Looking Back to look forward

I join you in acknowledging the Gadigal people on whose traditional lands we are privileged to meet. Contemplating the future, I first look back on my own involvement with these questions, mainly between 1981 and 1998, and most often in my state of origin, Queensland.

In 1981, I was junior counsel for Alwyn Peter in one of those many horrific murder/manslaughter cases coming out of reserves in far north Queensland. I was stopped in my tracks from celebrating our forensic win when a woman anthropologist/librarian at AITSIS put it to me that we had simply succeeded in withdrawing the last line of support and defence from Aboriginal women who faced such violence on remote communities. Marcia Langton’s report *Too Much Sorry Business* for the Royal Commission into Aboriginal Deaths in Custody ten years later supported the anthropologist’s claims. There was a plea for stronger police presence and greater deterrence in the operation of the criminal law.

In 1982, I had commenced work as legal adviser to the Queensland Aboriginal Co-ordinating Council. I was making my first trip to the Yarrabah Reserve. I was on the public bus from Cairns. I sat next to an Aboriginal man who was a teacher. He came from Yarrabah and still had family there. I asked him if he was returning home, if he worked there, and then, if he would ever consider returning to Yarrabah to teach. He answered “No” to each question, telling me that it was “a big shame job” to return to these communities. This was my first encounter with the brain drain from Aboriginal reserve communities. How could any self-determining community survive and thrive if its best members left with no intention to return?

In the late 80s, I was making periodic visits to the Pitjantjatjara lands during the Bonner Review on the delivery of services. I needed to attend the health clinic one day, and there I met a nurse who came from Palm Island. I asked her why she preferred to work on a South Australian community rather than back home. She explained that it was very difficult to work as a professional in your own community. There are strong kinship demands which you could avoid if you worked elsewhere.

In 1991, during the consultations on the Goss government’s *Aboriginal Land Bill*, I was sitting around a camp fire outside Hopevale, and the anthropologist John Von
Sturmer was joking with Noel Pearson: “I don’t know why you bother about all this land rights stuff. Within another generation all the white fellas are going to have left Cape York and you will have it to yourselves once again.”

In 1995, I made my first visit to the US. I went first to St Mary’s on the mouth of the Yukon River in Alaska. On the afternoon of my arrival, a resident took me to the cemetery and told me the story of the deaths of the three young men who had passed away in recent months. Later I appreciated the insight of her move. While respecting the confidences of the living, she was able to paint the picture of social and human misery in her community, describing the social circumstances that had contributed to these deaths. I was devastated because here was an indigenous community with their land rights, with a modicum of self-determination (more than enjoyed by communities in Australia) and a secure economic base from mining and fisheries. And still, life was dreadful.

Early this year I made my first visit to Indonesian West Papua. In places like Jayapura, Merauke and Wamena, I saw the indigenous people carrying their vegetables to town, sitting down on the footpath, and selling their produce. This was their only participation in the market. The main stores were all owned by non-indigenous persons. I reflected that in some of our Aboriginal communities, the indigenous residents do not even enjoy that degree of participation in the market.

Looking around us now

My NAIDOC celebrations this year commenced with attendance at the 60\textsuperscript{th} birthday of an old friend in Brisbane. At the party was a table of those women who had shared the dormitory days with her at Cherbourg. They were retelling the old stories with plenty of humour and a touch of sorrow. At the end of the night, the birthday girl’s 17 year old son made a speech. He is attending one of the leading private schools in Queensland, preparing to graduate this year.

The week ended with a NAIDOC dinner in Townsville where the community has been doing it very tough in the wake of the Hurley trial following the death of Doomadgee in the Palm Island Police Station. There is now evidence from Mr Hurley that he must have fallen on top of Mr Doomadgee. On the balance of probabilities, did he deliberately elbow or knee Doomadgee in the chest? Did he wantonly use excessive force in trying to get Doomadgee to the cells? These are the unanswered questions. His acquittal following a tainted investigation, an open coronial inquiry and the recommendation of prosecution by a retired judge does not provide the answers. Sir Lawrence Street has said that Hurley’s prior, inconsistent statements about the fall “could be considered by a jury to be untruths told out of a consciousness of guilt and fear of the truth.”

Seeking answers in court, the family and their supporters will further guarantee that never again will the police engage in such a tainted investigation of a death in custody. Such an investigation serves no one’s interests any longer. It works injustice on those detained and their loved ones, and it creates havoc and public odium for the police, especially those suspected of an excessive application of force in making an arrest. There is no doubt that Mr Hurley caused the death of Mr Doomadgee. Hurley was, as his barrister told the jury, the “instrument of another
young man dying and that is a cross he will carry for the rest of his life”. Mr Doomadgee’s family and loved ones are entitled to use the civil law to establish whether the deadly elbowing or kneeing by Hurley was accidental or warranted. If it was deliberate and unwarranted, the family is entitled to compensation.

While respecting the jury’s verdict, we need to acknowledge Gracelyn Smallwood’s remark which reflected the thinking of many Aboriginal people in Townsville and Palm Island: “This has not ended the way we wanted it to, but it has been a win on our slow climb up the Everest of justice.” That slow climb will continue over many peaks in communities throughout Australia for some years to come.

Looking at the Howard Government’s NT proposals

There can be no quarrel with the desire to act urgently to assist children in need. Everyone wants to heed Noel Pearson’s wake up call to the nation: “Ask the terrified kid huddling in the corner when there is a binge drinking party going on down the hall if they want a bit of paternalism.” It has to be the kind of paternalism that actually helps.

The Prime Minister has said, “We are dealing with children of the tenderest age who have been exposed to the most terrible abuse”. He asks, “What matters more: the constitutional niceties, or the care and protection of young children?” It is not a choice of one or the other. There are grounds for suspecting the complex motivations of government which puts the choice that starkly. Canberra cannot care for and protect these children if it rides rough shod over the constitutional niceties of relations with Darwin. Canberra must co-operate with Darwin. In the end, Canberra cannot deliver helpful paternalism to these terrified, huddled children without Darwin’s co-operation.

The children must come first in this analysis. The objective is the provision of a sustainable solution to this national scandal. While there can be no doubting John Howard’s commitment to helping these children, we know that he also has an eye on his re-election.

In 1978, John Howard sat at the Cabinet table when Malcolm Fraser decided that the Commonwealth would intervene in Queensland. The Commonwealth Parliament passed the *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978*. There was conflict with Joh Bjelke-Petersen’s government over two Aboriginal communities, Aurukun and Mornington Island, which had been conducted as Presbyterian missions. In the end, Fraser had to back down because Joh called his bluff. Joh knew that the feds could not deliver teachers, nurses or police on ground for just two remote Aboriginal communities in Queensland. Canberra could not back its rhetoric with resources on the ground.

In those days there was a Commonwealth Department of Aboriginal Affairs. Now there is no Commonwealth department specialising in Aboriginal service delivery or policy. Back then, there was an elected National Aboriginal Conference set up by the Commonwealth Government to advise on these issues. Since the abolition of ATSIC, there has not been any elected Aboriginal advisory body to government in Canberra.
Over the last eleven years many of the key indigenous leaders have felt burnt off by the Howard government.

Now without a Commonwealth Aboriginal Affairs department, without an elected Aboriginal advisory body, and without a bank of trust between the Commonwealth government and a broad cross section of indigenous leaders, Canberra wants to help not two but 60 remote Aboriginal communities in the Northern Territory. The government has appointed the distinguished Western Australian magistrate, Sue Gordon, to chair its taskforce. It is no discourtesy to her to point out that the Northern Territory communities and their leaders are not her native turf.

Canberra cannot reach, let alone help or rescue, the terrified kids huddling in these remote corners without the full co-operation of the Northern Territory government, the Northern Territory community and the Northern Territory Aboriginal leaders. There can be no doubting the rush of the announcement to achieve a political effect for the government before Parliament rose for the winter recess. It is only on issues of indigenous welfare that government could be so reckless and hasty in their policy formation and announcements. You will recall that the government announced that it would be “introducing compulsory health checks for all Aboriginal children to identify and treat health problems and any effects of abuse.” It took only the most rudimentary consultation with the medical professional to highlight how unethical, unworkable and harmful compulsory health checks would be. The government claimed to be acting urgently, without consultation with the NT government and NT Aboriginal leaders, in response to the NT report *Little Children are Sacred.* And yet the authors of that report had said, “In the first recommendation, we have specifically referred to the critical importance of governments committing to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities.”

The political edge is in the announced intention to amend the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Northern Territory (Self-Government) Act 1978*. The Howard government would be much more likely to bring the NT government and community aboard if it were to leave the self government law well alone. It would be much more likely to bring the NT Aboriginal leaders aboard if it were to leave the Land Rights Act well alone.

If the children are to be helped long term, the NT players have to be treated respectfully by Canberra. If Canberra forces hands in the Northern Territory by amending these two key statutes without NT request and approval, there will be good grounds for suspecting that Canberra is not just on about helping the kids.

In the short term, Canberra may be able to co-ordinate a health audit of the children by flying in assistants from throughout Australia. But nothing sustained will be achieved unless Canberra and Darwin work hand in glove. Whatever of the Northern Territory’s past intransigence, everyone now admits the need for urgent action. It would be very regrettable if the children were made to suffer because of an ideological desire to amend the constitutional niceties of self-government and land rights in the Northern Territory. Persons performing functions in accordance with Northern Territory laws already have guaranteed access to Aboriginal communities. There is no need to amend the land rights legislation. Canberra can gain access to the huddled children without winding back the self-government of the Northern Territory.
Canberra will not reach the huddled children without the assistance of the self-governing Northern Territory.

**Looking to the future**

In the last 20 years, the number of Australians identifying in the census as Aboriginal or Torres Strait islander has doubled from 227,433 in 1986 to 455,031 in 2006. There are many factors at play. But we cannot dispute that the self identifying indigenous population is now increasingly urbanised, and for the first time we now have an Aboriginal middle class in this country. We now have more than the token handful of Aboriginal professors, doctors, lawyers, and business executives. Some middle class people do much to help those in their society less well off than themselves; some do not – they tend to look after their own immediate family and concerns.

A generation ago, remote communities were denied their land rights and self-determination. These are no longer the primary issues. In the north of Australia, there is now an abundance of Aboriginal land. Generally, relations with mining companies have improved. Miners know they need to negotiate with the local Aboriginal community. Now the issue is the delivery of services to remote communities.

There is still no treaty or apology. But the next Prime Minister, whoever he is, and whatever party he is from, will apologise. Now that Victoria has a bill of rights, it is inevitable that all states and territories will have some form of statutory bill of rights in the next generation. We will become a republic in the lifetime of most of us here in this room. After the next election, hopefully we will return to the more normal pattern with the government of the day not controlling the Senate. It would be great to see a return to indigenous representation in the minor parties in the Senate, amplifying the indigenous voice inside the legislative chambers of the nation.

Given the diversity of Aboriginal voices and lifestyles now in Australia, we need a national indigenous representative body which is democratic, which is sensitive to local concerns, and which has a mandate to negotiate with government. To face the big issues of the future, government needs a negotiating partner which has legitimacy with the indigenous populace of the country.

In my opinion, the three major items of unfinished business on the road ahead are:

1. The conflict between individual and collective rights
2. Finding the balance between the permissive construction of small, remote outstations and communities and the delivery of basic services to those communities
3. The need to enhance indigenous spirituality so that persons caught between the worlds of the Market and the Dreaming can make sense of the vortex in which they find themselves.

Let me comment on each of these items.

1. Individual and Collective Rights: Even if a bill of rights is to address the collective right of indigenous communities to self-determination, individuals who are members
of these communities will still need to be guaranteed the full panoply of individual rights accorded any citizen regardless of their race. From now on, individual rights will trump collective rights at the instigation of the wronged individual.

2. The “snapshot of the Northern Territory” distributed for this seminar notes that “over the past two decades the Aboriginal population in remote communities has grown by approximately 40%” and that “72% of the Territory’s Aboriginal population lives on Aboriginal land outside major towns.” It also notes an horrific shortfall in the delivery of services: eg. 54% of these communities do not have a local health clinic and 94% are without preschools. Here now is the problem which has been escalating since land rights were first granted.

No matter what the politicians say at a time of emergency, it is not cost effective to deliver the full panoply of human services to small remote communities. Back at the time of the Aurukun and Mornington Island standoff in 1978-9, Joh Bjelke Petersen told the Queensland Parliament:¹

My own concept of social alienation can be illustrated by actions of the Uniting Church in establishing ‘outstations’ many miles from conventional facilities such as hospital, schools, etc, where reversion to the ‘tribal’ pattern of life was encouraged.

School attendances dropped 40% and we cannot accept or tolerate a situation in this State where the young people of a Community are thrust into an isolated situation where, by denial of fundamental education and health care services, and by an ideological indoctrination of Aboriginal separation and separate development, they would by contrast with all other Queenslanders, be seriously impaired in choosing to pursue broader horizons of life in future should they wish to do so. That Aborigines may be socially and educationally equipped to make such a choice in life is the fundamental aim of our Aboriginal Advancement policy.

People cannot expect to live on outstations or in very small remote communities and expect to have the full panoply of government services delivered to them. The acute problem now is that the children in such communities cannot be guaranteed protection from sexual predators by either the State or unaided by their own community members. It is not an option to have community outsiders living in small, unsustainable communities so to protect the children from their own.

Once the dust settles on the present political flurry, there will have to be a negotiated process for determining the viability of outstations and small remote communities which are designed to be more than weekenders or holiday camps. The taxpayers will not stand for delivering the full panoply of services to every community, no matter how small. This is where there will be a need for detailed government co-operation with groups like the Coalition of Aboriginal Organisations. Outside public servants can be sent to remote communities to deliver services; police can be sent to enforce the law; but there will be no long term satisfaction for anyone in commissioning outsiders to live in communities simply to monitor their family and welfare obligations.

3. Without a secure economic base and without assured cultural and spiritual identity, we all know that Aborigines living in remote communities will continue to suffer

¹ (1978) 276 QPD 3153; see F Brennan, Land Rights Queensland Style, University of Queensland Press, 1992, pp. 10-14
acute alienation and despair. I have 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 are 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. I was delighted to hear my co-panellist Kerry Arabena speaking of a need for a return to the sacred. The secularism, materialism and individualism of Australian society are now more the cause of the problems of identity and well being rather than the springs of any solution. This spiritual challenge is something which is never spoken about publicly by our politicians or the media.

Talk of the spiritual challenge from a token white male cleric like myself has previously upset Noel Pearson who hears me as claiming “that unless Aboriginal people can find a way other than ‘secularism, materialism and individualism’ then we are buggered.” In 2004, he had cause to say:

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.

I still think it best to leave my siblings, nephews and nieces out of my public deliberations on the relationship between spirituality and contemporary secularism, materialism and individualism. I continue to assert that without strong spiritual values, Aborigines unable to take up the limited education and work opportunities available to them will continue to find it all but impossible to live in the two worlds of Aboriginal and non-Aboriginal Australia. More recently Noel Pearson has opined, “Aboriginal law, properly understood, is not the problem, it is the solution. When I say Aboriginal law, I just do not mean the laws that prevailed in our pre-colonial classical culture; I mean our contemporary values and expectations about behaviour.”

Those values and expectations which are distinctly Aboriginal will for many Aborigines continue to be informed by the spiritual relationship to land, kin and the Dreaming.

Fifty years ago, the great anthropologist W E H Stanner wrote his essay “Continuity and Change” theorising about the “quite marked disinterest the Aborigines have

---

2 N. Pearson, 2004 Castan Lecture, Monash University
3 Weekend Australian, 23 June 2007
shown and still show in so many kinds of European activity”. He invited his non-indigenous readers to consider a few of the contrasts:⁴

We are deeply interested in futurity. We try to foresee, forestall and control it by every means from astrology and saving to investment and insurance: the Aborigines are scarcely concerned with it at all; it is not a problem for them. Their ‘future’ differentiates itself only as a kind of extended present, whose principle is to be continuously at one with the past. This is the essence of the set of doctrines I have called the Dreaming. Our society is organised by specialised functions which cut across groups; theirs on a basis of segmentary groups….Their is a self-regulating society knowing nothing of our vast apparatus of state instrumentalities for authority, leadership and justice. Ours is a market civilisation, theirs not. Indeed there is a sense in which The Dreaming and The Market are mutually exclusive.

What is the Market? In its most general sense it is a variable locus in space and time at which values – the values of anything – are redetermined as human needs make themselves felt from time to time. The Dreaming is a set of doctrines about values – the values of everything – which were determined once and for all in the past. The things of the Market – money, prices, exchange values, saving, the maintenance and building of capital – which so sharply characterise our civilisation, are precisely those which the Aborigines are least able to grasp and handle. They remain incomprehensible for a long time. And they are among the foremost means of social disintegration and personal demoralisation.

Stanner concludes:⁵

If we tried to invent two styles of life, as unlike each other as could be, while still following the rules which are necessary if people are to live together at all, one might well end up with something like the Aboriginal and the European traditions.

It remains my opinion that it is impossible for most human beings to straddle two such different worlds without a deep, nurtured and nurturing spirituality. Those of us who have never had to straddle two such diverse worlds are not those best placed to advise how to overcome the “social disintegration and personal demoralisation”. Governments which place a deep faith in the Market and in “law and order” policies enforced by instrumentalities of the State may be well intentioned, but unless they consult and work collaboratively with local Aboriginal leaders, they will be sure to make big mistakes, wasting precious resources and forfeiting trust. Now that land rights are assured in the north of Australia, it is time for a negotiated arrangement assuring service delivery to sustainable communities, involving all levels of government and indigenous organisations able to strike a balance between living on country and living securely and productively for the future.

⁴ W E H Stanner, White Man Got No Dreaming, ANU Press, 1979, p. 58
⁵ Ibid., 59