RECONCILIATION

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Reconciliation is an obligation of justice, not a manifestation of benevolence. It is bilateral, healing the division created by past injustice. Past injustice would be compounded and divisions would be more entrenched by a continuing failure to reconcile and to be reconciled. As reconciliation is a matter for the heart as well as the head, the law cannot achieve reconciliation of and by itself. But it has an important role to play. Injustice is revealed by application of the law in particular cases and, as the law is a mirror of contemporary values, its application can highlight shortcomings in our community morality. Sometimes a development of, or a change in, the law can be fashioned to eliminate the cause of an injustice revealed in a particular case; sometimes the injustice is beyond legal remedy.

Even if the law identifies the cause of a past injustice, it cannot undo the hurt, the alienation, the loss of dignity, the self-abnegation which the injustice (and particularly institutionalised and repetitive injustice) has produced. The law does not provide, indeed cannot provide, remedies for every kind of injustice or for every aftermath of an injustice suffered. It provides remedies only for an infringement of a legal right and its remedies are too blunt to undo all the effects of past injustices. Although, in the absence of reconciliation, injustice festers with the passing of time, in that time there may be such a change in relationships and rights that a remedy for the first injustice would be productive of a later injustice. In such a situation, if a compromise of rights is impossible or inadequate, no legal remedy is available. There may be a moral claim on the State for some form of compensation in those cases.

To recognise the limited role which law can play in the reconciliation between Aboriginal and non-Aboriginal Australians is to avoid false expectations that resort to the courts will cure all past injustices. Disappointed expectations of that kind, like dishonoured political promises, are cruel impositions on the victims of injustice and a massive barrier to true reconciliation. The courts are the protectors of a minority's legal rights, and it would undermine public confidence in that role if it be thought that the courts have the power to achieve reconciliation by decree and alone bear the responsibility for doing so. What the courts can do and have done, when the cases raise the issue, is to identify the

legal cause of a past injustice and, where it is within their jurisdiction to provide some remedy for the injustice, to do so provided the remedy does not infringe the legal rights of others. In recent years, in a series of cases in the High Court, past injustices suffered by Aboriginal Australians have been identified. Sometimes the law has provided some relief; sometimes it has not been able to do so.

Perhaps the greatest detriment suffered by Aboriginal people as a result of legal injustice was their loss of homeland. This loss was described movingly by the late Professor WEH Stanner in *White Man Got No Dreaming*,[1] which I quoted in *The Queen v Toohey; ex parte Meneling Station Pty Ltd*:[2]

> When we took what we call *'land'* we took what to them meant hearth, home, the source and locus of life, and everlastingness of spirit. At the same time it left each local band bereft of an essential constant that made their plan and code of living intelligible. Particular pieces of territory, each a homeland, formed part of a set of constants without which no affiliation of any person to any other person, no link in the whole network of relationships, no part of the complex structure of social groups any longer had all its co-ordinates. What I describe as 'homelessness', then, means that the Aborigines faced a kind of vertigo in living. They had no stable base of life; every personal affiliation was lamed; every group structure was put out of kilter; no social network had a point of fixture left.

It is not surprising that land rights litigation has produced the most controversial judgments: the taking of land from Aborigines during two centuries was identified as a cause of grave injustice that cannot be remedied by restitution of all that had been taken. It led Deane and Gaudron JJ in *Mabo v Queensland [No 2]*[3] to speak of the early dispossession of Aboriginal peoples as a

> conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame.

The supposed legal rule under which this injustice was perpetrated[4] was contemptuous of the Aboriginal peoples as

> so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.[5]

That approach, which underlay the doctrine of *terra nullius*, was firmly rejected and native title was recognized as a title which the common law would, subject to its infirmities, protect. But it was not possible to remedy the injustice

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1 Australian National University Press (1979).
2 (1982) 158 CLR 327 at 354. Hereafter, "*Mabo [No 2]*".
3 (1992) 175 CLR 1 at 104.
4 *Ibid* at 39.
5 *In re Southern Rhodesia* (1919) AC 211 at 233-4.

of dispossession by restitution of land in which inconsistent legal interests had been acquired since 1788. Thus native title was held to be extinguished over land alienated for an estate in fee simple[6]. Although native title could survive over land held under a pastoral lease in Queensland, the rights of the pastoralist were paramount.[7]

The disadvantages which Aboriginal peoples might labour under in securing legal protection for their native title was referred to in the joint judgment in *North Ganalanja Aboriginal Corporation and Another v The State of Queensland and Others*[8]:

> The remoteness of many Aboriginal communities and their lack of familiarity with the legal criteria for determination of native title posed practical difficulties for many people who might be entitled to claim native title. Moreover, the task of tracing the tenure history of any parcel of land during the previous 200 years was likely to be beyond the resources of many would-be claimants.

The right to negotiate under the *Native Title Act* 1993 (Cth) ("NTA") was held to arise as soon as an application showing an arguable case for native title was lodged.

The policy of compulsorily separating some Aboriginal children from their parents was revealed in terrible particularity in the Report of a Commission of Inquiry. The Court acknowledged this awful truth - a truth which *"profoundly distressed the nation"* - in *Kruger v The Commonwealth*,[9] but the Court was unable to hold that the measures under which the separations had been carried out were invalid.

In *Onus v Alcoa*,[10] the Gurnditch-jmara people invoked a statute that was intended to preserve relics of Aboriginal significance for the cultural benefit of all people. It was recognised that the destruction or obliteration of the relics would be a distinctive detriment to the Gurnditch-jmara people. A challenge to their standing to sue was dismissed.

In *Walden v Hensler*,[11] the Aboriginal appellant had been convicted of an offence under the *Fauna Conservation Act* 1974 (Qld) which prohibits the taking or keeping of fauna without a permit. The appellant, in accordance with Aboriginal custom, killed a scrub turkey for his family's food. The High Court confirmed that the killing of the turkey was in breach of the Act but set aside the punishment imposed in the courts below. I said:

> To deprive an Aboriginal without his knowledge of his traditional right to hunt for bush tucker for his family on his own country and then to convict and punish him for doing what Aborigines had previously been encouraged to do would be an intolerable injustice. It adds the insult of criminal conviction and punishment to the

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6 *Fejo v Northern Territory of Australia* [1998] HCA 58.
7 *Wik Peoples v Queensland* (1996) 187 CLR 1. Hereafter, *Wik People's Case*.
8 (1996) 185 CLR 595 at 614.
9 (1997) 190 CLR 1 at 36.
10 (1981) 149 CLR 27.
11 (1987) 163 CLR 561 at 578.

> injustice of expropriation of traditional rights. It can and should be avoided by discharging the appellant absolutely under s 657A.

These cases illustrate both occasions of legal injustice and the limited ability of the Court sometimes to award a remedy that will remove, at least in part, a cause of the injustice. But injustices which have been entrenched by law cannot be cured by merely changing the law. Over centuries, the self-confidence of Aboriginal people was eroded by or in the name of the law. That erosion produced frustration and, on some occasions, an outbreak of violence. *Neal v The Queen*[12] was such a case, the appellant having been convicted and sentenced for an unpleasant attack on a government official managing an Aboriginal reserve. Murphy J graphically described the underlying cause of the appellant's conduct:

> Aboriginal sense of grievance has developed over the two hundred years of white settlement in Australia. Early in the nineteenth century Aborigines were 'being treated with arrogant superiority, often accompanied by considerable brutality'... The plight of the Aborigines was compounded by the introduction of European diseases and alcohol which, in addition to white colonisation, 'contributed to the fragmentation of Aboriginal society and helped to promote the apathetic attitudes erroneously attributed by the Europeans to inferior intellectual capacity'... Aborigines have complained bitterly about white paternalism robbing them of their dignity and right to direct their own lives.

Frustration at Aboriginal powerlessness did not excuse the violence but was a factor relevant to the punishment to be imposed. This was but one of the many criminal cases in which contraventions – often serious contraventions – of the criminal law have been attributable to a diminished self-esteem, a want of self-confidence and a sense of frustration on the part of an Aboriginal offender. Aboriginal self-esteem, self-confidence and the power to cope with the modern world are not easily or quickly achieved. Reconciliation is needed to open the gate through which mutual respect and goodwill may pass.

Lawyers have played and will continue to play a part in effecting reconciliation. They must ascertain whether the state of the law is a cause of injustice and determine whether some remedy can eliminate, completely or partially, that cause. If the remedy lies in a variation of the common law, the lawyer must determine whether it is open to the court, consistently with the judicial function, to develop the law to provide the remedy. If such a development is possible, the lawyer must undertake substantial historical research, analyse precisely the authorities and select a suitable vehicle for raising the issue. If it is beyond the capacity of the court to provide the remedy, statutory intervention may be needed. That involves an engagement with the political branches of government, at least to the point of drawing to the attention of the relevant authorities the possibility of legislative remedy for the perceived injustice.

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12 (1982) 149 CLR 305 at 317-8.

The significance of the impact of our legal system on Aboriginal life and culture is reflected in the terms of the Declaration for Reconciliation produced by the Council for Aboriginal Reconciliation. The second paragraph declares that

> We value the unique status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of traditional lands and waters.

Leaving aside the words "and waters", which have not been the subject of judicial decision, the balance of the paragraph corresponds with the decision in *Mabo [No 2]* – and corresponds, of course, with the undoubted historical facts. The original owners and custodians – the peoples, as distinct from the individual members of the peoples - were the only owners and custodians of the land before adverse titles came to be asserted by Colonial Governments or under Colonial authority.

The third and fifth paragraphs of the Declaration state that

> We respect and recognise continuing customary laws, beliefs and traditions

and

> We acknowledge this land was colonised without the consent of the original inhabitants.

These paragraphs accord with the decisions in *Mabo [No 2]* and the *Wik People's Case* which acknowledge that the content of native title depends on Aboriginal laws and customs which were not obliterated by the establishment of Colonial regimes.

Other paragraphs of the Declaration find support in the adoption of laws prohibiting discrimination on racial and certain other grounds. There is an inadequate public understanding of the impact of law on Aboriginal life and culture. But lawyers are well fitted to explain the close relationship between law and the declared aspirations for reconciliation. When the explanation is accurate, many of the misunderstandings which undermine reconciliation can be dispelled. Lawyers can walk on the "new journey" which the Council for Reconciliation asks us to begin: "We must learn our shared history, walk together and grow together to enrich our understanding."