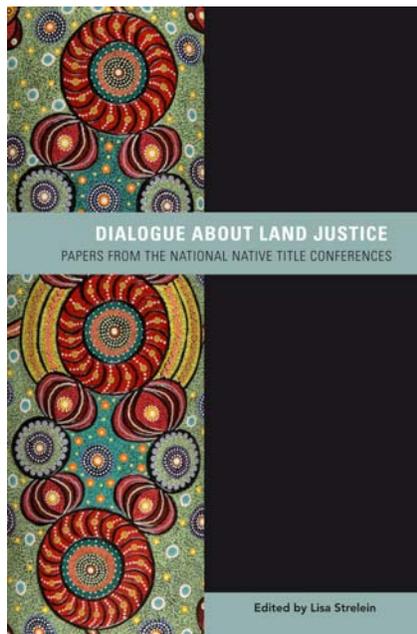


# Teachers' Notes: *Dialogue About Land Justice*

Aboriginal Studies Press



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# DIALOGUE ABOUT LAND JUSTICE

*Papers from the National Native Title Conference*

## TEACHERS' NOTES

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## Introduction to the teachers' notes

### The text

Strelein, L. (Ed.), *Dialogue about land justice; papers from the National Native Title Conference*, Aboriginal Studies Press, Canberra, 2010.

### Presenting the editor



Dr Lisa Strelein is the Director of Native Title Research Programs at AIATSIS. She holds degrees in Law and Commerce and has been at the forefront of the native title debate in Australia. She convenes the annual Native Title Conference and is an Adjunct Professor with the Australian National University's National Centre for Indigenous Studies. Dr Strelein's research is concerned with the role of the law in governance of Indigenous peoples' rights, with a focus on native title.

### How to use these notes

*Dialogue about land justice* presents teachers of Aboriginal Studies and Legal Studies with opportunities to explore the issue of native title at an advanced level. These teachers' notes have been developed to engage students in the current debate. The conference papers are suitable for study in a range of disciplines – including Stages 5 & 6 Aboriginal Studies, Legal Studies and Australian History.

This program has been specifically designed to meet certain requirements of the NSW Board of Studies' Stage 6 HSC Aboriginal Studies course. The notes present a guided study of the text and the issues it raises. A range of questions, discussion activities and extended writing tasks are presented, along with teaching suggestions. Research skills are discussed through the program, with opportunities for students to develop their own

research skills and techniques in their chosen topic area. Many of the tasks are suitable for homework or extension work.

### **Syllabus links**

Teachers are encouraged to use this program as a case study in the HSC Aboriginal Studies course to meet the requirements of Parts II and IV. Teachers may use the activities presented in the program as means of guiding research methods, the key requirement of the Major Project. The program is also suitable for use to fulfil the requirements of Part III of the HSC Legal Studies course. Students are required to complete two study options. This program meets the outcomes designated for **Option 4: Indigenous peoples**. The program provides opportunities for detailed study of the history of native title policy and process, with a focus on developments occurring within the last ten years.

### **Aboriginal Studies (Stage 6 HSC course)**

#### **Course Description**

The HSC course provides for in depth study of legislation, policy, judicial processes and current events from the 1960s. During the course, students will undertake consultation with Aboriginal communities and will study the course through the experiences of national and international Indigenous communities. Students apply research and inquiry methods through the completion of a major project.

#### **Part I – Social Justice and Human Rights Issues**

The HSC course aims to provide an in-depth knowledge of legislation, policy, judicial processes and current events from the 1960s.

During the HSC course, students and teachers will undertake consultation with the local Aboriginal community. In the HSC course a variety of national Australian Indigenous communities and international Indigenous communities may be studied.

#### **Part II – Case Study of an Aboriginal community for each topic**

Aboriginality and the Land – the Land Rights movement and the recognition of native title; government policies and legislation; non-Aboriginal responses.

### **Part III – Research and Inquiry Methods – Major Project**

Application of research and inquiry methods.

#### **Outcomes**

A student:

H4.1 investigates, analyses and synthesises information from Aboriginal and other perspectives

H4.2 undertakes community consultation and fieldwork

H4.3 communicates information effectively from Aboriginal perspectives, using a variety of media

H4.4 applies ethical research practices.

#### **Background**

The Major Project is to be a topic of the student's own choice, negotiated with their teacher and Aboriginal community members, and should be related to the course. It will allow students to apply their knowledge and skills in acquiring, processing, communicating information, and participating in community consultation, as learned in the Preliminary course.

While the Major Project will be an original piece of work, published materials should be used to provide students with background information and raw data. A project proposal should be submitted before the teacher gives the student approval to begin their project. This will ensure that students have chosen an appropriate and manageable topic that can be explored within the bounds of consultation with Aboriginal people.

The Major Project should not commence before the start of the HSC course and should be completed by the end of the second term of the HSC year. It will consist of two sections – the log book (including evidence of community fieldwork), and the final presentation.

#### **Content**

Students learn about:

**Acquiring information**

- *outlining methods of investigation and identifying potential resources*
- *applying a project proposal*
- *collecting data from primary sources*
- *participating in community consultation protocols, and fieldwork methodologies*
  - quantitative methodologies such as use of surveys, structured interviews, observation, statistical analysis, focus groups*
- *maintaining a logbook, including the recording of all fieldwork, correspondence*
  - and reading secondary research including reading texts, reports, bibliographies,*
  - accessing opinion polls, government statistics, print media, CD-ROM, internet*
  - and other appropriate technologies*

**Processing information**

- *analysing statistical data to interpret meaning and make generalisations*
- *converting raw data to a useful format*
- *analysing information from a variety of sources*
- *judging usefulness and reliability of data*
- *identifying propaganda and bias*

**Communicating information**

- *reflecting Aboriginal viewpoints in submitted work*
- *using a variety of media to express ideas*
- *speaking to groups and individuals about their research*
- *communicating using letters, phone calls, sending e-mail, and accessing the internet and other appropriate technologies for information exchange*

**Participating in community consultation**

- *protocols and methods for effective and genuine community consultation*
- *the importance of ongoing community consultation*
- *cultural differences and sensitivities*
- *issues of copyright, ownership and the ethics of research.*

**Students learn to:**

- *undertake a project and investigate an independently chosen topic*
- *define the parameters of a project including resources required to complete the project*
- *examine data to interpret meaning and differentiate between fact and opinion*
- *distinguish between quantitative and qualitative data*
- *synthesise information from a variety of sources and perspectives*
- *demonstrate empathy with Aboriginal peoples' views and experiences*
- *acknowledge the history of the local area and be sensitive to the impact this may have had on the local Aboriginal community*
- *identify useful and reliable sources of information*
- *maintain accurate and thorough records as part of a logbook*
- *manage time effectively to ensure the project is completed within a deadline*
- *locate and identify appropriate resources*
- *construct a survey which will enable the collecting of useful information in a culturally sensitive way*
- *consider the most appropriate media for presenting information*
- *consult with members of the local Aboriginal community in a culturally appropriate and ethical way*
- *recognise cultural differences which may exist and accept that some community members may not be willing to share particular information with non-Aboriginal people*
- *respond to and incorporate feedback from community members throughout the process of consultation*
- *acknowledge ownership and copyright in the final presentation of project work*
- *apply ethical research practices*
- *demonstrate originality in their research and presentation of material*
- *ensure that project content is accurate*

- *communicate ideas effectively.*

Source: NSW Board of Studies website, [http://www.boardofstudies.nsw.edu.au/syllabus\\_hsc/course-descriptions/hsie.html](http://www.boardofstudies.nsw.edu.au/syllabus_hsc/course-descriptions/hsie.html)> Accessed: 6 Aug, 2011.

### **Legal Studies (Stage 6 HSC course)**

The program is also suitable for study in Part III of the HSC Legal Studies course, where students are required to complete two study options. The program meets the outcomes designated for **Option 4: Indigenous peoples.**

#### **Course Description**

- Part I of the core: Crime
- Part II of the core: Human rights
- Part III: Options

Students must study TWO options.

#### **Option 4 : Indigenous peoples**

Principal focus: Through the use of contemporary examples, students investigate the effectiveness of legal and non-legal processes in achieving justice for indigenous peoples globally.

Themes and challenges to be incorporated throughout this topic:

- the impact of state sovereignty in encouraging cooperation and resolving conflict
  - in regard to indigenous peoples
- issues of compliance and non-compliance
- laws relating to indigenous peoples as a reflection of changing values and ethical standards
- the role of law reform in recognising the rights of indigenous peoples
- the effectiveness of legal and non-legal responses in achieving justice for indigenous peoples.

#### **Content**

Students learn about:

### *1. Nature of the law and indigenous peoples*

- *definition of 'indigenous peoples'*
- *loss of rights of indigenous peoples over time*
- *legal recognition of indigenous peoples*
- *importance of the right to self-determination*
- *explain the difficulties faced by indigenous peoples in determining their own future*

### *2. Responses to indigenous peoples*

- *The roles of:*
  - *the nation state and state sovereignty*
  - *the United Nations*
  - *international instruments*
  - *courts*
  - *intergovernmental organisations*
  - *non-government organisations*
  - *the media*
- *Australia's federal structure in responding to the needs of indigenous peoples*

### *3. Contemporary issues concerning indigenous peoples*

*Issues that must be studied:*

- *loss of cultural rights including language*
- *land rights*
- *legal rights to natural resources*
- *intellectual property rights.*

*Students learn to:*

- *define 'indigenous peoples'*
- *outline the loss of rights of indigenous peoples globally*
- *outline the need for legal recognition of indigenous peoples*
- *examine the role of sovereignty in assisting and impeding the recognition of the rights of indigenous peoples*

- *evaluate the effectiveness of legal and non-legal measures in achieving justice for indigenous peoples*
- *explain the role of Australia's federal structure in responding to the needs of indigenous peoples*
- *identify and investigate these contemporary issues involving the rights of indigenous peoples and evaluate the effectiveness of legal and non-legal responses to these issues.*

Source: NSW Board of Studies website, [http://www.boardofstudies.nsw.edu.au/syllabus\\_hsc/pdf\\_doc/legal-studies-syllabus-st6.pdf](http://www.boardofstudies.nsw.edu.au/syllabus_hsc/pdf_doc/legal-studies-syllabus-st6.pdf) Accessed: 6 Aug, 2011.

### **Provisions for extension work**

To supplement this program, suggestions are provided for extension tasks that will challenge students to practise more advanced research skills. There are also opportunities for students to engage in challenging discussions and debates.

### **Provisions for students with learning difficulties**

Students with special learning needs may be assigned more reading time. They may elect to work in partnerships with peers or a learning support teacher. The more challenging writing tasks can be broken down into simpler steps, or could be refocused on the development of oral responses rather than formal writing tasks.

### **Specific language considerations**

Indigenous Australians prefer to be identified by a language label. For example, using the expression 'Yorta Yorta woman' makes it clear to which specific language group the person belongs. The terms 'Aboriginal people' and 'Indigenous people' have passed into accepted usage despite their originally generic meanings. To distinguish these terms as proper nouns naming cultural groups, it is important that they are capitalised when they appear in written language. It is appropriate to seek to properly define distinct and individual nations and peoples when making reference to Indigenous Australians.

**Preparation and reading plan**

Students will need their own copy of the book, *Dialogue about land justice*. Teachers should also photocopy relevant pages from the teachers' notes document for students' reference. Conference papers should be read in preparation for lessons, prior to a whole-class discussion. Students with learning difficulties may benefit from a learning support teacher assisting them in 'guided reading'.

**Assessment**

All the activities may be used for assessment purposes at the teacher's discretion. There are activities designed to promote discussion, essay questions and other short-answer questions presented throughout the program. Provision is also made for the study of two related texts – a conference paper and an academic speech, with specific links defined to guide students in an intertextual study.

**Introduction to native title**

In the past few decades, Australia's indigenous people have been engaged in struggles to establish native title agreements with those who style themselves as 'controllers' of the lands and waters of the continent. The historic legal decisions to grant certain land rights to the Mabo and Wik people have been interpreted by the Australian public as victories for indigenous people who are seen to be 'reclaiming' their land. This simplistic and inaccurate view of the legal and political situation is challenged by the Native Title Conference presentations explored in this program of study.

At the Conference, the complexities of the issues surrounding the fight for land justice are explored. A variety of perspectives are presented that reveal the ways in which the rights of Indigenous Australians have been articulated within a legal system imposed upon them by people with alternative histories and alternative worldviews. Thus have Indigenous Australians been brought into conflict over Country – legal and social conflict, as well as conflicts with pastoralists, miners and other modern users of the land and waters of Australia.

While it is true that agreements can be and have been negotiated, the ways in which those agreements satisfy or fail to satisfy the needs of Indigenous Australians and both the letter and the spirit of the law of the Commonwealth of Australia, remain under question. In the wake of the native title decisions of the past ten years, it has never been

more important to continue efforts to come to a greater understanding of the legal and moral implications involved in the securing of autonomous access to traditional lands for this generation and subsequent generations of Indigenous Australians.

### **For discussion (before reading the Conference papers)**

1. What is 'native title'? Ask students to use their own words to summarise the concept.
2. From your general knowledge, do you feel that Australian law sufficiently recognises that some Indigenous people continue to hold rights over their native lands and waters?
3. What is the literal meaning of *Terra Nullius*, the Latin name given to Australia by the British invaders?
4. What is the full name of the representative plaintiff of the Meriam people after which an historic legal land rights decision was named?
5. What types of activities do you think native title agreements should allow traditional owners to do in regard to their land and waters?
6. In the past, some Australian pastoralists have felt threatened by the decision to grant native title to Indigenous owners because of misunderstanding and ignorance. How were these problems overcome in the Wik case?

## **Key doctrines**

### **Land rights**

The term 'land rights' has passed into common usage in Australia. In this program of study, we use the term to refer to the rights of Indigenous Australians to possess, use, access and otherwise deal with land either individually or collectively, according to their descent from traditional owners. There exists tension between the bases of claims to land rights, in the following areas: international law, domestic law, common law, treaties, the Australian constitution and state and federal legislation. Indigenous people have been affected profoundly by dispossession in terms of their self-determination, cultural and religious identity, economics, kinship and personal sense of belonging.

**Native title (known in various countries as Aboriginal, Indigenous, Customary or Original Indian title)**

Under Australian common law, Indigenous people may have certain rights on Crown land under the notion of 'customary tenure'. But these rights do not extend to ownership or control which most Australians enjoy over their legal property. While most jurisdictions agree that native title exists in principle, the requirements for proof that it applies to a particular area vary greatly. Generally though, the claimant must provide evidence of continuous occupation of the land under question before colonisation. This is an impractical requirement for semi-nomadic people as most claims in Australia depend on content related to the traditions and customs of the claimants, not western notions of ownership or development of the land. Native title is an area of comparative law, where legal precedent underpins new cases. Indigenous people were not involved in the formulation of the original legislation, which dates back to the nineteenth century.

**Terra Nullius**

In international law, the doctrine of *terra nullius* has undermined the land rights of Indigenous Australians. This notion comes from the Latin phrase for 'land belonging to no one'. The notion of *terra nullius* holds that territory that has not been previously held under the sovereignty of any state (or which has been relinquished by a previous owner) is open to take-over by any power that asserts sovereignty through occupation.

**Fiduciary duty**

Native title cases in Australia and internationally have been influenced by issues relating to the scope of the government's powers to enforce laws among indigenous people that fail to fulfil a perceived 'fiduciary duty'. This term refers to the moral obligation to act in the best interests of another party. The debated point is whether or not the present Australian government owes a fiduciary debt to Indigenous Australians.

**Official bodies**

In Australia, native title cases are brought before the Federal Court of Australia, then pass on to the High Court at the appeal stage. The National Native Title Tribunal (NNTT) investigates claims and mediates between claimants and the courts.

**The Native Title Act (NTA)**

After the Mabo decision, Australian law codified the ruling by establishing the controversial Native Title Act in 1993.

### **Extinguishment**

Native title can be extinguished in some countries, leading to questions about the right to property under common law. Under the Native Title Act (1993), extinguishment can occur in Australia.

### **Landmark native title cases**

Under Australian common law, a number of native title cases have significantly advanced the cause for land justice of the Indigenous people of this country.

- [Milirrpum v Nabalco Pty Ltd](#) (1971)
- *Coe v Commonwealth* (1979)
- [Mabo v Queensland \(No 2\)](#) (1992)
- [Western Australia v Commonwealth](#) (1995)
- [Wik Peoples v Queensland](#) (1996)
- [Western Australia v Ward](#) (2002)
- [Yorta Yorta v Victoria](#) (2002)

**Selected contributors to the Native Title Conference**

**Mick Dodson,**

**Chair of the AIATSIS (Australian Institute of Aboriginal and Torres Strait Islander Studies) Council.**

Professor Mick Dodson is a member of the Yawuru people of the southern Kimberley in Western Australia, though he was born in Katherine in the Northern Territory. Professor Dodson advocates on issues affecting Australian Aboriginal and Torres Strait Islander people and Indigenous people internationally through the United Nations Forum on Indigenous Issues. The first Indigenous law graduate in Australia, Professor Dodson directs a legal and anthropological consultancy firm, holding a Bachelor of Jurisprudence and a Bachelor of Laws from Monash University, an honorary Doctorate of Letters from the University of Technology and an honorary Doctorate of Laws from the University of New South Wales. His achievements in legal advocacy earned him the title of Australian of the Year in 2009. Professor Dodson is also a member of the Order of Australia (AM), conferred in 2003.



**Marcia Langton,  
Foundation Chair, Australian Indigenous Studies,  
University of Melbourne.**

Marcia Langton is a leading Aboriginal land claims anthropologist and an articulate activist for Indigenous rights. Descended from the Wiradjuri and Bidjara nations of south-central Queensland, Marcia has worked with many organisations involved in Indigenous socio-cultural issues. She worked for the 1989 Royal Commission into Aboriginal deaths in custody, contributing a report that would eventually lead to legislative changes aimed at improving social order and justice in disadvantaged communities. Ms Langton holds a PhD in Geography from Macquarie University and is involved in supporting the rights of Indigenous people internationally. The scope of her work includes advocacy in environmental policies affecting the First Nations of Canada and the people of East Timor. She is the author of numerous books and scholarly works that have contributed to a better understanding of the issues facing Indigenous Australians today. Ms Langton also serves in bodies including the Centre for Aboriginal Reconciliation, the directorship of the Centre for Indigenous Natural and Cultural Resource Management and is the Chair of the Indigenous Higher Education Advisory Council. Ms Langton was awarded the Order of Australia (AM) in 1993.



**Noel Pearson,**  
**Director, Cape York Institute for Policy and Leadership.**

Noel Pearson, descended from the Bagaarmugu and Guggu Yalanji people of Cape York Peninsula, is founder and director of the Cape York Institute for Policy and Leadership. His primary area of advocacy has been Indigenous peoples' rights to land. For many years, Mr Pearson has worked in the areas of social welfare, family, justice and economic development among Indigenous people. He holds history and law degrees from the University of Sydney and was a legal advisor to the [Aboriginal and Torres Strait Islander Commission](#). Mr Pearson played a key role in negotiations centering on the Native Title Act of 1993, after the historic Mabo ruling of the High Court of Australia. He has been an active critic and lobbyist of successive Queensland and Australian Federal governments, attracting publicity to various actions and policies that can be shown to have disadvantaged Indigenous Australians in the past few decades. His academic contributions and political activism have resulted in positive steps toward policy reform.

### ***An Australian history for us all by Noel Pearson***

Chancellor, distinguished guests. It is my honour to have been invited to speak this evening on some questions about Australian history that are presently at fundamental issue in this country. I had the great privilege to have been taught history at the University of Sydney by Professor Schreuder, who was for me inspirational and I hope that the University of Western Sydney has shared that pleasure. I was therefore delighted to accept his invitation, but alas I cannot promise my teacher's rigour. I come only with some observations about how our popular understanding of the colonial past is central to the moral and political turbulence we are still grappling with as Australians.

I fear however that I am in danger of indulging in agonising navel-gazing about who we are and conducting what Prime Minister John Howard calls the perpetual seminar for elite opinion about our national identity. I will nevertheless persevere.

It is very clear that guilt about Australia's colonial history is what the Americans would call a hot button issue in the Australian community. It has been a hot button for some time now. You would not need to be a political genius to bet that the guilt issue is one of the keenest buttons that the Federal Member for Oxley and her followers in our national government have pressed, and with great electoral resonance.

The polls will tell you this: most ordinary Australians are offended by any suggestion that they should feel guilty about any aspects of the country's past. They vehemently reject any responsibility for it. Many will reject any notion that some of the legacies of the past live in the present and need to be dealt with. They will say that Aborigines must stop being victims and 'should get over it, it's all in the past, we had nothing to do with it, we are not guilty, help yourselves'. Others still will say 'it's all in the past, we had nothing to do with it, we are not guilty but we are willing to help alleviate your present condition.'

In his Sir Robert Menzies Lecture this week, Prime Minister John Howard supported these views, views that are held overwhelmingly by the majority of ordinary Australians. He characterises the recent historiography of colonial relations and the discussion of Australian history during the Labor ascendancy as having been altogether too pessimistic. Following Professor Geoffrey Blainey's description of the 'black armband view of history' John Howard implies that a history has been cultivated by the politically-correct classes which urges guilt and shame upon Australians about the national past.

Earlier the Prime Minister said on the John Laws radio program in Sydney:

'I sympathise fundamentally with Australians who are insulted when they are told that we have a racist, bigoted past. Australians are told that quite regularly. Our children are taught that...some of the school curricula go close to teaching children that we have a racist, bigoted past. Of course we treated Aborigines very, very badly in the past – very, very badly – but to tell children whose parents were no part of that maltreatment, to tell children who themselves have been no part of it, that we're all part of a sort of racist, bigoted history is something that Australians reject.'

There is no doubt in my mind that the Prime Minister's characterisation of the

historiography that has developed over the past twenty-five years, and the particularly lively discourse in the wake of the High Court's decision in the Mabo Case, which judgment canvassed the legal and moral implications of this history, is a characterisation that resonates with the instincts and feelings of ordinary Australians.

It is now well understood that up until the 1960s there was, in the writing and indeed teaching of Australian history, the historiographical equivalent of *terra nullius*: a history that denied or ignored the true facts of the colonial frontier. This was what the late Professor Bill Stanner called the Great Australian Silence. In what I consider to be a truly masterpiece lecture series for the Boyer in 1968, Professor Stanner said:

'... inattention on such a scale cannot possibly be explained by absent-mindedness. It is a structural matter, a view from a window which has been carefully placed to exclude a whole quadrant of the landscape. What may well have begun as a simple forgetting of other possible views turned under habit and over time into something like a cult of forgetfulness practiced on a national scale ... the Great Australian Silence reigns; the story of the things we were unconsciously resolved not to discuss with them or treat with them about.'

The popular, Anglo-Celtic story of Australia's past was seriously distorted by significant omissions and by some straight out fictions, such as the fiction of 'peaceful settlement.' The certitude with which history and the humanities generally proclaimed the myth of *terra nullius* meant that the legal invisibility of Aboriginal people and a steadfast belief in our inhumanity was embedded into popular belief.

On the writing of colonial history in North America, Robert Hughes pertinently advises:

'The reading of history is never static. Revise we historians must. There is no such thing as the last word. And who could doubt that there is still much to revise in the story of the European conquest of North and South America that we inherited? Its scheme was imperial: the epic advance of Civilisation against Barbarism: the conquistador brings the Cross and the Sword, the red man shrinks back before the cavalry and the railroad. Manifest Destiny. The white American myth of the nineteenth century. The notion that all historians propagated this triumphalist myth uncritically is quite false: you have only to read Parkman or Prescott to realise that. But after the myth sank from the histories deep into popular culture, it became a potent justification for the plunder, murder and enslavement of peoples and the wreckage of nature.'

However, there is now accumulated a new Australian history, to which Professor Blainey has also contributed, which tells the story of the other side of the frontier. The contributions of Professor Henry Reynolds and his colleagues at James Cook University which has been a powerhouse of Australian frontier history, along with the oral histories of Aboriginal people, have illuminated aspects of the Australian past that had previously been buried. The national narrative now recognises and incorporates Aboriginal achievement, death and sacrifice.

It is this narrative that was substantially adopted by the judges of the High Court of Australia in their historical survey in the Mabo Case. The judges did not just dwell on the

legal implications of the recognition of native title by the common law of Australia, they canvassed the historical consequences of this conclusion and its moral implications. There are at least two explicit moral implications put forward by the judges.

Firstly, Justices Deane and Gaudron said that the failure of the law to recognise the rights of Indigenous peoples to their traditional homelands which led to their death and dispersal left the country with 'a legacy of unutterable shame.'

Secondly, Justice Brennan (as he then was) said that the dispossession of the Aboriginal inhabitants 'underwrote the development of the nation.'

These are two brief but critical observations made by our nation's highest court, when confronted with questions about the country's colonial past and the belated accommodation of Indigenous people in the present. These are the key instances when the Court ventured beyond its role in declaring our common law, and suggested some moral leadership.

It is very clear from what the Prime Minister and his Minister for Aboriginal Affairs, Senator John Herron, have said about these matters, that they do not deny the depredations against Aboriginal people that are illuminated by the new Australian history. John Howard said: 'Injustices were done in Australia and no one should obscure or minimise them.'

Clearly then the debate today is not so much about the facts of the past. There is generally common ground about them. The debate is about how Australians should respond to the past. The Prime Minister puts his view very clearly, he said:

'... in understanding these realities our priority should not be to apportion blame and guilt for historic wrongs but to commit to a practical program of action that will remove the enduring legacies of disadvantage.'

Senator Herron said in his Enid Lyons Memorial Lecture recently:

'I also believe that a clear distinction must be made between the importance of acknowledging the injustices of the past and the need to secure an admission of guilt for those injustices. I do not believe that most Australians feel individual guilt about these injustices, for the simple fact that they took no direct part in them...Certainly, as a nation, we have a responsibility to be frank and forthright about those aspects of our history that are not always palatable, and importantly to learn from the mistakes that have been made. However true reconciliation between Indigenous and non-Indigenous Australians is not about assigning guilt for the actions of our forebears. Rather it is about achieving an appropriate balance between acknowledging and respecting the lingering pain from past injustices and acting decisively to ensure full equality of opportunity in the future.'

At the height of the native title debate in 1993, in a speech to the Endeavour Foundation, the then Leader of the Federal Opposition, Dr John Hewson, applied his own faculties to these questions and remarked that: 'A divisive debate over issues long gone should never be preferred to a unifying search for common ground.'

In my Hancock Memorial Lecture I argued that it should not be necessary for the truth to be distorted in order for white Australians to be able to live with themselves. Dr Hewson's suggestion was that the truth about the past should suffer in the name of a united Australia. The situation is entirely the reverse. It seems to me that the psychological unity of this country depends upon our taking responsibility for the future by dealing with the past. Anything less is simply evasion of reality.

I said that there was every indication that Australia is mature enough to deal with these questions: how do we explain the past to our children? How do we locate ourselves as Australians in relation to the diverse traditions and experiences that comprise our combined heritage?

How do we as Indigenous people respond to the legacy of colonialism and that brutal, troubled, culture by which we were dispossessed? Do we reject it outright, and furthermore, do we require Anglo-Celtic Australians to spurn their origins in the name of penance and of solidarity with us?

I argued that such a response to our history is quite inappropriate, now when at last we may be approaching a state of 'live and let live' in this country. It is at odds with the quest to discover 'what unites us' as well as 'what separates us'. There is an extent to which I agree with Robert Hughes when he observed:

'The need for absolute goodies and absolute baddies runs deep in us, but it drags history into propaganda and denies the humanity of the dead: their sins, their virtues, their efforts, their failures. To preserve complexity and not flatten it under the weight of anachronistic moralising, is part of the historian's task ...'

I argued that we need to appreciate the complexity of the past and not reduce history to a shallow field of point scoring. I believe that there is much that is worth preserving in the cultural heritage of our dispossessors, much that I for one would be loath to repudiate and much that has also become ours, not necessarily by imposition but by appropriation.

I said that contrary to the propaganda of colonialism, which justifies our dispossession through neo-Darwinian arguments that Aboriginal cultures were doomed to extinction due to our innate inability to 'progress', our cultures are resilient and adaptable. We have taken from you and we should not belittle ourselves by contending that we have had no choice in the matter. The reverse is also of course true. You have taken from us not just our land and not just all of the icons of Indigenous Australia, but some of our ways of approaching things have become an inescapable part of Australia's national mythology. This cultural interface has not been entirely woeful.

But has the so-called black armband view of history been about apportioning guilt?

In his speech at Redfern Park in December 1992, the then Prime Minister Paul Keating said this about guilt:

'Down the years, there has been no shortage of guilt, but it has not produced the

responses we need. Guilt is not a very constructive emotion. I think what we need to do is open our hearts a bit. All of us.'

In his recent address to the Asia Australia Institute at the University of New South Wales, the former Prime Minister reiterated his view when he said:

'...the process of reconciliation had to start with an act of recognition. Recognition that it was we non-Aboriginal Australians who did the dispossessing; and yet we had always failed to ask ourselves how we would feel if it had been done to us. When I said these things, it was not my intention to impress guilt upon present generations of Australians for the actions of the past, but rather to acknowledge that we now share a responsibility to put an end to the suffering. I said explicitly that guilt is generally not a useful emotion and, in any case, the recommended treatment is confronting the past, not evading it.'

So if both sides of this apparent debate deny that the allocation of guilt is necessary for the country to deal with the colonial past, then why has it been alleged that Australians have been urged by the black armbands, through a delirium of political correctness, to feel guilty about the past?

The distinction made by John Herron between acknowledgment of the past and guilt about the past is indistinct from the statements by the former Prime Minister that it was not about guilt but about opening our hearts a bit.

The denial of the place of guilt will be at odds with many Indigenous Australians, for whom injustice is not in the remote past but within their living memories. Those who feel keenly the legacy of that past in the present, in the form of loved ones who now suffer the terrible psychological consequences of being removed from their families and being institutionalised, will not readily say that guilt is an altogether irrelevant emotion.

However, as Social Justice Commissioner, Michael Dodson, recently observed, it has not been Aboriginal people talking about guilt in coming to terms with our history, it has been the Prime Minister and Senator Herron who have been most anxious to exorcise the spectre of guilt.

As to the question of guilt, I am myself equivocal. I know very clearly that as individuals, ordinary Australians cannot be expected to feel guilty about the past. Ordinary Australians might fairly be held to account for what happens in their own lifetimes and perhaps, what they leave for the future. It is indeed a useless objective in the teaching and writing of history to hold individuals to account for the past.

However, as a nation, the Australian community has a collective consciousness and conscience that encompasses a responsibility for the present and future, and the past. Our collective consciousness includes the past. For how can we as a contemporary community in 1996 share and celebrate in the achievements of the past, indeed feel responsibility for and express pride in aspects of our past, and not feel responsibility for and express shame in relation to other aspects of the past? To say that ordinary Australians who are part of the national community today do not have any connection with the shameful aspects of our past, is at odds with our exhortations that they have

strong connections to the prideful bits. After all the heroic deeds at Gallipoli and Kokoda are said to be ours as well. Lest we forget.

My feeling is that guilt need not be an ingredient in our national (re)consideration of our history. For those Australians who are not still afflicted with the obscurantist tendencies of the past, who are untroubled about recognising the truths of the past, and are prepared to acknowledge the legacies of that past, guilt is not a feature apparent in their psychology. In my experience, it is for those Australians who resist the truths of history and who yearn for a return to the Great Australian Silence, and who deny some responsibility to deal with the legacy of the past in the present, that guilt seems to be an ingredient. The more vehement the denials the more they betray an anxiety to exorcise guilt.

But if present generations of Australians cannot be held to account for the past, they are surely responsible for the infidelities of the present.

At the present moment the Yorta Yorta people of the Murray River region around Barmah and Shepparton are prosecuting a native title claim in the Federal Court of Australia, in relation to their remnant traditional homelands. William Cooper, an ancestor of the present Yorta Yorta claimants wrote in 1938 to the then Prime Minister, Mr Lyons. He said:

‘I have addressed numerous letters to the editor of the various newspapers and find my pleas for better conditions are, in nine cases out of ten, ‘pigeon holed’.

‘In spite of this fact we live in the hope that someday the newspapers will begin to publish the truth concerning Aboriginal affairs so that the public, being informed, will see that the great evils from which we are suffering are remedied...

‘We Aborigines are a ‘protected’ people. I understand that the correct meaning of the word ‘protector’ is ‘one who protects from injury; one who protects from oppression; a guardian; a regent; one who rules for a sovereign’.

‘It would please us greatly to have a protector over our people who would live up to that standard, but how do our protectorates work? ... Take for instance the policeman who was appointed as a protector of the Aborigines in Central Australia. He went out one day to arrest a native who was reputed to have killed a white man.

‘He stated in his evidence that he shot 17 natives and later shot another 14 and a so-called ‘Justice of the Peace’ officially, without trial, justified the constable for shooting these 31 people. Now ... do you think this Justice of the Peace could justify the Constable before God?

‘Do you think that he could justify his own judgment before the king?...The whole thing is contrary to British Justice and cannot be justified even before a much lower tribunal, the white people (if they knew the facts) and of these you are one!

‘History records that in the year 1771 white men first landed on the shores of what is now

called Botany Bay. They claimed that they had 'found' a 'new' country – Australia. This country was not new, it was already in possession of, and inhabited by, millions of blacks who, while unarmed excepting spears and boomerangs, nevertheless owned the country as their God-given heritage.

'From the standpoint of an educated black who can read the Bible upon which British constitution and custom is founded, I marvel at the fact that while the text book of present civilisation, the Bible, states that God gave the Earth to man, the 'Christian' interferes with God's arrangement and stops not even at murder to take that which does not belong to them but belongs to others by right of prior possession and by right of gift from God...

'The time is long overdue when the Aborigines should be considered as much and as fully under the protection of the law as any other citizen of the Empire...

'This more particularly in view of the fact that history records that in the commission originally given to those who came from overseas the strict injunction was given that the Aborigines and their descendants had to be adequately cared for...

'The taking of rightful belongings has not yet ceased...

'Will you, by your apathy, tacitly admit that you don't care and thus assume the guilt of your fathers?'

When on 3 June 1992 the High Court of Australia suggested that Mabo might be the foundation of a lasting compromise between the old and new of this continent, I was seized with a conviction in its correctness. But my concern has not just been with the narrow legal meaning of Mabo, though it is critical. I am concerned with the spirit of historical reckoning and acceptance and compromise and reconciliation which it represents. I have hoped that it might be possible for our national leaders to gain an intellectual, if not an emotional or spiritual, understanding of its importance.

Mabo threw the country into social, political and psychological turmoil. I always said that it was the turmoil and confusion the country had to have.

And the challenge for ordinary Australians today is this: that the foundation for compromise – that is the acknowledgment under the common law of England that with the sovereign claim over the Australian continent on behalf the Crown, came the recognition of the native title of the Indigenous inhabitants who became subjects of the Crown entitled to the protections of the law – this compromise comes from their own legal and institutional heritage. Mabo is not a product of Indigenous heritage. Rather more it is the product of the country's English heritage: it is a product of the genius of the common law of England.

If there is one thing about the colonial heritage of Australia that Indigenous Australians might celebrate along with John Howard with the greatest enthusiasm and pride, it must surely be the fact that upon the shoulders of the English settlers or invaders – call them what you will – came the common law of England and with it the civilised institution of native title. What more redemptive prospect can be painted about the country's colonial

past? It just confounds me that this golden example of grace in our national inheritance is not the subject of national celebration. After all, Indigenous people are entitled to say: 'it is your law'.

The amendments to the Native Title legislation that are proposed by John Howard's government amount to a derogation and a diminution of the entitlements that Indigenous people have under the common law, which were negotiated in good faith with the Federal Parliament on behalf of the non-Indigenous community, in 1993. Make no mistake, if the amendments as proposed by the Howard Government succeed, Mabo will be no more. There will only be some remnant rights. The spirit of compromise and moral reckoning which Mabo represents will be lost to us and to future generations. It is for our national leaders to rupture the spirit and meaning of Mabo as a key opportunity in our history, and for ordinary Australians to allow this to happen in the coming months; then we will be held to account. Of these obscenities we will indeed be guilty.

William Cooper, whose hopes for justice for his Yorta Yorta people are the subject of Federal Court proceedings under the Native Title legislation, would remind us:

'The taking of rightful belongings has not yet ceased ... Will you, by your apathy tacitly admit that you don't care and thus assume the guilt of your fathers?'

In conclusion, what substance is there in the new emphasis on our colonial history that Prime Minister John Howard and his Minister are urging and in the crusade against the black armbands and their alleged obsession with guilt? The answer is: nothing at all. The Prime Minister has not been able to grasp what his predecessor was able to: that it is not about guilt, it is about opening our hearts a little bit.

And to have an open and generous heart in relation to these things, means that when you acknowledge the wrongs of the past, you might try to do so ungrudgingly. An open heart means that if a people have suffered wrongs and have wounds that are still keen, then there must be some respect for that. It would be inappropriate for us to say to Jewish people today, 'the treatment of your people has been terrible, but perhaps we should not be so consumed by it, maybe it is time to now look forward'. These are matters for these people to come to terms with. Hectoring by the leading spokesmen for the other side of the colonial grievance, which the Prime Minister represents, about how we need to move on, is stupid. It is ungracious and insensitive and will advance nothing in the relationship. It diminishes one's sincerity.

My concern is that our present national leadership is only thinking in terms of broad characterisations and slogans. A more rigorous examination of the so-called politically correct, black armband, histories would have revealed the fact that no one is urging guilt upon the Australian people.

The new approach is significantly anti-intellectual. The new free speech is tabloid free speech, where people who should expect to account for what they say, are able to conduct so-called debate about issues through tabloid-style slogans that are carefully crafted to activate those hot buttons in our community. Black Armbands. Guilt Industry. Political Correctness. Aboriginal Industry. These are lines that resonate. They work on the evening

news grabs. They work on the radio airwaves. So we end up with this brain-damaged dialogue between the politicians and the punters passing for free speech and public debate. The politics of mutual assurance.

I am sure that Robert Hughes, whose seminal book *Culture of Complaint* was touted as the first foray against political correctness but is an intelligent and invigorating critique of anti-intellectualism, would be ashamed to see what is passing for free speech and history in this country today. If John Howard wants to properly comprehend a balanced and perhaps even conservative critique on how we might deal with our history, he might care to read Robert Hughes rather than the opinion polls.

Noel Pearson, *An Australian history for us all*,

Address to the Chancellor's Club Dinner, University of Western Sydney, 20 November, 1996.

<<http://www.boardofstudies.nsw.edu.au>>

### Contextual information

In 1996, when this speech was given, native title and the Australian nation's view of its past were provoking controversy in the news. The 1992 Mabo case and the resultant rejection of the doctrine of *terra nullius* had ignited debate across the spectrum of politics and social groups. The Native Title Act of 1993 was passed, recognizing Aboriginal Australians as the original people of Australia for the first time in legislative history.



**Aden Ridgeway,**

**former New South Wales Senator representing the Australian Democrats.**

Aden Ridgeway is a Gumbaynggirr man, one of the few Aboriginal people who have been elected to an Australian Parliament. He has served on a number of parliamentary and senate committees, and has represented Australia at the United Nations and World

Conference Special Sessions on racism in 2001. Mr Ridgeway served as executive director of the New South Wales Aboriginal Land Council and two terms of office on the first ATSIC (Aboriginal and Torres Strait Islander Commission) Sydney Regional Council. He became the deputy leader of the Australian Democratic Party in the same year. Mr Ridgeway is the inaugural chairman of Indigenous Tourism Australia.



**Robert French,  
Chief Justice of the High Court of Australia.**

Robert French was born and educated in Western Australia. He attained bachelor's degrees in Science and Laws and was admitted as a barrister and solicitor in 1972. Justice French was the first president of the [National Native Title Tribunal](#). He ran for the seat of Fremantle for the Liberal Party at the age of 22, and served as President of the Fremantle chapter, and later in the State Executive. He was appointed to the Federal Court in 1986. Justice French has served in leadership roles in numerous bodies, including the Australian and the Western Australian Law Reform Commissions, the Native Title Tribunal, Edith Cowan University, and the Aboriginal Legal Service of Western Australia. He has also been appointed as a Judge of the Supreme Court of the ACT and of Fiji. He has played active roles in judicial administration, native title legislation, law reform, town planning appeals processes, trade practices law and legal aid for Indigenous Australians. Justice French helped found the Western Australian Aboriginal Legal Service. He has received numerous awards and honours, including Western Australian Citizen of the Year (1998) and the Centenary Medal for his service as President of the National Native Title Tribunal. Justice French is also a Companion of the Order of Australia (AC), conferred in 2010.

**Aboriginal Studies short-answer test paper**

*Note to teachers: The following short-answer test could be set for completion in a limited time period for assessment purposes.*

**Aboriginal Studies:  
Short-answer test paper**

(a) According to TWO speakers you have studied, in what ways are Aboriginal and Torres Strait Islander people at a legal disadvantage under the current judicial system in Australia?

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(b) Outline your personal opinion about whether Australia's present government is acting in violation of the United Nations Declaration on the Rights of Indigenous Peoples. Use specific evidence to justify your response.

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## Resource list

Ecological humanities website,

<<http://www.ecologicalhumanities.org/index.html>>

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Langton, M., M. Tehan, L.R. Palmer & K. Shain (eds). 2004. *Honour among nations? Treaties and agreements with Indigenous peoples.*

Melbourne: Melbourne University Publishing.

Langton, M., 1998. *Burning Questions: emerging environmental issues for Indigenous peoples in northern Australia.* Darwin: Northern Territory University.

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Canberra: Australian Government Publishing Service.

National Native Title Tribunal website,

<<http://www.nntt.gov.au/Pages/default.aspx>>.

Pascoe, B (with AIATSIS, the Australian Institute of Aboriginal and Torres Strait Islander Studies), 2008, *Little Red, Yellow, Black Book: An introduction to Indigenous Australia.*

Canberra: AIATSIS (Australian Institute of Aboriginal and Torres Strait Islander Studies).

Pearson, N. *An Australian history for us all*, (address to the Chancellor's Club Dinner, University of Western Sydney, 20 November, 1996), transcript from the NSW Board of Studies website, <<http://www.boardofstudies.nsw.edu.au>>.

Strathburn Station website (of Strathburn Station in Queensland, site of an historic Native Title agreement), <<http://www.strathburncattlestation.com.au/location.php>>.

Torres Strait Regional Authority website,

<<http://www.tsra.gov.au/the-torres-strait/events/mabo-day.aspx>>