

THE PROSPECTS FOR NATIONAL RECONCILIATION FOLLOWING THE POST-WIK STANDOFF OF GOVERNMENT AND INDIGENOUS LEADERS

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Having been Rapporteur at the Australian Reconciliation Convention in May 1997, I have been asked to offer some reflections on the state of play with regard to national reconciliation since the Convention. The re-election of the Howard Government in 1998 has required a further reassessment of the mode of interaction between government and Indigenous groups. The 1998 amendments to the NTA have redefined the objectives which are achievable at this stage in Australia's political and legal development as a nation state receptive to the distinctive claims of its Indigenous peoples. The election of Aden Ridgeway as a Democrat Senator for New South Wales will transform much of the parliamentary debate in the term of this Parliament. Given that the ALP, Democrats and Greens would be unlikely (at least when in opposition) to take a position contrary to Ridgeway when he has expressed objections to government proposals, the Howard Government will not be able to pass any specific Aboriginal legislation through the Senate without Ridgeway's endorsement. Justice, recognition and respect in process and outcomes remain the preconditions for reconciliation. There are four pressure points in the national life to consider. They are: the government and community responses to the *Bringing Them Home* Report;¹ the ongoing problems with the acceptability and

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1 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and their Families*, 1997.

administration of amendments to the NTA; the Prime Minister's publication of a preferred preamble; and the Council for Aboriginal Reconciliation's decision to proceed with a National Declaration of Reconciliation.

I. BRINGING THEM HOME

As a follow up to the Reconciliation Convention, I wrote to the Prime Minister on 5 August 1997 in the following terms:

Thank you for the personal apology you made to the 'Stolen Generations' at the Australian Reconciliation Convention. In your consideration of the government's response to the report *Bringing Them Home*, would it be possible for your government to sponsor a resolution of the Parliament reflecting the sentiments of your apology[?] I would suggest the following:

The Senate/House of Representatives expresses its deep sorrow for those Australians who suffered injustices under the practices of past generations towards Indigenous people, and especially for the hurt and trauma many Australians continue to feel, as a consequence of these practices.

This wording was a stylistic modification of the Prime Minister's personal apology at the Reconciliation Convention. Eventually, on 24 October 1997, Senator Herron replied on behalf of the Prime Minister, saying:

The government does not support an official national apology. Such an apology could imply that present generations are in some way responsible and accountable for the actions of earlier generations, actions that were sanctioned by the laws of the time, and that were believed to be in the best interests of the children concerned.

The debate about the apology has nothing to do with government liability for any compensation. That will be a matter for determination by the courts when any member of the stolen generation establishes a case. What might be said by politicians in Parliament would be irrelevant. No parliamentary resolution could be used in court proceedings to establish or defeat a claim for damages. As McHugh J said in *Egan v Willis*: "What is said or done within the walls of a parliamentary chamber cannot be examined in a court of law".² The Howard Government has made a 'separation of powers' mistake. What is sought is an apology by the Parliament, not an apology by the government. Given that the Government is not prepared to sponsor the parliamentary resolution, that is not the end of the matter. Such a resolution could still be sponsored by the opposition, minor parties, or an individual member. Given this Government's position, the resolution should be put as a matter for a conscience vote.

The resolution could first be moved in the reconstituted Senate where it would undoubtedly be passed. After June 1999, one of the senators who is in a position to vote for the apology will be an Indigenous Australian, Aden Ridgeway, who,

2 (1998) 158 ALR 527 at 547.

like other senators, bears no personal guilt for things done by others in the past. The resolution could then be introduced into the House of Representatives as a conscience vote where it would pass because the Opposition would be joined by a significant grouping of Liberals voting contrary to the Prime Minister's conscience without undermining his leadership. It would be similar to the euthanasia debate. People could pay due deference to the Prime Minister's conscience while pointing out that the conscience of the Prime Minister is not necessarily the conscience of the Parliament, nor the conscience of the nation.

II. THE AMENDMENTS TO THE *NATIVE TITLE ACT*

Whatever the variance of political opinion, Senator Harradine was of the view that the compromise he brokered regarding Prime Minister Howard's ten point plan in July 1998 was the best achievable result for native title holders. The only other possibility was a deadlock between the two houses of parliament resulting in a double dissolution election. With the benefit of hindsight after the 1998 election, one might endorse Harradine's view. The compromised legislative package was the best conceivable political outcome because it was an improvement on what would have been delivered by a returned Howard Government.

There was at least a theoretical possibility that leaving the native title issue unresolved in the Senate could have improved the chances of electing a Beazley Government. But it is hard to see how the issue could have been played to Labor's advantage in country seats. Despite the passage of the native title amendments, the Coalition did win the seats of Leichhardt and Kalgoorlie, the areas outside the Northern Territory with the greatest concentration of native title holders. There has been no credible claim since the 1998 election that the passage of the *Native Title Amendment Act* 1998 (Cth) cheated Labor of government.

Had the native title amendments not been resolved before the 1998 election, there would have been a double dissolution election. The campaign would have been similar to the one that was run in the cities. The rural campaign would have featured attacks on the supporters of native title. Pauline Hanson's One Nation Party would definitely have picked up a handful of seats in the Senate.

With the re-election of the Howard Government, there has been a need for a change of strategy by the Indigenous leadership in light of these political considerations. The National Indigenous Working Group's (NIWG) choice of consultants, their pooling of lawyers with the ALP, and their members' publicly entertaining the endorsement of Labor and the Democrats, occasioned major problems of perception for the Indigenous groups dealing with the Howard government in 1998. These were problems that had never confronted Indigenous leaders during 13 years of Labor governments because the Aboriginal leaders had not used ex-Liberal and future Liberal candidates as consultants. They had not pooled QCs with the Liberal Party. And their senior members had not publicly entertained the idea of running for the Liberals or the Nationals. Prior

to the 1998 election, the Howard Government perceived the NIWG to be too close to the ALP and Democrats and too party political in its approach.

The Howard Government has shown little sympathy for negotiating with Indigenous leaders. The Government's handling of the native title amendments left Indigenous leaders with the perception that miners, pastoralists and State governments have privileged access to government processes in Canberra. There can be no prospect of greater reconciliation unless the Government is seen to be more inclusive in its consultations and decision making processes and unless the Indigenous leadership is able to accept the legitimacy of the government of the day, despite this Government's shortcomings when compared with its Labor predecessors.

Indigenous leaders have taken heart from the decision of the UN Committee on the Elimination of Racial Discrimination acting under its early warning procedures and finding that the NTA amendments discriminate against Indigenous title holders in four ways: the Act's 'validation' provisions; the confirmation of extinguishment provisions; the primary production upgrade provisions; and restrictions concerning the right of Indigenous title holders to negotiate non-Indigenous land uses. But there is a need for caution given that the validation provisions substantially mirror those approved by the Keating Government in 1993, and were a response to an unexpected High Court decision following upon the decision of the National Native Title Tribunal not to register claims over Queensland pastoral leases. The real work of "confirmation of extinguishment" (if any) was done by the Beattie Labor Government in Queensland, rather than the Howard Government which simply insisted on giving States the power to act. The most controversial title was always Queensland's Grazing Homestead Perpetual Lease. This form of tenure was said to cover 12 percent of the land area of Queensland. In his second reading speech for the Native Title (Queensland) State Provisions Bill 1998 (Qld), Premier Peter Beattie said, "We have honoured our commitment to maintain Queensland as a State with low sovereign risk, which stands by, and does not seek to revisit, the grants it has made in good faith in the past".³ The Beattie Government proceeded with its legislation despite the publication of an opinion from Walter Sofronoff QC, who had appeared for the Wik Peoples in the High Court, stating, "I am of opinion that the grant of a Grazing Homestead Perpetual Lease does not extinguish native title".

Reconciliation will not be advanced by ongoing political allocation of blame to the Howard Government accompanied by silence about the actions of State Labor governments.

III. THE CONSTITUTIONAL PREAMBLE

With another lamentable failure to consult broadly and to include Indigenous leaders in his discussions, the Prime Minister went ahead in March 1999 and

3 Queensland, Legislative Assembly 1998, Debates, No 6, p 1512.

published his preferred preamble to the Constitution which included some acknowledgment of Indigenous Australians. He proposed: “[s]ince time immemorial our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures”.

Meanwhile Mr Gareth Evans composed Labor’s preferred preamble and many citizens tried their hand at an alternative. I suggested:

Aborigines and Torres Strait Islanders have belonged here and have cared for the country since time immemorial. They enrich the nation’s life with their unique and continuing cultures and traditions.

Belonging to and caring for one’s country are two of the key concepts that Aborigines use when speaking about their custodianship or stewardship of the land. In 1993, ATSIC had proposed a preamble to the Republic Advisory Committee:

Whereas the territory of Australia has long been occupied by Aboriginal peoples and Torres Strait Islanders whose ancestors inhabited Australia and maintained traditional titles to the land for thousands of years before British settlement.

That preamble also proposed that Aboriginal peoples and Torres Strait Islanders “have a distinct cultural status as Indigenous peoples”.

At the 1998 Constitutional Convention, there were three distinct moments in the evolution of the preamble proposal. First, a working group convened by Lowitja O’Donoghue and including Gatjil Djerrkura and Neville Bonner recommended that the preamble “should include recognition of Aboriginal peoples and Torres Strait Islanders as the original inhabitants of Australia”. The group recommended “that this separate referendum question on the Preamble be put to the Australian people at the same time as the referendum on the republic.” Secondly, in the plenary session of the Convention on 9 February 1998, Gatjil Djerrkura proposed a preamble which was silent on occupation, custodianship and ownership of land but which called for recognition of “Aboriginal and Torres Strait Islander peoples as its Indigenous peoples with continuing rights by virtue of that status”. Thirdly, it was resolved in the final communique that the Constitution should include a preamble containing an “[a]cknowledgment of the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders”. The Convention also said that there was a need to consider for inclusion “[r]ecognition that Aboriginal people and Torres Strait Islanders have continuing rights by virtue of their status as Australia’s Indigenous peoples”.

There is no point in proceeding with a preamble question at the time of the republic referendum unless the wording has the public support of key Indigenous participants at the Constitutional Convention. If that support is forthcoming, the preamble question would presumably be supported by all major political parties and would be a symbolic aid to national reconciliation. The issue of continuing rights flowing from Indigenous status did not have sufficient support at the

Constitutional Convention to effect a reversal of the Prime Minister's position. The key issue is whether there can be a description of Indigenous inhabitation and Indigenous peoples' unique contribution to national life which satisfies Aboriginal leaders and the government.

A constitutional referendum is very different from the legislative process because it will succeed only with bipartisan support. The non-Labor side has always been the most successful side of politics in constitutional reform, precisely because of their conservatism. So the Prime Minister is holding the trump card. If the Indigenous leaders are not interested in a compromised document, they should abandon any call for constitutional change. Compromise is not antithetical to reconciliation in this instance.

IV. TOWARDS A DOCUMENT OF RECONCILIATION

The Council for Aboriginal Reconciliation is committed to a National Document of Reconciliation to be finalised in the next year. Indigenous leaders are adamant that such a document must be negotiated between them and government and that it must ensure the ongoing need for government to negotiate agreements whenever government-sanctioned activities impact on Indigenous peoples and their lands. There will be no enhancement of reconciliation unless it is accepted that such agreements are not necessarily inimical to the integrity and security of the nation state and are not incompatible with parliamentary sovereignty and responsible government. The United States experience is illustrative. On 11 October 1995, the US Supreme Court heard arguments in *Seminole Tribe v Florida*.⁴ Counsel for the tribe commenced:

Mr Chief Justice and may it please the Court: 121 Indian tribes in 23 States have entered into 137 compacts pursuant to the Indian Gaming Regulatory Act. The Act carefully balances the interests of three sovereigns, the States, the United States and the Indian tribes. The Act provides the States with an opportunity to play a significant role in the scope of Indian gaming within those States. Central to the Act is the duty of State officials to negotiate in good faith with the Indian tribes regarding gaming, and central to the Act is the ability of the tribes to sue the States in Federal Court if the States have not negotiated in good faith.

I was seated beside the Attorney General for Alabama listening to the case. No Justice reacted adversely to counsel's opening remarks; neither did my neighbour. That is just the way these matters are discussed in the United States. It is the law. For many Australians, the idea of negotiated compacts with Indigenous sovereign entities seems fanciful. In other places, they are just the ordinary way of doing business. In the course of the judgment, Chief Justice Rhenquist observed that the states "have been divested of virtually all authority over Indian commerce and Indian tribes".

4 116 S Ct 1114 (1996).

V. CONCLUSION

If the road to reconciliation is to be any smoother in this parliamentary term, both the government and Indigenous leaders need to learn from their mistakes during the *Wik* debate. The Parliament needs to apologise. Prime Minister Howard and Senator Aden Ridgeway need to act together in the national interest and for the well-being of Indigenous Australians. Special legislative measures with discriminatory impact (whether adverse or benign) on Indigenous people ought to be enacted only after negotiation with Indigenous leaders. Indigenous critics of government ought not align themselves too closely with other political parties. Indigenous leaders should be prepared to compromise on questions of Constitutional reform. All parties should then come to the table and negotiate a Document of Reconciliation. At the conclusion of the National Reconciliation Convention, Mr Patrick Dodson issued a call to the nation noting:

Despite the airing of differences on specific issues, the Convention ... witnessed some profoundly unifying statements from political and community leaders who all affirmed support for reconciliation and found common ground in recognising some requirements of reconciliation. These included coming to terms with our intertwining histories, better human relationships and the addressing of disadvantage.

Since the Convention, on the rocky road of government-Indigenous relations, finding common ground has demanded more than both sides have found in themselves or in each other.

5 Communications Section, Aboriginal Reconciliation Branch, Department of Prime Minister and Cabinet, *The People's Movement for Reconciliation: Proceedings of the Australian Reconciliation Convention: Book 1* (1997) p 123.