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FIRST AUSTRALIANS, LAW AND
THE HIGH COURT OF AUSTRALIA

AIATSIS
Wentworth Lecture 2010

The Hon. Michael Kirby AC CMG

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INTRODUCTION AND OUTLINE

Professor Mick Dodson, Russell Taylor, Principal of the Institute, Professor Barry Dexter and members of the Wentworth Family, Georgina and Mara, who are here today. Just as Bill Wentworth was always here when his health held out to be present at the presentation of his lecture and to offer a few well-chosen critical comments on the lecturer: something which I expect that Georgina and Mara will stand up at the end of these words and offer to me.

I, like those who have gone before, offer my respects to the traditional custodians of the land. A genuine respect. A respect such as we hear given in New Zealand and not perfunctory. A moment of reflection upon the wrongs that have been done to the indigenous people of our continental land. And a reminder of our obligation, our citizens, to ensure that wrongs are repaired, not just with words, but with actions.

My remarks today, like Caesar's Gaul, will be divided into three parts. The first part will be a tribute to Bill Wentworth because I do not think you should come along to give a named lecture and just ignore the person in whose name the lecture is given. You'd be amazed at how many people do that, but the whole point of the lecture is for us to remember, and take inspiration from, the life of Bill Wentworth and the lives of similar spirits.

Secondly, I propose to say a few words about the time that I spent in the High Court of Australia when issues of Aboriginal law came before the court on a number of occasions. This was just across the paddock here in the great building of the High Court where I was proud to serve for thirteen years as a judge in the final court of this nation.

And thirdly, I propose to say a few words on the issues of the Northern Territory intervention and the case, very little reported in the media, that came before the High Court just as I was about to leave office in February 2009. The case was *Wurridjal v The Commonwealth*. Indeed it was the very last case in which I delivered a decision as a Justice of the High Court. That happened at 2.15pm on the last day of my sitting. It's something that hasn't really been noticed much in the media or in the community generally. Yet it will, I hope, be of interest and of use to be reminded of it. There's not much point in having these great decisions, of constitutional and legal moment, decided in the High Court, if no one knows about them. The media of our country are altogether too concerned about infotainment. They are not sufficiently concerned about matters of justice, of principle, of constitutionality and of law. So I propose in my remarks to try to correct that default.

REFLECTIONS ON THE HON BILL WENTWORTH

First of all to some reflections on Bill Wentworth. I knew him because of my service from 1975 to 1984 as the inaugural Chairman of the Australian Law Reform Commission. I was told that the driveway to my home in those years, which is still the driveway to my home at Rose Bay in Sydney, was, with a driveway to Bill Wentworth's home, the hardest navigational feat that Commonwealth drivers had to accomplish. I see that Georgina and Mara get the point. I never had the pleasure of being invited to Bill Wentworth's home. Yet certainly he was famous, or perhaps more notorious, amongst Commonwealth drivers. I don't think I'll say anymore about that subject in

light of the events that later unfolded in my life. Suffice to say that both Bill Wentworth and I had only the nicest relationships with Commonwealth drivers. They were only too happy to assist us up and down our steep driveways at home and in life.

Bill Wentworth was involved in the project of the Law Reform Commission on the recognition of Aboriginal customary laws. This was a project which was led by Professor James Crawford, one of the most distinguished academic scholars that Australia has produced. He is now Whewell Professor of Law at Cambridge University in the United Kingdom. The report hasn't been implemented in full; not even in large part. Still is the most popular report of the Australian Law Reform Commission (ALRC) if that can be judged by the hits on the ALRC website. It still stands before us as a reminder of the unfinished business of working out the precise relationships between Aboriginal customary laws and the laws of this country.

Bill Wentworth had many ideas on the subject. He made them well known to us. I got to appreciate his quirky, somewhat difficult, informative, but insistent personality which was an unusual one for people in public life.

Most such people, as we know, are too tamed and bland because of their desire to 'wedge' their opponents and to avoid anything that might act to their disadvantage. Bill Wentworth didn't mind what people thought of him. He was more interested in the ideas that he presented. We need more politicians of that calibre.

In a decision to which I was a party in 1998, two years after I arrived at the High Court of Australia, a decision in the case of *Kartinyeri v The*

*Commonwealth*¹, I referred to Bill Wentworth and to his dedication to the cause of the Aboriginal people. The question in the case was whether or not the amendment to Section 51(26) of the Australian Constitution, to remove the exclusion of people of the Aboriginal race from the provisions whereby the Federal Parliament was empowered to make laws with respect to (“people of any race for whom it is necessary to make special laws”), was to be interpreted beneficially. So that “for whom it is deemed necessary to make special laws for people of a particular race” was interpreted as meaning *for the benefit* of them. Or whether it simply meant ‘for’, in the sense of “in respect of” them. So that there was no inference that the laws were only to be laws of a beneficial character. In the end, the majority of the High Court took the second interpretation. They held that ‘for’ meant merely in respect of. It didn’t carry an inference that the amendments of the laws by the Federal Parliament had to be ‘for the benefit of’ people on the ground of their race.

I took a different view. I did so, in part, by reference to the parliamentary record; but also many other sources. My view was partly agreed in by Justice Gaudron. But the other Justices didn’t take the same view. Accordingly, the law of our country is as stated by the majority. Section 51(26) in authorising laws ‘for’ people of any race, for whom it is deemed necessary to make special laws, can include nice laws or awful laws; beneficial laws or antagonistic laws. They do not have to have a beneficial character.

In seeking, contrary to that majority opinion of the High Court, to demonstrate that the purpose of the amendment effected by the great constitutional referendum of 1967 was to ensure that the races power in the Constitution was only to be used beneficially, I drew upon the history of the steps that had

¹ *Kartinyeri v The Commonwealth* (1998 195 CLR 337)

been taken in which Bill Wentworth played a significant part. Part of my reasons for judgment included these words:²

“In March 1966 Mr WC Wentworth, later the first Australian Minister for Aboriginal Affairs, introduced a private member’s bill to amend the Constitution to substitute for the race power in paragraph (xxvi) a new provision, ‘The advancement of the Aboriginal natives of the Commonwealth of Australia’”

I proceeded:³

Mr Wentworth also proposed a new Section 117A of the Constitution. This would forbid the Commonwealth and the States from making or maintaining any law which subjected any person born or naturalised within the Commonwealth ‘To any discrimination or disability within the Commonwealth by reason of his racial origin.’ The proposal contained a proviso that the Section should not operate ‘So as to preclude the making of laws for the specific benefit of the Aboriginal natives of the Commonwealth of Australia.’ One of the reasons given by Mr Wentworth for his amendment was his concern that the deletion of the exclusion of people of the Aboriginal race from paragraph (xxvi) could leave them open to ‘discrimination adverse or favourable.’ He suggested that ‘Power for favourable discrimination was needed, but there should not be a power for unfavourable discrimination.’ His bill was supported by the opposition Labor Party, but it ultimately lapsed.”

Remember at the time Mr Wentworth was a member of the Menzies’ government. According to the entry about him in the *Australian Encyclopaedia*⁴, he didn’t advance far during Mr Menzies’ (later Sir Robert Menzies’) time as Prime Minister, into the ministry. This was because Sir Robert didn’t always agree with the somewhat robust and independent-minded attitudes that Bill Wentworth adopted on a large number of controversial subjects, including the subject of Aboriginal and Torres Strait Islander advancement.

I should mention that Bill Wentworth was not picky and choosy in this respect. During the Second World War, when the Labor Party was in government, he

² *Ibid* at 405, [141]

³ *Ibid* 406 [141]

⁴ *The Australian Encyclopedia* (Aust. Geographic, 6thEd., 1996), 3068. (vol 8).

lost office in a role he had in the military because of the fact that he demonstrated that Sydney in 1942 was extremely vulnerable to foreign invasion. He was immediately punished for being so bold as to raise that issue publicly. He was punished then by the Labor Government. So Labor or Liberal, they both found Bill Wentworth difficult to live with. We need more people of that kind in our Commonwealth because they certainly stimulate the democratic process.

As you know, the 1967 referendum subsequently proceeded to remove the constitutional provisions relating to the exclusion of Aboriginals from the races power. The races power was then left in its pristine state, applicable equally to the Australian Aboriginal people and to the Torres Strait Islander people. The net result was that the power, which was historically inserted in the constitution to allow the new Federal Parliament to make laws which were adverse to the interests of Chinamen (as they were described during the 1890s) became available to be used in respect of the Aboriginal people⁵.

The net result of this change was that the power to make special race laws was available to do good things and not so good things; beneficial things and adverse things. The history of our Commonwealth since 1967 has shown the wisdom of Bill Wentworth's concern. His wisdom in asserting the need to have something in the Australian Constitution that made it clear that, in the light of the history of the terrible wrongs done in a civilised country like Germany during the Second World War in racially designated legislation was such that you had to make absolutely and abundantly clear in the constitutional text that it was only for "advancement of people on racial grounds", or "so that no discrimination or disability may be imposed by reason of racial origin". In short, that Australians should restrict the powers of law makers because law makers will often do beneficial things under a racist

⁵ *Kartinyeri* (1998) 195 CLR 337 at 406-409 [142] – [147]

power. Yet as history has shown, they will sometimes do things which are not beneficial: not beneficial to the people involved and, specifically, not beneficial on the grounds of their race.

So I'm very pleased to be here to honour Bill Wentworth. And particularly glad that Georgina and Mara have come to be present during this lecture. My tribute to Bill Wentworth is sincere and respectful. He was an early and faithful advocate of Aboriginal advancement.

REFLECTIONS ON THE HIGH COURT AND ABORIGINAL LAW

In the High Court of Australia, when I arrived in 1996, the issue of Aboriginal rights and the interface with the law was one of the major factors on the agenda of the court at that time. Remember that the *Mabo* decision, *Mabo v Queensland [No2]*⁶, had been reached by the High Court in 1992. So that was four years before my appointment. There is no doubt that the *Mabo* decision of the Mason court was a decision of the greatest importance for our country. It was crucial for the indigenous people of the country. It was unquestionably a bold decision. It was a decision that took a step that showed foresight, insight and courage. It was a majority decision of six Justices to one. The decision was one which had to overcome a series of earlier decisions about the common law of Australia and a decision of the Privy Council which held that, upon the acquisition of sovereignty over the Australian continent by the British Crown, all pre-existing rights to land of the indigenous people had been expunged and vested in the Crown. And that therefore, no recognition would be given under Australian common law to the interests in land of the indigenous people. Legally speaking, Australia was a kind of *terra nullius* so far as the indigenous people and the laws were concerned.

⁶ (1992) 175 CLR.

How to overcome that long standing series of decisions? How, in particular, to overcome a decision of the Privy Council so holding at a time when the Privy Council in England was the final court of appeal in the Australian judicature? The answer to those questions was provided by Justice Brennan, later Chief Justice of the High Court. In his reasons in *Mabo* at 175 *Commonwealth Law Reports* 1 at 42, Justice Brennan invoked the universal principles of human rights. He said that the earlier decisions of the Privy Council, and of Australian courts, denying recognition to the rights to land on the part of indigenous people was a principle of law which had at its heart racial discrimination. And that, if there was one principle of universal human rights which was accepted by the international community of civilised countries today, it was that a legal system cannot deprive people of basic rights simply on the basis of their race.

This invocation of universal principles of international human rights law in *Mabo* was the key that unlocked the door that barred the way of the High Court of Australia to stating a new principle of the common law in terms which were not infected with racial discrimination. It was decided on that footing by six Justices to one; Justice Dawson dissenting. The High Court in that fashion set aside the old statement of the common law. It embraced a new statement which was one without the flaw of racial discrimination. That, of course, set in train a very large public debate, as is natural and proper in a free democracy. It also set in train large numbers of assertions by pastoral and mineral interests that it would be the end of civilisation as we knew it. That it would destroy investment in the country. That it would mean that nobody would have any certainty in their land interests. That the homes of people throughout the country would be at risk. That it would greatly damage Australia's standing in the international community. In particular, that the international economic community would lose confidence in Australia

because it would make unstable something which every society demands to be absolutely stable, namely legal interests in land.

Nothing of the sort happened. The world accommodated itself to the statement of the new principle of the law in Australia. The economy went on and had a record decade. The Australian community came to appreciate the great injustice that had been done in the earlier statement of the common law. It came to appreciate what a very important decision the *Mabo* decision was. And how proud we could be that the highest court in the land had corrected the errors of insight of earlier judges over more than a hundred years and restated the common law on a basis which was not racially biased.

All this goes to demonstrate, yet again, how important it is to have independent judges in conversation with the elected parliaments. For those who say that elected parliaments will fix up in Australia every wrong that is ever done to any group (and in particular, wrongs done to minorities and especially wrongs done to sometimes unpopular minorities), it's very important for us to always remember *Mabo*. We had 150 years of elected parliaments in Australia before *Mabo* was decided. Australia is a land with some of the oldest continuous elected parliaments in the world. We nonetheless did not correct in our parliaments basic injustices. It took a decision made in the number one court across the paddock from where I'm standing, in the High Court of Australia, by six Justices to one, to do so.⁷ Please keep that in mind when you next hear politicians and the media saying "We must never have a Charter of Rights in Australia. We must never give unelected judges power. We must always keep power in parliament, because parliament always does the right thing." That is not always the case. Parliament often does correct injustices. Usually, it corrects injustices. But

⁷ There were particular statutes, Federal, State and Territory dealing with Aboriginal land rights. However, none of them questioned or corrected the basic premise of the Australian common law.

sometimes a parliament needs a little help from its friends. That was what the High Court did in the *Mabo* decision.

Now I can take neither credit nor blame from the *Mabo* decision. It happened four years before my appointment to the High Court. It was a given by the time I arrived. Yet in the first year of my arrival, indeed in one of the very first cases after I arrived, a question arose concerning the application of the *Mabo* principle to pastoral leases.⁸ Were pastoral leases excluded from the *Mabo* principle? By, the operation of the *Mabo* principle, were pastoral leases cut out from the application of claims for native title or were they not? Ultimately, that question too was argued before the High Court in a decision which was published at the end of 1996 in the *Wik Peoples v Queensland*.⁹ That was a decision which upheld, by majority of four to three, the assertion by the Wik Peoples that the *Mabo* principle applied in pastoral leases. The four in the majority were Justice Toohey, Justice Gaudron, Justice Gummow and myself. The minority were Chief Justice Brennan, Justice Dawson and Justice McHugh.

Had another person been appointed in February, 1996, and not myself, it would have depended on that person to be the deciding vote in *Wik*. But the fact is that I was there. My deciding vote was in favour of applying the *Mabo* principle, so important to me was the essential foundation of the *Mabo* principle as explained in *Mabo* by Justice Brennan.

That was my first exposure to the issue of Aboriginal title and Aboriginal law in the High Court. For our pains, the majority Justices were lambasted in parliament and out of parliament and in the media and in many areas of the community. We were called “a group of basket weavers” by the then Premier

⁸ *Northern Ganalanja Aboriginal Corporation v Queensland* (1996) 208 CLR 1
⁹ (1996) 187 CLR 71.

of Queensland, Mr Borbidge. We were also described as the “kings and queens of Canberra.” We were otherwise excoriated for our decision. Yet the decision was a simple matter of the application of a basic principle of law. It really was simply the application of the *Mabo* principle to new factual circumstances. So it wasn’t a particularly difficult legal decision, at least so far as I was concerned.

After the *Mabo* decision, we had a number of other cases concerned with the application of the *Mabo* case, apart from *Wik*. Those cases included the case of *Fejo*¹⁰ in the Northern Territory which held, contrary to the assertions in parliament and elsewhere that the title of property held in freehold, (that is to say what we normally conceive of as ownership of land) was at task, nut also it was not diminished by the *Mabo* principle. People’s ownership of their homes, whether in the Northern Territory or anywhere else, was safe. That was so held by unanimous court in *Fejo*. There was then a decision in a case of *Ward v Western Australia*.¹¹ It dealt with many other particular aspects of land law. There followed numerous other cases concerned with land and other rights, rights over water and so on, as the court interpreting the *Native Title Act*, as it gave meaning to that Act and to the application of the principles expressed in the earlier decisions. There was a lot of work in the High Court at that time, at the end of the twentieth century, concerned with Aboriginal title. This was inevitable and natural once you accepted that *Mabo* changed the direction in which the law had been travelling and laid down a new principle which required several readjustments of the law of Australia.

There were two other important decisions concerning Aboriginal Australians during my time on the court. One of them was the *Kartinyeri* case which was the case concerning the meaning of section 51(26) of the Constitution that I

¹⁰ (1998) 195 CLR 96

¹¹ (2002) 213 CLR 1

referred to earlier. Was the power by the language and the use of the word “for” confined to beneficial legislation so characterised? Or was it simply at large, meaning ‘in respect of?’ That was a very important decision. It was decided in 1998.

Shortly before I left the court a further an important decision, a constitutional decision, was reached in the court in the case of *Roach v Electoral Commissioner*.¹² Ms Roach was an Aboriginal Australian who had been convicted and imprisoned for a crime of fraud. When she was in prison she decided to do two unusual things. First, she decided to undertake university studies, specifically studies for a doctorate. Secondly, she decided that she didn’t like legislation that had been enacted by the Federal Parliament in 2006, depriving her of the right to vote in Federal elections. She therefore began to look around for someone who would help her to challenge that legislation in the High Court of Australia, asserting that the legislation was constitutionally invalid. The subject legislation changed the long-standing law. It had deprived people from voting in Federal elections if they were in prison. Previously, that legislation had deprived people who were imprisoned and who were serving more than a three years sentence in prison. The new legislation, in 2006, was enacted through the Parliament when the then government gained control of the Senate. It went through, depriving all prisoners of the right to vote.

Material was placed before the High Court showing that very large numbers of people are in prison in Australia for very short periods of time. Often they’re incarcerated because they can’t afford to pay their fines. Therefore, on the face of things, a disqualification from the important right of the franchise for all prisoners seemed to have been a disproportionate response by the parliament to their antisocial conduct. However, the legal question was

¹² (2007) 233 CLR 162

whether or not that was a matter that was left by the Constitution to the Federal Parliament to decide, one way or the other. Ms Roach pointed to the fact that a considerable portion of prisoners, certainly disproportionate to their numbers in the population, were indigenous Australians. She therefore argued that the legislation was disproportionate in effect and that steps should be taken by the court to uphold the right of electors to vote as central to their rights (and in Australia their duties) to take part in the political process for which the Constitution provided. Ms Roach also pointed to various other inconsistencies between taking away the rights to vote of other groups of Australians. She argued that, although our Constitution didn't contain a bill of rights or a specific statement about rights, it did contain very detailed provisions about the elections to the Federal Parliament. Those provisions were written on an assumption that prisoners would take part in the vote, at least prisoners who were not in prison for a lengthy period. And that parliament could not take away the right to vote of all prisoners.

In the end the High Court upheld Ms Roach's argument. I want to pay a tribute to the lawyers who acted on her behalf *pro bono*. When I was a young lawyer I performed a lot of work *pro bono*. It tends to be interesting and exciting. It's generally much more interesting than the high paying work that lawyers perform, much of which is really glorified debt recovery. The lawyers who acted in the case included Mr Ron Merkel QC who had been a federal judge in Victoria and who had been a great friend of Ron Castan QC in turn great friends to Aboriginal causes. Also, Allens Arthur Robinson Solicitors, a very famous and old legal firm who acted *pro bono*.

The *Roach* case is also important for the introduction into Australian law of general legal principles derived from international law. In his decision, in favour of Ms Roach, Chief Justice Gleeson referred to decision of the European Court of Human Rights in a case called *Hirst v The United*

*Kingdom [No2]*¹³ and a decision of the Canadian Supreme Court in a case called *Sauvé v The Queen*.¹⁴ In both cases concerning respectively British legislation and Canadian legislation, the removal of all prisoners from the vote was struck down or disapproved as it was in the case of Australia. The legislation of 2006 was held to be unconstitutional. It was incompatible with the design and implications of the Constitution as to the right to vote. In the result, many of the prisoners in Australia, certainly all of those who were in prison for offences and punishment of less than three years, were given the vote in the Federal Election of 2007. That is the law of this country as it now stands.

Two Justices dissented, Justices Hayne and Hayden. Both of them not only dissented in the result. They strongly dissented over the reference by the majority to principles of international human rights law. They declared that these were completely irrelevant to the consideration of the meaning of the Australian Constitution. The slow but certain, inevitable and predictable impact of international law (and in particular, international human rights law) on the understanding of our legal rights in Australia, and in particular of our Constitution, will come, come ever come. It is inevitable. The case of *Roach* like the earlier decision in *Mabo*, was merely one further step in what I consider to be the right direction.

REFLECTIONS ON WURRIDJAL AND THE NORTHERN TERRITORY 'INTERVENTION'

I now reach the third part of this lecture. It is a part in which I will demonstrate the wisdom of Bill Wentworth in his feeling that if our parliament in Australia were to be given a power to make racial laws, it should be limited to racial laws for the *advancement* of the race concerned or at least not to *discriminate* against the race concerned. That approach, as proper to racial laws, would

¹³ (2005) 42 EHRR 41

¹⁴ (2002) 35SCR 519 at 585 [119]

seem to be borne out by the terrible wrongs that were done in Germany under the Nuremberg Laws by the Nazi regime and done in South Africa after the advent of the government of Dr Verwoerd and the National Party in South Africa during the apartheid years. At that time, laws were enacted to discriminate against black people on the basis of their race and to reduce their dignity and to diminish their legal rights.

The case of *Wurridjal v The Commonwealth*¹⁵ arose in the High Court of Australia on a very technical legal issue. It arose under a process called demurrer. Demurrer is a process that the English law devised for the purpose of allowing a party, who is sued in a court, to respond to the suit by saying, in effect, “Even if everything you say in your statement of claim is accepted factually, you have no legal foundation for the case. Therefore, I should not be troubled and harassed by your case. It should be stopped.” You’ll see therefore, that it’s quite a sensible procedure. It’s designed to stop people being troubled by expensive, time consuming and sometimes stressful litigation if the other party doesn’t have a legal leg to stand on. So a demurrer was brought when Mr Wurridjal and his colleagues sought a declaration from the High Court of Australia that the Northern Territory intervention legislation was constitutionally invalid.

The challenge to the Northern Territory legislation was brought before the High Court in 2008. It was defended in the High Court by the Solicitor General acting on the instructions of the present Rudd Federal Government. The court, in the usual way of the development of argument in these things, was taken most carefully through the language of the legislation¹⁶ and through the parliamentary record, and to certain documents which preceded the enactment of the intervention legislation. Those documents included the

¹⁵ (2009) 237 CLR 309

¹⁶ *Northern Territory National Emergency Response Act 2007* (Cth)

report of a special committee in the Northern Territory of Australia concerning the protection of children, which had been written by a board of inquiry, co-headed by Mr Rex Wild QC. The Committee had suggested that steps needed to be taken to protect children in Aboriginal communities in the Northern Territory from instances of child abuse and from lack of support education and nutrition.¹⁷

The report which Mr Wild and his colleagues produced insisted, repeatedly, on the crucial importance of consulting the Aboriginal community before remedial steps were taken. It insisted that such consultation was an absolute prerequisite to the proper introduction of remedial laws and policies. The speed with which the legislation was introduced, some eight weeks before the 2007 federal election, would be enough to make one concerned about the legislation and about its true purposes. It could, of course, reveal a somewhat belated interest of the then government and parliament to respond to the report of the Northern Territory. However, since self government in the Northern Territory, it would have been normal, at least in the first instance, for the matter to be considered by the government and legislature of the Northern Territory. In that way, the responsibility taken for consultation and steps to respond to the Northern Territory report locally, in that territory of the Commonwealth formally concerned.

The speed of the Federal measures has been described by the President of the Law Council of Australia as “outrageous and unsettling”. It was a speed to which I referred in my reasons in *Wurridjal* and, in particular, to the fact that so hasty was the legislation that it was drawn up in a matter of days of its announcement. It encompassed about 300 pages of printed text. Although a perfunctory enquiry was conducted in the Senate, it was simply impossible,

¹⁷ Northern Territory, Board Inquiry into the Protection Aboriginal Children from Sexual Abuse, (2007) “Little Children Are Precious” See *Wurridjal* (2009) 237 CLR 309 at 398 [227].

under the impetus of the haste that was demanded by the then government (and in particular by the Prime Minister, Mr John Howard, and the then Minister for Aboriginal Affairs Mr Mal Brough), so that it became pretty plain, that no real attention would, or could, be paid to valid criticisms of the legislation including by the Aboriginal communities concerned.

The legal point that was ultimately contested in the High Court, as I saw it, was whether there was a valid legal argument on the part of Mr *Wurridjal* and his colleagues concerning their contention that the imposition of five year compulsory leases upon Aboriginal communities in the Northern Territory failed to accord with the obligations of the Australian Constitution. In this respect, unusually, the Constitution contains a human rights provision. That human rights provision says that if there is, putting it generally, to be a federal acquisition of property, it can only happen in this country on “just terms”. Such a provision doesn’t apply to State legislation. An earlier decision of the High Court, in a case called *Teori Tau*¹⁸, had held that it didn’t apply to Territory acquisitions by the Commonwealth. Therefore, the first contention of the Commonwealth, in support of its demurrer, was that the demurrer should be upheld because the constitutional requirement of “just terms” did not apply to the acquisition of Mr *Wurridjal*’s land and the land of others in the Northern Territory and their property there. This was because they were in the Territory. Therefore, they weren’t covered by the general provision which only covered specifically federal legislation, operating otherwise than solely in the Territory.

If *Teori Tau*, the decision of the Barwick court, stood, then that would have been a perfectly valid and fatal demurrer point. It would have knocked out the case. It would have been revealed, at least so far as to claim based on the failure to accord ‘just terms’ was concerned, that it was fatal to the case.

¹⁸ *Teori Tau v Commonwealth* (1969) 119 CLR 564

However, in a number of earlier decisions doubt had been cast in the High Court about the correctness of the *Teori Tau* decision. In a case called *Newcrest*¹⁹, decided in 1996, the year of my arrival in the High Court, the High Court had said that the principle in *Teori Tau* was now to be seen a dubious principle²⁰. Four of the judges of the court had cast doubt on it. However *Teori Tau* hadn't been formally overruled.

So that was that the preliminary question that had first to be decided. On that question, a majority of the High Court (Chief Justice French, Justice Gummow, Justice Hayne and I) held that *Teori Tau* was wrongly decided. Therefore, the 'just terms' requirement did apply to legislation applicable in the Territory, just as much as to federal legislation applying anywhere else in Australia. So that ruling knocked away the first and primary (and, one might think, chief) argument of the Commonwealth that the legislation for the Northern Territory intervention didn't have to give 'just terms' and therefore that the claim of complaint about the failure to give 'just terms' was not legally tenable. It was irrelevant.

That ruling drove the parties to the second line of argument. The second line of argument was that there is a distinction in the Australian Constitution in the requirement for 'just terms.' Pretty clearly the basic provision was borrowed from the provisions of the Fifth Amendment to the United States Constitution. The Fifth Amendment is part of the Bill of Rights of the United States Constitution. It contains a specific statement in the United States that if your property is taken by the federal government or under the federal legislation, the government must give "just compensation". The distinction between the American requirement to give "just compensation" and the Australian requirement to give "just terms" was a distinction drawn to notice by that great

¹⁹ *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 561, 613-4, 652: c/-561.

²⁰ *Wurridjal* (2009) 237 CLR 309 at 344 and 359 [86] per French CJ; 385-8 [179-189] per Gummow and Hayne JJ; 419 [287] per Kirby J.

judge of the High Court of Australia, Justice Dixon, in a case called *Nelungaloo Pty Ltd v The Commonwealth*²¹ some 40 years ago. He said that, if it had been intended to require only that the Federal Parliament provide for “just compensation”, it would have been so easy for the Australian founders just to copy the American provision. Instead, a nuance was introduced, with a requirement that a person whose property is taken has to be given “just terms”.

In this way the second question in *Wurridjal* was what was the requirement of ‘just terms’ in the type of legislation that was under consideration there for the Northern Territory intervention? Specifically the submission was put that “just terms” required fairness in dealings. It therefore required not just that the Commonwealth provide money (as would be required by “just compensation”), but that the Commonwealth must, in a way appropriate to the case, engage in proper consultation and prior discussion in order to ensure the provision of “just terms”. The Commonwealth contested this argument. It said “just terms” and “just compensation” meant roughly the same. In any case, that “just terms” had been provided. Certainly money compensation was provided. Still in my opinion, it was at least legally arguable that the Aboriginal interests could maintain a contention that they had not been given “just terms”. Specifically so because they hadn’t been consulted at all when such a radical intrusion was authorised by federal law into their peaceful enjoyment of their property rights.

In the course of my reasons I said this:²²

“If any other Australians selected by reference to their race suffered the imposition on their pre-existing property interests of non-consensual five year statutory leases, designed to authorise intensive intrusions into their lives and legal interests. It is difficult to believe that a challenge to such a law would fail as legally unarguable on the ground that no

²¹ (1948) 75 CLR 495 at 569. See *Wurridjal* (2009) 237 CLR 425 at 388 [190]

²² (2009) 237 CLR 309 at 394-5 [214]

property had been acquired or that just terms had been afforded, although those affected were not consulted about the process and although rights cherished by them might be adversely affected....the Aboriginal parties are entitled to have their trial and day in court. We should not slam the doors of the court in their face. This is a case in which a transparent, public trial of the proceedings has its own justification”.

I therefore supported the order that the demurrer should be overruled. The majority rejected that contention. They gave effect to the demurrer and so effectively terminated Mr Wurridjal’s claim as legally unarguable. In the course of his reasons, Chief Justice French, who had only been at the court for a matter of weeks when the *Wurridjal* case was decided, wrote this:²³

“The conclusion at which I have arrived does not depend on any opinion about the merits of the policy behind the challenged legislation, nor contrary to the gratuitous suggestion in the judgement of Justice Kirby is the outcome of this case based on an approach less favourable to the plaintiffs because of their Aboriginality.”

I responded to this in my opinion:²⁴

“The issue for decision is not whether the approach of the majority is made on a basis less favourable because of Aboriginality,”

With a footnote to Justice French’s reasons,²⁵

“It is concerned with the objective fact that the majority rejects the claimant’s challenge to the constitutional validity of the federal legislation that is incontestably less favourable to them on the basis of their race and does so in a ruling on a demurrer. Far from being gratuitous, this reasoning is essential and, in truth, self evident. The demurrer should be overruled.”

Earlier in my reasons I had said this:²⁶

“History and not only ancient history teaches that there are many dangers in enacting special laws that target people of a particular race and disadvantage their rights to liberty, property and other entitlements

²³ (2009) 237 CLR 309 at 337 [14]

²⁴ (2009) 237 CLR 309 at 395 [215]

²⁵ (2009) 237 CLR 309 at 395 [215] continued

²⁶ (2009) 237 CLR 309 at 393 [209]

by reference to that criterion. The history of Australian law, including earlier decisions of this court, stands as a warning about how such matters should be decided. Even great judges of the past were not immune from error in such cases. Wrongs to people of a particular race have also accord in other courts and legal systems. In his dissenting opinion, in Falbo v United States²⁷, Justice Murphy of the Supreme Court of the United States observed in famous words that the “law knows no finer hour” than when it “protects individuals from selective discrimination and persecution”. This court should be specially hesitant before declining effective access to the courts to those who enlist assistance in the face of legislation that involves an alleged deprivation of their legal rights on the basis of race. All such cases are deserving of the most transparent and painstaking of legal scrutiny.”

The reference in my reasons to “history and not only ancient history teaches”, was a reference to the very words of Justice Dixon in the *Communist Party case*²⁸, the case in 1951. It is certainly one of the greatest decisions of the High Court of Australia. There the High Court struck down as unconstitutional the legislation of the Menzies’ Government which purported to dissolve the Communist Party of Australia and to impose on Australian communists various disadvantages in their civil liberties. Still, my words were to no effect. The *Wurridjal* case failed. The Northern Territory intervention legislation was upheld. In substance, it still operates.

THIS IS WHAT WE SAID: ABORIGINAL VOICES

Recently I was sent a book. The book is titled *This is What We Said*. It is a book in which Aboriginal people and others give their views on the Northern Territory intervention. It’s as well, at this time, when the legislation is again before the Australian Parliament, for us to reflect upon some of the words that are expressed in that book. Our chair here today, Professor Mick Dodson, Australian of the Year for 2009, said “The intervention is a bully boy approach handed with no respect to the Aboriginal people”. In other statements, Mr Malcolm Fraser, former Prime Minister and Liberal leader said:

²⁷ 320 US 549 at 561 (1944)

²⁸ (1951) 83 CLR at 193

“The intervention was based on old fashioned paternalism, an arbitrary process that of course implied no respect for the people that one was trying to help, no partnership and that someone in Canberra knows best.”

Professor Larissa Behrendt, a most notable scholar and leader in the indigenous community, but also in the law generally, said;

“The profound flaw of the intervention package is that the whole approach is predicated on dealing with the symptoms, rather than the causes of dysfunctional Aboriginal community.”

Mr Rex Wild QC, who was co-chair of the Committee into abuse of children and whose report was given as the reason for exceptional and rushed federal legislation for the “intervention,” wrote:

“Why is it that after all of the reports, it’s now necessary to move in a patronising, paternalistic way which is the very same thing that has caused all the difficulties in the last 200 years?”

Sir William Deane, a past Governor General said;

“Indeed, in seeking to advance true indigenous reconciliation or to address the awful disadvantage which still afflicts our country, adequate and informed dialogue with full indigenous participation is not only desirable at every stage, it is absolutely essential and let me digress to express the hope that that unfortunate word ‘intervention’ will disappear from our language, at least as far as government policies affecting indigenous Australians are concerned.”

REPORT OF UN SPECIAL RAPPORTEUR ANAYA

After the change of government, a Special Rapporteur of the United Nations, Professor James Anaya (who is the Special Rapporteur on the situation of Human Rights and Fundamental Freedoms of Indigenous People), came to Australia. With the assistance of the Australian government, he conducted his enquiries and a detailed examination of the situation here. His report, which was produced in February 2010, contained what can only be described as an extremely critical review of the enactment of the intervention legislation;

and of the haste and lack of consultation that attended its enactment. It also described the serious discrimination that was involved in the detailed provisions of the legislation and of the fact that, in order to justify such serious discrimination as would warrant such exceptional measures, it was essential for the proponents to do so to a very high standard. And to establish that it was proportional and necessary to attain a valid objective.

Professor Anaya accepted that it was part of the obligations of the Australian government, and indeed governments everywhere, to protect people (and in particular women and children) from cases of abuse. And that that was actually part of the obligation of the Australian government to ensure the upholding of the human rights of those Australians who were so affected. However, Professor Anaya, in his report, evaluating the responses of the Australian government, said that, whilst reiterating the need to purge the legislation of its racially discriminating character, the government of Australia was obliged by international law to conform to the relevant international standards and to do so “through a process genuinely driven by the voices of the affected indigenous people.”

It is a source of pain for many Australians that, despite reports of this kind and despite views that have been expressed in Australia by many distinguished and thoughtful observers since the Northern Territory intervention legislation, such remedial steps as have been taken, have not completely dealt with the paternalistic and discriminating legislation that was enacted by the Australian Parliament in its previous manifestation. One would hope that, even now, the prudent, cautious and balanced words of the United Nations Special Rapporteur will be given very close attention. Closer attention than it has to date, in the final enactment of the laws that remove the discriminating provisions that exist in the legislation. This does not seem to be in the amendments to the intervention legislation that are now being

proposed. This is a matter where our national honour and reputation are at stake. More fundamentally, it's a matter where the human rights of our citizens are at stake and the human rights of our indigenous citizens in particular. If you read this book, *This is What We Said*, you will see the sense of disquiet which the Special Rapporteur says is "growing in its intensity".

HOLDING OUR TONGUES, LIFTING OUR VOICES

So these are issues that should concern us today as Australian citizens? Of the members of the communities that are affected; of the way that the sense that they feel that they have been dishonoured by being treated in a manner that is second class; of the way that they have been dishonoured by having signs placed outside their communities with explicit statements about sexual offences; of the imposition of fines and other offences for bringing alcohol and pornography into the place. The members of the Australian Aboriginal communities in the Northern Territory they have been treated in a way which, if it were ever done to Australians of Irish ancestry or Australians of Greek ancestry or Australians of Chinese ancestry, it would be a national outrage. I commend to those who have not seen it, the words that were not sought or asked for before the legislation was enacted, and that have still not been sufficiently heard in this land since the legislation was enacted. In *This is What We Said*. Australian Aboriginals and others at last give their views on the Northern Territory intervention. These are words that we should hear and that our parliament should hear. They are words that our leaders should hear. These are the words that speak to us, the citizens of Australia. In my opinion, it is essential that our community should hear those words, reflect on them, attend to them and act on them.

I'm sure that, if Bill Wentworth were here at this lecture today, although it was in his nature always to try to find faults and to find inadequacies and to find defects in what was said by the lecturer (many of which he would be able to

find in these few remarks of mine), that he would nonetheless agree with the central message of what I have had to say. People should read the *Wurridjal* case. Not enough Australian people bother. Not enough Australians know about the case. Not enough Australians know about the working of the court. What do they talk of in the media about the High Court of Australia? It's generally matters of infotainment and personality. Trivia, mostly. It's not matters of substance. On matters of great substance, there is silence. Well, I've come here today to talk on substance and to break the silence. Not to unnecessarily recontest the matters that were decided in the *Wurridjal* case. It's all there in writing and on the internet. Nothing I can do can or say now will add to those words. They are there. But attend to them. Read them. Listen to them. Listen to the debate which was expressed in the High Court on matters of high principle. Think about them. And have your say.

I hope if those words of mine are listened to and if the words of the Aboriginal people of the Northern Territory are attended to, that our parliament and our people will take action without more delay. This is a great affront by our laws and under our Constitution in Australia. It should burn into our consciousness with "growing intensity". We should finally right a large constitutional, legal and ethical wrong. So far, I do not see the will to do this in Australia. But one day we will see these issues more clearly. And then the *Wurridjal* decision and the intervention legislation will be sources of further shame. And the greatest shame will be upon those who held their tongues when they should have lifted their voices and acted with all the resolution that was within their power.
