Speech to be delivered to Commonwealth Law Conference, 23rd March 2017, Melbourne Convention and Exhibition Centre

*This is a shortened version of my book published by Federation Press called *Treaty and Statehood: Aboriginal self-determination*.*

1 The statistics paint a picture of the poor condition of Aboriginal people in Australia

- In 2012-2013, the infant mortality rate for Aboriginal children was almost twice that of white children – 6.2% cf 3.7%;
- Aboriginals were 4 times more likely to be hospitalised for chronic conditions compared with non-Indigenous Australians;
- Less than half as many Aboriginals completed high school compared white children; 25% cf 52%
- In 2012/13, youth detention rates were 24 times higher for Aboriginals;
- Aboriginal youth suicide is almost twice the national average -Productivity Commission;[1]
- According to the Australian Bureau of Statistics, at 30 June 2015 there were 36,134 prisoners in Australian prisons, of which 9885 (27%) were Aboriginals and Torres Strait Islanders. Indigenous peoples are 3 per cent of the Australian population.

These statistics reflect a powerless, poor and alienated people. Change is badly needed. It must be fundamental change, though, not peripheral change. New policies affecting Aboriginal land ownership, an economy, power and certain freedom to create one's own destiny, are required.

Social improvements flow to a people who are stable and contented, and empowered with a sound economic base. A people denied justice, discriminated against and alienated, and powerless, are not likely to present at the top of the heap on health, housing, employment and education statistics.

2 The government's response

is to tackle social and health conditions, both important areas to be worked on. But there is no effort to empower Aboriginal people, no economic plan and no self-determination policy. Little wonder then, in February this year, the Prime Minister reported to parliament that only one of seven targets to improve outcomes in indigenous health, education and employment is on track to be met.

Programs such as the current 'Close the Gap' cannot make improvements across the board as it leaves fully in place all the structures, institutions and decision making arrangements that have continually let Aboriginal people down. The government is big on cashless welfare

cards and welfare quarantining that sees those Aboriginal people subjected to them even more bewildered about where this will all lead. Once placed under these imposed schemes, Aboriginals are trapped until they can prove to the white people they are to be trusted. Whatever justification there is for such punitive measures, one result is further Aboriginal resentment towards, and distrust of, government.

Australian officials cannot claim to be unaware that systemic disadvantage requires a holistic set of remedies. In 1990, the Royal Commission into Aboriginal Deaths in Custody concluded that:

> 'running through all the proposals that are made for the elimination of …disadvantage is the proposition that Aboriginal people have for two hundred years been dominated to an extraordinary degree by the non-Aboriginal society and that the disadvantage is the product of that domination. The thrust of this report is that the elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands.'

Take the issue of which law is the most appropriate to apply to discrete Aboriginal communities.

The official Australian position is that there is one law for the country, despite there being federal laws, six state laws, two territory laws and local government jurisdiction. There is no room for recognition of Aboriginal law. The theory seems to be that Aboriginals must conform to white law on a policy of crash or crash through.

The 2006 West Australian Law Reform Commission report into Aboriginal customary law noted that while traditional law is still strong in the hearts of urban Aboriginal people, it is not as applicable in day-to-day activities as it is with Aboriginals in remote communities:

for some Aboriginal people, particularly those living in remote communities, Aboriginal customary law is clearly a daily reality and it is Aboriginal law, not Australian law, which provides the primary framework for people's lives, relationships and obligations.[2]

Placing more and more police in these Aboriginal communities to apply white law fractures the fabric of communal self-rule – people become unsure whether to obey Aboriginal law or the young constable clothed in uniform. This leads to a break down in law and order, communal responsibility and obligation, and then dysfunction. When the signs of dysfunction emerge, mainstream media have a field day broadcasting fights between Aboriginals (described as 'riots'), the state sends in more troops, adding to the break-down of social cohesion.

The 2003 Northern Territory Law Reform Committee added that a category of people existed on the question of jurisdiction:

[2] Page 229 Treaty & statehood

Regrettably, some Aboriginal communities have become dysfunctional, in the sense that *neither* Australian law nor traditional law is properly observed. The reasons for this lie in a whole host of economic and social factors.[3]

In its Final Report on Aboriginal Customary Laws (Project 94), the Law Reform Commission of Western Australia stated:

The relevance of Aboriginal customary law is not that it contributes to the abuse, but rather that it is the destruction of Aboriginal customary law and the breakdown of traditional forms of maintaining order and control that has impacted upon the extent of violence and sexual abuse in Aboriginal communities.[4]

We know that legal aid alone cannot reduce disproportionate imprisonment rates, because legal aid deals with the after effects, not the source of the problem. If dispossession, despair, poverty and powerlessness are root causes of too much police contact, too many convictions and over use of imprisonment, providing lawyers can only have a marginal impact in reducing the high imprisonment rates of Aboriginals. Legislation is needed to restrict imprisonment of Aboriginals to only serious offences or where the person was a danger to others, or where no alternative to imprisonment scheme was available. Such legislation would bind governments to funding community programs to divert Aboriginals from prison. The sentencing discretion of the courts would thereby be expanded. It is one practical way to reduce the effects on Australian society and Aboriginal people of high imprisonment rates.

3 **Leadership by the people**

Australia has been slow to realise that outsiders cannot show a distinct people the way to a better life. The people themselves must lead. They must drive the necessary reforms with government assisting, not the other way around. Aboriginal people are understandably suspicious of government directives and government initiated programs. The world has come to see that self-determination is another word for people choosing their own destiny, not having someone else decide for them. Che Guevara fatally learnt that in Bolivia.

Yet Australia persists with its white Australia policy into which Aboriginals are meant to fit. It hasn't worked for two centuries and is not showing much success at the moment.

As a nation, Australia must be big enough to make room for Aboriginal self-determination. Australia and Australians want to maintain what they have. There is a public willingness to support reform that Aboriginals seek provided the system is not destroyed. Fair enough.

The compromise might be that so long as the institutions that have well served white Australia since 1901 are maintained to foster the lifestyle and vales of white Australia; so long as people keep their houses, their jobs and their lifestyle, there is plenty of land left over to be returned to the original owners, plenty of room for a sharing of sovereignty and

[3] Ibid p230
[4] Ibid p263

empowerment, and plenty of scope for the two peoples to respect each other's rights and live peacefully together.

4 Treaty as a mechanism for changing the relationship

In August 1996, Australian Governor-General Sir William Deane said that Australia stands alone as the only Commonwealth country not to have signed a treaty with the original people whose lands were taken.

It is pleasing to hear the states of Victoria and South Australia, and the Northern Territory, are willing to enter into a treaty with Aboriginal people. The alternative Prime Minister, Bill Shorten, said last year he was up for a treaty.

Keeping in mind that land, empowerment, an economic base, and guarantees of cultural protection hold the keys to a successful Aboriginal future, treaties and designated seats in parliament are key mechanisms for achieving success. If Australia really wants Aboriginal people to enjoy self-determination within the constitutional framework of Australia, it must be prepared to give ground. So far it has refused, offering Aboriginal people individual access to the laws and institutions of Australia. There is no offer of structural change and accommodation. Aboriginal people require the tools that every society needs to prosper: security of tenure, empowerment, an economic base and the freedom to develop as a society.

How then could an agreement maintain white Australian society and its benefits while accommodating essential Aboriginal needs? In my book on Treaty and Statehood, I suggest a process of theoretical agreement which, if accepted, could be implemented in various ways.

The first step in this process might be to theoretically restore to Aboriginal people all we had before the invasion in 1788.

Then, exclude from that list those things that are just not practical today, or which interferes with the needs of 24 million non-Aboriginals. What is left over after the exclusion process is complete, should be accommodated.

The legal mechanism could be simple legislation described as a treaty or something else. The label is not as important as the content.

The likely result would be:

- All crown lands are returned in ownership to Aboriginal people. The exception would be crown lands required by governments for utilities such as power generation and water supply and such services. Recreational areas could be owned by Aboriginals subject to a public right of access;
- Discrete Aboriginal communities could be vested with state government powers. This would enable them to reconstruct internal political authority, re-stablish customary laws, take charge of education, health delivery and community services, garbage collection, raise taxes, manage the environment and land use and planning. Such powers would be exercised subject to the Australian constitution;

- Empowerment could be through designated seats in parliament – somewhere between 8 and 12 Senate seats out of the 226 federal seats, is not too much. A national Aboriginal body elected by Aboriginals could take charge of the $35m Aboriginal Affairs budget and set priorities for improving conditions.

Aboriginal Senator Pat Dodson said -

> 'The challenge for Indigenous peoples will be to define what it means to be truly free – not just from a state of disadvantage, oppression and historical domination but in our hearts, minds and being. Amongst other things, this will require us to think critically about who we are, what we aspire to and how we are going to achieve this.'

A properly crafted modern treaty might answer Pat's challenge. It would free Aboriginal people from being 'done to.' For the first time in 200 years we could free to manage ourselves, prosper from our rich heritage and culture, and look ahead with optimism instead of gloom.

The vision I have is of a healthy, vibrant Aboriginal people living harmoniously with the Australian people. It is admittedly idealistic to imagine different peoples sharing a continent in full cooperation and with mutual respect, but ideals are like the stars: we may never reach them, but like the mariners of the sea, we chart our course by them.

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