would assist in this endeavour and to that end no church body broke more sweat than the Hope Vale Lutheran Mission Board under Bjelke-Petersen's ten-year chairmanship.

My parents watched their contemporaries pack up their young families, leave the mission and go south to live near Lutheran congregations: to milk cows, pick peanuts, cut cane and work on highways. Just like poor whites did.

I don't recall wishing that my family had also gone south. But I do recall the strange tolerance that my father and the older people showed those who administered the paternalistic regime which was our life in the mission: the missionaries and the managers. This was explicable by their over-riding devotion to the Church, a fierce sense of the mission's history and the community's tribulations and survival through times of extreme hardship, loss and dislocation. Like those born before us and indeed those who would follow, the collective psyche of myself and my schoolmates was dominated by the Moses-like figure of George Heinrich Schwarz of Neuendettelsau, who had died six years before I was born.

Old missionary Schwarz had first landed at Cape Bedford in 1887, by which time Guugu Yimithirr people had been reduced to a demoralised fringe-dwelling existence following the establishment of Cooktown. Many of their number now exterminated, their bones lined the blood-stained tracks to the Palmer River Goldfields. There was gratitude for Schwarz's lifelong effort to provide a shelter from a colonial storm whose waves had almost completely swamped the Guugu Yimithirr, drowning many of the descendants of those who first met James Cook at the Endeavour River in 1770.

Who of those who saw the sails disappear north after the crew of the Endeavour had effected repairs on the vessel, would have thought that four generations later the Captain's descendants would return with such vengeance, with a fever for gold and for land, leaving demoralised strugglers, begging, sneaking and apologising for an existence in their own country?

Given the Church's role in the secular administration of the mission, and the fact that the Government was now headed by a church friend, indeed a mission friend during the years of my early youth, the older people forgave and suffered government paternalism in much the same way that they had suffered the paternalism of old Missionary Schwarz.

But as with the old missionaries who had gone, there was increasing disquiet among the younger people about the Government and Church-sanctioned policy of inequality justified by difference. Why were people prohibited from buying motor-vehicles, why should they have to seek permission from the Manager to

leave the Reserve, why did the money that they earn have to be kept and managed by the Mission, why could not the community have title to their land in their own hands?

The increasing awareness that Queensland legislation and policies concerning Aboriginal people breached fundamental human rights, and that our mission friend was a leading and vehement opponent of Aboriginal rights, brought on a significant identity crisis for the community. It was a crisis which led to a realisation that paternalism whilst in a fraternal context might be a natural relationship of affection, but when it concerned adults of different races it was undeniably racist, and arose from a fundamental assumption of inferiority and superiority. The Government and indeed the Church had assumed our innate inferiority and their own superiority. Like many paternal relationships put asunder, the bitterness of this realisation was painful.

As with the memory of the old Missionary, the pain was most acutely felt by those who had watched their parents and grandparents endure a system which treated them as State wards, as incapable and undeserving of equality and dignity. It was within the young hearts of those who contemplated this history that indignation burned, and it found resonance in the memories and secret, long-suppressed feelings of those who had endured it. There arose a movement for change and a demand for equality.

The Brisbane Commonwealth Games in 1982 and Aboriginal protests focused international attention on Queensland's record on human rights and land rights in particular, and signalled a change in the direction of the National Party Government's policies on Aboriginal Affairs. The infamous Aborigines Act was repealed and new and less draconian legislation governing communities was introduced. Together with legislation granting a form of land title to Aboriginal Reserves under an instrument called a Deed of Grant in Trust, this heralded a new era where the Government strove to address the long-standing and widespread criticisms of its discriminatory laws.

Rather than sanctioning difference and inequality, the new policy urged equality and sameness. Aboriginal people were no longer to be distinct from the rest of the Queensland community, they were equal and this meant that they could not be allowed to be different. Aborigines were to be considered merely dark-skinned Queenslanders.

Communities which had endured terrible histories of repression and stranglehold government management, in which social problems were rife, lacking basic health, housing, educational and other services, were by semantic fiat to have been transformed into wholesome country towns with black yokels sitting on verandahs contemplating cows and the sorghum harvests.

Formal equality was now largely a fact. The Government's policies were therefore difficult to reproach. The response was always that it now treated Aborigines as equal like any other Queenslanders.

Of course, the respect in which Aborigines were most similar to their fellow Queenslanders was that they had no special claim or right to their traditional homelands. Non Aboriginal Queenslanders had no such inherent rights, and it would be discriminatory to accord special rights to compensation or land ownership to Aborigines. All rights to land in the State were granted by the Crown and there was neither any legal nor moral claim on behalf of indigenous people to what they claimed were their lands. How can you have an equal society when one group sets itself apart with claims to separate rights?

Therefore, whilst a substantial change occurred in policies in the 1980s from inequality and difference to equality and sameness, both policies were discriminatory and were premised on a vehement denial of the notion of traditional rights to land.

Thus whilst Professor Stanner confronted the myth of waste and desert lands and said that if Crown title were paraded by, every Aboriginal child would say, like the child in the fairy tale,'But the Emperor is naked ...', in Queensland the Government continued to insist that the Emperor was decently attired in its Crown titles. It was on this insistence that the Bjelke-Petersen Government moved at a night sitting of the Parliament to pass the Queensland Coast Islands Declaratory Act 1985. This Act purported to retrospectively extinguish any native title that might have existed in the Murray Islands. If valid, the legislation would bring to an end the court action brought by Eddie Mabo and others three years before, challenging the Crown's power to grant title to people who claimed they already held a pre-existing title to their homelands.

Before dealing further with the question of pre-existing title and the outcome in what is the most important and controversial decision of the High Court of Australia, I would like to survey briefly the developments which unfolded at the national level following the 1967 Referendum and Stanner's hopes for a final breaking of the Great Australian Silence and his hopes for Aboriginal land rights recognition.

Prior to his Boyer lecture, Professor Stanner had been to Yirrkala on the Gove Peninsula, consulting the Aboriginal people in relation to bauxite mining leases granted to Nabalco. He spoke in his lecture about the people's anxiety about the proposed development, and the strong feelings the people expressed about their homelands and what lay ahead with the mining development.

The Yirrkala people launched an action in the Supreme Court of the Northern Territory against the mining company, claiming that they held a communal native title, recognised by Australian common law, to their traditional lands. Professor Stanner gave expert evidence for the plaintiffs.

In a 1971 decision now known as the Gove Land Rights Case, Justice Blackburn of the Northern Territory Supreme Court found that there was a traditional system pertaining to the claimed lands which he described as 'a government of laws and not of men'. Nevertheless his judgement denied that native title was part of Australian common law, and he confirmed the assumed doctrine of terra nullius: an empty land without owners.

However, the negative finding in the Gove Case combined with increasing political agitation by Aboriginal people in the early 1970s gave rise to a political imperative to address land rights. If Aboriginal people possessed no inherent rights to land at law, then a moral onus fell upon Parliament to create rights to land. The Woodward Commission, established by the Whitlam Labor Government, eventually led to the enactment of the Northern Territory Land Rights Act 1976. This followed moves in South Australia to address land rights.

Similar if increasingly inadequate legislative measures on land title were taken in New South Wales, Victoria and eventually Queensland. As each State eventually dealt with the imperative to address the question of land rights within their jurisdiction, it is true to say that each subsequent measure was less inspired than the last.

What has resulted is a patchwork of legislative regimes which have made provision for some areas of the country and no provision in respect of others. Moves in the mid 1980s at the federal level to introduce a national land rights model failed to fulfil the need for a national provision. The well-spring of goodwill, which erupted after Gove, had petered out to a trickle by the time Michael Mansell made his assessment in 1989 that no more would we see land rights legislation in this country. The question, so far as the material Australians of the 1980s were concerned, had been more or less addressed and, if not addressed, then at

least attempted. In confirmation of Mansell's assessment, in 1991 the Queensland Labor Party adjusted its land rights policy platform downwards to match its recently introduced legislation. The outcome determined the policy.

It therefore appeared that there would be no more political or social impetus for any national movement on land rights. At this point, Mansell quite correctly asked whether our better prospects lay outside of the nation rather than within it.

The constitutional mandate over Aboriginal Affairs which the 1967 Referendum gave the Commonwealth has been infrequently exercised. Aboriginal Affairs and matters concerning our entitlements have too often been left to the States to repeat the long history of neglect and denial which had given rise to the need for constitutional change in the first place. One of the few assumptions of constitutional responsibility for peoples of the Aboriginal and Torres Strait Islander races was the Whitlam Labor Government's enactment of legislation outlawing Queensland's discriminatory laws. And, of course, the most significant exercise of the race power came in the last days of that Government with the enactment of the Racial Discrimination Act in October 1975.

The Act has proved to be pivotal in respect of the protection of native title as established in the Mabo cases. The High Court's finding in the 1992 decision, that whilst under Australian common law the British Crown acquired sovereignty over the country, it did not thereby extinguish the beneficial title of the indigenous inhabitants which they held under their own laws and customs, has revolutionised the nation's understanding of its land laws and indeed its history.

There are historical truths which are difficult for some to accept given that history is so important to contemporary political ideology. There are prescriptions which taste like too many bitter pills to many Australians who have alternately lamented, grieved and felt betrayed by the Court's decision.

There may now be some remnant rights which must be accounted for and will no longer suffer denial. This is being met by the complaint of politicians and interest groups that many in the desert areas of Western Australia and elsewhere in remote Australia, where there may be such remnant rights, have not been as comprehensively dispossessed and, better still, obliterated like so many have been in settled Australia. If only their ancestors had achieved in the Pilbara what they achieved in Van Dieman's Land!

There are black Australians too who will also feel betrayed by the Court's decision on native title, who will feel shortchanged by history and white law. But for many Australians, both black and white, Mabo represents an opportunity for the achievement of a greater national resolution of the question of Aboriginal land rights, and an improvement in relations between the new and old of this land, a first step in a new direction which might yield the changes necessary for indigenous people to be genuinely re-possessed of their inheritance.

Given the hope and doubt which Aboriginal people feel about the court's decision and the responses of various Governments and the non-Aboriginal public to native title, how can we proceed with feet laden by such trepidation?

Mabo is an attempt by the colonialist legal system to accommodate Aboriginal land rights. It is by no means the most perfect accommodation between rights under Aboriginal law and the white legal system. But, from all assessments, it is close to the best accommodation achievable within the Australian legal system. It stands creditably against similar accommodations in Canada, the United States and New Zealand.

The significance of the decision is that it recognises Aboriginal law and custom as a source of law for the first time in 204 years of colonial settlement. For the great part, however, Aboriginal law remains unrecognised. Nevertheless, the breadth of the context of this recognition sets the stage for an interaction which has never before been possible.

Colonial law has been a reality in Australia since 1788. Aboriginal law has always been a reality and we are unanimous in our resolve that it continue to be so. Colonial law is part of our indigenous reality here in Australia; it determines and controls our ability to exercise our law, enjoy our rights, maintain our identities.

With Mabo, the colonial system is saying: Yes, we do recognise Aboriginal law in certain circumstances relating to land but our law also says that there has been extinguishment which is legal in many circumstances. As to the balance of Aboriginal law, well, the colonial law is saying: It has no reality, in so far as we are concerned and in so far as we are prepared to act.

No matter the illigitimacy of the imposition of colonial law; no matter how revisionist and how artificial and pragmatic the High Court's recognition of indigenous law in the Murray Island case might be said to be–it is nevertheless the prevailing reality. They are saying to us: this is the position, this is the reality, what can you do about it?

If this is the situation–that Aboriginal law has restricted recognition and there is little prospect for an extension of recognition through agitation of the common law–what strategies do we pursue to make Aboriginal law have a reality, have consequence for our colonial condition?

For the most part, the Aboriginal political system occupies a sphere which is quite distinct from the white political system. Indigenous political activity and philosophy are largely spinning in an orbit that does not have much relevance to, or impact upon, the dominant sphere in which many of the critical developments are taking place. We need a new political ideology for indigenous political strategy.

Uncle Tom and Malcolm X represent the two extreme characterisations of racial-ethnic politics in the United States, where the pan-Afro-American struggle has provided an image of the way black politics ought to be understood. At one end of the spectrum is the sell-out, at the other the radical activist. These characterisations are largely white constructs. The colonists have defined the way in which our struggle is to be understood–they, the media, the wider colonial society, define our struggles as moderate or radical, conservative or activist, to suit themselves, and we have internalised these characterisations and made them our own.

Early black leaders in Australia seized upon the politics of liberating victims which defined the black struggle against segregation in America. The emergence of radical activism changed the way in which Australians were forced to take account of the victims, but it did not always change the stance and the position from which the victims spoke–as the powerless and oppressed minority. The language of victim politics positioned the rest of Australia as guilty perpetrators. It is an uncomfortable position and not one which will sustain a political cause. The Australian body politic will salve its conscience so far and then react in an indignant backlash, the 'we can't he blamed for what happened' response.

To that constituency, a reminder that such conscience-salving is to be particularly observed in the ready agreement of those most vehemently opposed forces who nevertheless concede the need to address the shameful health, sanitation, educational, employment and housing conditions of black Australians.

Rather than land rights this view urges conscience-salving through the pursuit of what Stanner called the 'hobby horses'. But as in 1968, with many of the statistics deteriorating rather than improving, Stanner's questioning of this approach is relevant to 1993: He said: 'They are all in part right and therefore dangerous. If all these particular measures, with perhaps fifty or a hundred other, were carried out everywhere, simultaneously, and on a sufficient scale, possibly there would be a general advance ... But who shall mobilise and command this regiment of one-eyed hobby horses? And keep them in column?'

For the indigenous quarter, the fact of our changing political circumstances calls for us to re-evaluate our political strategies. People aren't moderates or conservatives on the one hand, and radicals and extremists on the other. Rather, it is actions and strategies which should be seen as moderate or radical. There is a world of difference between black radical cheek and black radical chic. The test of credibility of a strategy is not whether the approach is radical or conservative, but whether it is smart or dumb, and whether it enhances or jeopardises the rights and interests of one's people.

The politics of victims asserts that unless the dominating State accepts us on our own terms, any complicity, any dealing constitutes an unacceptable relinquishment of our power. For a long time, the only political currency which Aboriginal people could use was their refusal to be involved. Now that the non-Aboriginal legal system has offered something in the way of rights, however narrow, to refuse to engage in the game and to fail to appreciate the rules and its limitations–even if our purpose be to disrupt the game–no longer seems smart. The challenge is to negotiate the expansion of those rights without losing ground and without surrendering the chances of future advances in a struggle which has incrementally advanced and whose destination is still long in arriving.