THE LOWITJA O'DONOGHUE ORATION
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Paul Keating's Lowitja O'Donoghue Oration was his first major speech on the subject of native title since he introduced the Native Title Bill eighteen years earlier, in 1993. The Oration presented him with a number of opportunities: to underline that the development of the Native Title Bill arose from the first ever full consultation and negotiation between the Aboriginal community of Australia and the Government of Australia; that that negotiation was led by Lowitja O'Donoghue; that notwithstanding that no progress had been made on national legislative land rights in the then 204-year history of the settled nation, the Native Title Act received the Governor General's assent just eighteen months after the High Court's historic decision. Moreover, that the Native Title Act dealt with the longest continuing problem Australia faced as a nation: the fundamental colonial grievance, the dispossession of its indigenous people and the injustices inherent in that dispossession. Paul Keating made use of the Oration to point out how a more conservative High Court had treated native title as an ordinary exercise in statutory interpretation, cutting across the spirit of the Keating government's legislation, with its fidelity to the Mabo judgment principles. He reminds his audience that native title is not a creature of the common law, nor a common law title but an ancient title recognised by the common law.

I knew Don Dunstan, though not well. But I admired him for his ability to see through the conservative social orthodoxy which had developed as part and parcel of Australia.

Don Dunstan used the premiership of South Australia to challenge elements of that orthodoxy, so I am pleased to be associated with his spirit and this foundation in his name. And well may it be the case that Don Dunstan's progressive instincts, reflected in the Foundation's remit, should sponsor an oration in the name of another South Australian progressive, Lowitja O'Donoghue.

I have accepted the opportunity of delivering the Lowitja O'Donoghue Oration for one primary reason: out of respect for Lowitja O'Donoghue as a remarkable Australian leader. A leader whose unfailing instinct for enlargement marks her out as unique.

And unique for this reason: when a great opportunity in history, the history of the Aboriginal people and the largely European population of Australia presented itself, Lowitja O'Donoghue saw that opportunity with great clarity and unilaterally moved to seize it. The opportunity was the willingness of the Labor government I led to

legislatively validate and develop the decision of the High Court of Australia in Queensland v Mabo (1992), today known as Mabo (No. 2).

Without any position of mandated authority from her people, she caused their mobilisation in what was, the first time, that Aboriginal people were brought fully and in an equal way to the centre of national executive power. In the 204-year history of the formerly colonised Australia, this had never happened. Never before had the Commonwealth government of Australia and its Cabinet nor any earlier colonial government laid out a basis of consultation and negotiation offering full participation to the country's indigenous representatives; and certainly not around such a matter as the country's common law where something as significant as native title rights could arise from a collection of laws which had themselves developed from European custom and tradition.

The High Court of Australia had opened the door to this possibility in Mabo (No. 2), but without a comprehensive, firm and quick legislative response, that door would have just as quickly closed. Most of the states of Australia had adopted a defensive posture to the opportunity of Mabo while Western Australia would have moved to extinguish whatever native title rights were revealed by the High Court's historic judgement, as it, in fact, tried to do.

Lowitja O'Donoghue understood this. She knew that in the dismal history of indigenous relations with European Australia, this was an illuminated breakout, a comet of light in an otherwise darkened landscape.

Many people here tonight will know the history, or some of it. They will know that no one person or group of persons was ever mandated to assume the authority of or to act on behalf of the whole indigenous community. They will know that attempts to so act were often met with reaction and derision. They will know there was no premium for assuming or even attempting to assume such a mantle of leadership. They will also know that in respect of the Keating government's first offers of consultation around the issue of a proposed native title act that many Aboriginal leaders rejected the entreaties of the government out of hand. They will remember the meetings at Eva Valley and Boomanulla Oval in Canberra; they will remember the rancour. They will also remember me saying, as Prime Minister, that 'I doubted whether indigenous leaders would ever psychologically make the change to come into a process, to be part of it, and to take the burden of responsibility which went with it—whether they could ever summon the authority of their own community to negotiate for and on their behalf'.

I like to think those remarks helped galvanise Lowitja O'Donoghue's view as to what needed to be done. But as it turned out—only she could do it. She was the chair of ATSIC. This gave her a pulpit to speak from but no overarching authority, much less power. But this is where leadership matters: she decided, alone decided, that the Aboriginal and Torres Strait Islander peoples of Australia would negotiate, and I emphasise negotiate, with the Commonwealth government of Australia—and that the negotiators would be the leaders of the indigenous land councils. She decided that. And from that moment, for the first time in the 204-year history of the settled country, its indigenous people sat in full concert with the government of it all. This is why I am here tonight: to acknowledge that moment of leadership and to celebrate it.

Of course, Lowitja had helpers. Principal among them was David Ross, a director of the Central Land Council, a leader in his own right and a weighty judge of circumstances. She had Peter Yu from the Kimberley Land Council. She had Rob Reilly from the Legal Service of Western Australia, Noel Pearson from the Cape York Land Council and Getano Lui from the Island Coordinating Council.

She had, in those important earlier stages, the support and advice of Pat and Mick Dodson, Chair of the Council for Aboriginal Reconciliation and Social Justice Commissioner, respectively. And she had others who came to the process a little later: Darryl Cronin from the Kimberley Land Council, who effectively became secretary to the negotiating group, Darryl Pearce from the Northern Land Council and Marcia Langton, who fulfilled an important general advisory role.

Indeed these people, or most of them, also attended with Lowitja the first Mabo ministerial meeting which I chaired, as Prime Minister, in the Cabinet room Canberra, on Tuesday, 27 April 1993.

Had Aboriginal and Torres Strait Islander leaders not stepped up to the plate, the substance and equity of the subsequent Native Title Act may never have materialised. In an instant, I was struck by the opportunity of the High Court decision and was determined to not see it slaked away in legislative neglect. But determined as I was, I needed the partnership with indigenous leaders to get it done and get it done fairly.

We know, sadly, that the history of Aboriginal and Torres Strait Islander land rights had been broadly a shameful one. Not only from earlier High Court decisions implying that all native title rights to land were extinguished at sovereignty, but by unfulfilled promises by a clutch of otherwise well-meaning governments. Save for Gough Whitlam's Northern Territory Land Rights Bill of 1975, passed into law by Malcolm Fraser in 1976, which was, of course, confined to Northern Territory lands, there had been no exercise of the power under the 1967 constitutional amendment in favour of comprehensive land rights.

In 1983, the Hawke government promised a national land rights bill which included an inalienable freehold title and compensation for past acts and alienations. But this promise of uniform national land rights was broken in March 1986 when Bob Hawke buckled to pressure applied by the then Labor premier of Western Australia, Brian Burke, in concert with his federal factional colleague, Senator Graham Richardson. What Burke promised in substitute for Commonwealth national land rights legislation was to provide Aboriginal people with a title to the reserve lands they lived on while providing an unspecified amount of funds to improve local services. The federal cabinet accepted the Burke proposal in lieu of its own act and it did so without any legislative enforcement against Western Australia. This was one of the low points in the campaign for national land rights; it was also one of the rare moral low points of the Hawke government.

From 1986 onwards, I always knew that Aboriginal land rights was unfinished business. And I might say, I had the feeling that in some way I would be called upon to deal with it. It was one of those intractable issues, a bit like endemically high

inflation, the kind that tends to follow you around. So when the High Court handed down its decision in Mabo (No. 2) on 3 June 1992, saying that there was a concept of native title at common law and that the source of the title was a traditional connection to or occupation of the land by Aboriginal and Islander people, I saw it as an opportunity to deal with the longest continuing problem Australia faced as a nation: the fundamental colonial grievance, the dispossession of the indigenous people and the injustice inherent in that dispossession.

By establishing that Aboriginal and Torres Strait Islanders had a private property right to their own soil, the High Court pointed a way as to how the Parliament could deal with indigenous land rights in a way that marked a turning point in the history between indigenous and non-indigenous Australians. I thought and said at the time, it was ‘a once in a lifetime opportunity’ to make peace between the first Australians and those who came here later.

I thought this pathway was a superior one to that where land was conferred upon indigenous people by the act of a Parliament. Here we had the High Court saying that title of an ancient kind had survived sovereignty and to the extent that subsequent grants of interest in land were consistent with the title, the nature and content of the title could be determined by the character of the connection to or occupation of the land under traditional laws and customs. In other words, it is not ours to give you but we recognise it as something which has always been yours. A way better approach, I thought, than one where a broadly non-indigenous Parliament gave land back to people who had earlier been dispossessed of it.

But above all that, I saw the approach of using the High Court’s native title route as possessing an even greater attribute—and that was truth. There is, especially in public life, no more beautiful a characteristic than truth. Truth is of its essence liberating; it is possessed of no contrivance or conceit—it provides the only genuine basis for progress. By overturning the lie of ‘terra nullius’, the notion that at sovereignty the continent was possessed by no one, the High Court not only opened a route to indigenous land, it rang a bell which reminded us that our future could only be found in truth. This is the principal reason I found the Mabo pathway to indigenous land rights so compelling. And I said so at the time, in the address to celebrate the launch of the International Year for the World’s Indigenous People at Redfern on 10 December 1992: ‘Mabo establishes a fundamental truth and lays the basis for justice. It will be much easier to work from that basis than has ever been the case in the past’.

In the event, virtually across all of the year 1993, my cabinet ministers and I negotiated with Lowitja O’Donoghue and her Aboriginal negotiating group to produce the Native Title Act. The Act, while necessarily complex, met two fundamental aims: justice for Aboriginal people and a workable and fair system of land management in Australia. And it did so in accordance with the Racial Discrimination Act. The preamble to the Native Title Act made clear the objective. It said ‘the people of Australia intend to rectify the consequences of past injustices by the special measures contained in this Act . . . to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire’. The special measures contained in the Act enabled us to

determine who has native title and where; it gave native title holders the right to negotiate about actions affecting their land and it bestowed and restored rights without threatening existing rights.

Just eighteen months after the High Court had handed down its decision and one year, almost to the day, after I had extolled the virtue of the common law pathway to truth and justice in the Redfern Park speech, the bill had been built and negotiated and had passed both houses of the Federal Parliament. Receiving assent on 24 December 1993, the Native Title Act went a substantial way in settling the fundamental grievance of indigenous Australia; the brutal dispossession of their lands and the smashing of their ways of life at the hands of an alien imperial power.

I was grateful at Gough Whitlam's kindly exclamation that the unique process of the development of the Act 'was a shining example of promptitude in a century old story of procrastination'.

However, in a lecture in the name of someone as significant as Lowitja and around the issues with which much of her public life has been associated, it is opportune to say some other things about the subject of native title and indigenous circumstances in the broad.

At the risk of repeating myself, I saw the opportunity of the native title route as a modality in dealing with and settling unresolved questions of indigenous land justice in this country.

This brings me to an important point and one I wish to dwell on, one made by the majority of the High Court (in Mabo (No. 2)) and illuminated in writings by Noel Pearson. And this is that native title is not a creature of the common law or indeed, a common law title, rather it is a title recognised by the common law. Or as the majority said at the time, 'whether the Imperial common law as that existed at the time of sovereignty and first settlement, or the Australian common law as it is today'. In other words, while the common law recognises a native title, native title itself did not evolve nor did it spring from the common law. Here it is worth focusing on a refrain from the Native Title Act itself. One of its main objects is to 'provide for the recognition and protection of native title'; that is, those rights and interests finding their origin in indigenous law and custom, not finding those rights and interests arising solely or peculiarly from the Act itself.

Indeed, it is worth my taking this opportunity to say that as Prime Minister, I had always intended that native title be determined by the common law principles laid out in Mabo (No. 2). That is, I saw the Native Title Act giving expression to native title as native title had evolved, in the same organic and dynamic sense that the common law itself had evolved. The common law, derived from European custom and tradition, was never frozen nor did its development stop with Federation. So, too, native title should not be viewed as some museum-like strain of law which, snap-frozen, requires defrosting around anthropological principles, documentary records that rarely exist, if they ever existed and an onus of proof built within rules of evidence which are calibrated so as never being able to helpfully apply.

Justice Brennan in Mabo (No. 2) emphasised the principles of equality in the recognition of native title. The Keating government's Native Title Act was built on and around those principles. Yet in two important subsequent cases before the High Court, Western Australia v Ward (2002) and Yorta Yorta v State of Victoria (2002), the Court treated native title as an ordinary exercise in statutory interpretation instead of recognising that the legislation did not seek to supersede the common law, so much as to give articulation to its recognition of native title. Part and parcel of that recognition is the possibility, according to circumstances, of enlargement and flexibility. But the Court chose instead the black-letter route of statutory interpretation. And it did this knowing there is a body of relevant common law in the United States and in Canada and Britain which had cogently developed over the course of numerous decisions.

In fact, the current Chief Justice, Justice French, said that in Yorta Yorta, 'the High Court again emphasised the statutory definition of native title as defining the criteria that had to be satisfied before a determination could be made'. He said 'to that extent the Court appears to have moved away from the original concept of the Act as a vehicle for the development of the common law of native title'. He went on to say that the Court in so acting 'may have transformed the Act from a vessel for the development of the common law into a cage for its confinement'.

Earlier, I made clear that I regarded common law rights as they were revealed in Mabo (No. 2) as being superior to any form of statutory creation. Indeed, s12 of the Native Title Act 1993 made clear that the characteristics of native title under the Act were to be determined in accordance with the developing common law. Section 12, though since removed from the statute, said: 'subject to this Act the common law of Australia in respect of native title has, after 30 June 1993, the force of the law of the Commonwealth'. What it said, or was trying to say, was that the common law, as it had developed in its native title complexion, enjoyed all the force and validity of a law of the Commonwealth. The section provided the guide as to the principles the Keating government endorsed when it constructed the Act. Section 12 was removed from the Act after the High Court in Western Australia v Commonwealth (1995) held it was invalid. But technical objections to the place Section 12 tried to preserve for common law flexibility do not diminish at all the high significance of the legislative attempt to promote the recognition of ownership rather than the gift of rights as the true basis for native title.

It is beyond discussion that the government I led intended native title to be determined by the common law principles laid down in Mabo (No. 2). I raise this issue because of the significance of the derogations from the principles as set down in the Mabo (No. 2) judgement and the adoption and incorporation of those principles in the original, 1993, Act.

Going hand in hand in this regression is the continuing high onus of proof falling on claimants to native title. These arise from the need to establish continuity of the existence of native title rights and interests on the part of claimants with reference to evidence of an anthropological kind, including archaeological and historic evidence as well as oral evidence as to group customary traditions and evidence and as to how long such traditions have been maintained.

We all know that the rupture of European settlement had an atomising effect upon Aboriginal society as a whole and on particular groups, such that contemporary efforts to reconstitute that society or groups within it, including the resuscitation of traditional ways, is beyond our facilities and probably our imaginations.

This brings me back to Yorta Yorta v State of Victoria. In that case the High Court held that a determination under the Native Title Act was said to be 'a creation of that Act, not the common law'. This is at the kernel of the problem I just referred to, moving away from the Native Title Act as I envisaged it, to the snap-frozen, museum variety the Court subsequently came up with.

Once you are working in the field of literal or statutory interpretation, you are bound to satisfy more precise, or let us call it, stringent characteristics of the kind laid down in the Act for the award of title. For instance, the title must:

• be communal, group or of individual rights or interests of Aboriginal and Torres Strait Islanders
• be rights and interests 'in relation to land or waters'
• be possessed under the traditional laws acknowledged and the traditional customs observed by the Aboriginal people or Torres Strait Islanders
• be that relevant people by their law or customs have a connection with the land or waters and that those native title rights and interests must be recognised by the common law of Australia.

In Yorta Yorta, the trial judge substantially lifted the bar on the whole issue of continuity. As we know, it was in south-eastern Australia where the effects of European settlement were the most catastrophic and dislocatory to Aboriginal people. Despite this, the trial judge, Justice Olney, made virtually no concession to the claimants on the need to establish proof. Indeed, Justice Olney put the onus on the Yorta Yorta claimants to establish that there was a pre-sovereign society and that each generation of that society had acknowledged and observed the laws and customs of its people—in a material way—and uninterrupted from sovereignty to the present. As an indication of the level of difficulty this involved for the claimants, in the proceedings, Olney would not concede that an Aboriginal person born in the 1840s in the area under claim had any connection with Aboriginal forebears who inhabited the same land in 1788.

Indeed, Olney went out of his way to discount oral evidence by the Aboriginal claimants, preferring to rely on the written records of a squatter in the locality. In the appeal proceedings before the Federal Court, Chief Justice Black, in dissent, had this to say by way of observation:

'For one thing, the use of historical material to answer a claim based substantially upon an orally-transmitted tradition needs to take fully into account the potential richness and strength of orally-based traditions . . . It is necessary too, to bear in mind the particular difficulties and limitations of historical assessments, not least those made by untrained observers, writing from their own cultural viewpoint and with their own cultural preconceptions and for their own purposes.'

He went on to observe:

‘The external and casual viewer of another culture may see very little because the people observed may intend to reveal very little to an outsider, or because the observer may be looking at the wrong time, or because the observer may not know what to look for, or for any one of numerous other reasons. Even a conscientious attempt in past times to provide a complete record would run into difficulties of this nature. The dangers inherent in giving particular authority to the written word, and more authority when it is repeated, need to be borne constantly in mind as well.’

But no such caveats stopped the Federal Court and later the High Court in backing in the Olney view—notwithstanding the fact that in a number of jurisdictions abroad, once proof of a pre-sovereign society had been established, courts had accepted or presumed continuity thereafter.

This onerous burden of proof has placed an unjust burden on those native title claimants who have suffered the most severe dispossession and social disruption. It has substantially slowed the right of redress by Aboriginal people to adequate recognition of their rights in respect of land, water and other natural resources.

In fact, after fifteen years’ operation of the Native Title Act 1993, there have been 1300 claims lodged, arriving at 121 native title determinations, covering just over 10 per cent of the land mass at a cost to the taxpayer of over $900 million.

To ameliorate some of the constraints in the application of the substantive law where applicants are required to prove their continuity with native title rights, the Chief Justice Robert French had some helpful things to say here in Adelaide in July 2008.

In those remarks Justice French highlighted the beneficial purpose which the Native Title Act seeks to confer on Aboriginal and Islander people. One of those beneficial purposes is the rectification of the consequences of past injustices wherein, under the main objects of the Act, section 3 seeks to ‘to provide for the recognition and protection of native title’. Indeed Justice French went on to provide a quotation from the full court in Northern Territory v Alyawarr (2005). There the Court said ‘the preamble (of the Native Title Act) declares the moral foundation upon which the Act rests’; that is, to recognise, support and protect native title. It went on to say ‘that moral foundation and that intention stand despite the inclusion in the Native Title Act of substantive provisions which are adverse to native title rights and interests and provide for their extinguishment, permanent and temporary ’.

In other words, the Court reminded people that some substantive provisions within the judicial framework may operate such as to be adverse in their consequences for native title.

To ease the heavy requirements on claimants in respect of those substantive provisions, as they go to proof and matters of continuity, Justice French suggested that some change in the Act as it relates to onus of proof could facilitate a presumption of continuity of connection by claimants and continuity since sovereignty. Such a presumption, he said, ‘would enable the parties, if it were not to be challenged, to

disregard a substantial interruption of continuity of acknowledgment and observance of traditional laws and customs'. He said 'were it desired, the provision could expressly authorise disregard of substantial interruptions in acknowledgment and observance of traditional law and custom unless and until proof of such interruption was established'. In other words, Justice French was suggesting a reverse onus of proof where proof of any interruption would need to be established—to be proved.

In this model, a presumption could be challenged by the respondent party, whether it be a state or a territory, but Justice French went on to say 'it would be important that any presumption be robust enough to withstand the mere introduction of evidence to the contrary'; that is, proof to the contrary being required.

His Honour's other helpful suggestion was also by way of another amendment to the Native Title Act. One which would allow extinguishment to be disregarded 'where an agreement was entered into between the states and the applicants that it should be disregarded'. Agreements of this kind, of course, go to certain goodwill and judgement by the states and territories by way of them seeking to advance and protect native title. We know that such a specific objective would require somewhat of a seachange on the part of a number of them.

I realise that amendments encapsulating some of these proposals have been put before the Federal Parliament—and I know the Attorney General has said he will take such proposals into consideration. I can only add my recommendation that the Federal government give legislative effect to such changes so as to enhance the efficiency, effectiveness and equity of the Native Title Act.

The other major matter germane to native title I wish to address is the question of pastoral leases and the Wik High Court judgement of 1996.

As Prime Minister, the pastoral lease question was a very vexing and torrid one for me. And for this reason: notwithstanding that the Commonwealth government's legal advice was that the Mabo (No. 2) judgement had the effect of extinguishing native title on lands subject to pastoral leases—I did not agree with that advice. That is, I did not personally agree with the logic behind the advice.

Many people will know how much pressure I was under as Prime Minister to clear up the matter once and for all, by having the Native Title Act extinguish native title over lands subject to pastoral leases. The argument went, 'if Prime Minister, you say your best advice is that the High Court decision in Mabo (No. 2) signalled the extinguishment of native title on pastoral leases, why don't you follow your own legal advice and make it certain in the Native Title Bill?'

I had lots of supposedly good people urging this upon me, like the former leader of the National Party Tim Fischer, who was doing his level best to turn pastoral leases into quasi-freehold titles at the expense of Aboriginal people.

I knew there was a massive potential loss here for Aboriginal people— because in 1993 a very large proportion of the land mass of Australia was subject to pastoral leases. In Western Australia it was 38 per cent of the entire state, in Queensland 54

per cent, South Australia 42 per cent, New South Wales 41 per cent and the Northern Territory 51 per cent.

Given its scale and importance, I was determined not to deny Aboriginal people the chance to test this question before the High Court. So to keep the naysayers at bay and to fend off the opportunists, I decided to record in the preamble of the bill that on the government's view, past leasehold grants extinguished native title. Indeed, in my second reading speech introducing the legislation, I said the following:

I draw attention also to the recording in the preamble of the bill of the government's view that under the common law, past valid freehold and leasehold grants extinguish native title. There is therefore no obstacle or hindrance to renewal of pastoral leases in the future, whether validated or already valid.

I had these words in the second reading speech and in the preamble to the Act but I refused to make extinguishment a fait accompli under the operating provisions of the Act.

I knew that the whole idea of pastoral leases over Crown land arose because squatters decided to move on to land for which they had no title and where their activities, grazing or otherwise, were uncontrolled. The motivation for the legislative regime, first in New South Wales in the late 1820s, was to put some control on squatters without conferring on them a freehold title to vast tracts of the country; country largely occupied by Aboriginal people. So I understood that when the various colonial and state governments came to issuing pastoral leases they did so knowing that the pastoral activity would occur over lands where Aboriginal people were still conducting a traditional way of life. That is, the governments issuing these leasehold titles issued them in the knowledge and acceptance of the fact that grazing could be accommodated concurrently with Aboriginal people maintaining a traditional connection with the land under grant.

So when in Mabo (No. 2) the High Court laid down its principles, I could not see those principles being at odds with a coexistence of title as between pastoral activity and a traditional Aboriginal life arising from the latter's native title.

In other words, I had rejected, or at least held under question, the Commonwealth Attorney General's Department advice that the High Court's Mabo (No. 2) decision and its principles effectively extinguished native title. I told officers of the Attorney General's Department at the time that I regarded their advice as black-letter property advice, wherein they failed to understand how and in which ways the High Court was peering through the common law to the development of native title rights over the course of Australian history following European settlement.

Putting it in the language of the lawyers, I told them that exclusive possession of land could be an incident of a pastoral lease but in the majority of cases was unlikely to be and need not be.

As it turned out, in the Wik decision of 1996, the High Court by a majority of four to three held that the grant of the relevant leases did not confer on the lessees exclusive possession of the land under lease and correctly, in my view, made clear

that, in the case of the Wik and the Thayorre peoples, that a relevant intention to extinguish all native title rights at the time the grants were issued was not present. That is, the grants did not necessarily extinguish all incidents of the native title rights that the Wik and Thayorre peoples enjoyed.

Of course, that decision of the High Court was attacked mercilessly by the Howard government. That villain, Tim Fischer, boasted that there would be bucketloads of extinguishment in the Howard government's response to the decision.

Many people here will be familiar with the sorry tale which became part and parcel of the Native Title (Amendment) Act 1998. That amendment arose from the Coalition government's so-called Ten Point Plan, a plan facilitated in the Senate with the support of Senator Brian Harradine under the advice of the Jesuit priest, Frank Brennan.

As an aside, let me say, and as a Catholic, let me say, wherever you witness the zealotry of professional Catholics in respect of indigenous issues, invariably you find indigenous interests subordinated to their personal notions of justice and equity: because unlike the rest of us, they enjoy some kind of divine guidance.

And so it was with the Wik amendments. Point two of the amending act declared:

'States and Territories would be able to confirm that . . . agricultural leases in existence on or before 1 January 1994 could be covered for . . . exclusive tenure . . . to the extent it can reasonably be said that by reason of the grant or the nature of the permitted use of the land, exclusive possession must have been intended . . . thereby extinguishing native title.'

The amendments were entitled 'Confirmation of past extinguishment of native title'. But it was never clear that all freehold grants and leasehold grants permanently extinguished native title.

Mick Dodson said at the time 'by purporting to 'confirm' extinguishment by inconsistent grants, the Commonwealth is purposely pre-empting the development of the common law—not allowing sufficient time to integrate the belated recognition of native title into Australia's land management system'. He said 'this does not require the obliteration of indigenous interests so as to favour non-indigenous interests'. Quite so.

The Keating government's Native Title Act of 1993 recognised a right to negotiate given to native title holders and a duty to negotiate vested in government and grantees with respect to grants of mining tenements as well as compulsory acquisition by governments for the giving of interests for a commercial purpose.

The Howard government's 1998 amendments denied the application of the right to negotiate over those great parts of Australia where native title might be established, indeed, to probably half the mainland. The amendments removed many forms of grant from the ambit of the Act, seriously diminishing the value of the Act while choking off access by native title holders.

The Howard government's 1998 amendments cut across the spirit of the Keating government's 1993 Act; the notion that the Act was, first and foremost, legislation of a beneficial kind—enacted to redress historic inequities—rather than to compound ones sanctioned by earlier acts.

Finally, I wish to say something about another outcome in that historic negotiation between Lowitja O'Donoghue, her negotiating team and the Keating government. And that is the establishment of the Indigenous Land Corporation and land fund.

In the course of that historic negotiation, I invited ATSIC and the Council for Aboriginal Reconciliation to submit proposals for a wider package of measures to help establish an economic base for Aboriginal and Torres Strait Islander peoples and in establishing such a base to safeguard and further develop Aboriginal and Islander culture.

That invitation and those submissions came together in what was called the Social Justice Package. A substantial element of that package was a land fund—a fund set up to support those indigenous people, dispossessed of their lands, yet unable to assert native title rights and interests. In the second reading speech to the Native Title Bill 1993, I said 'that despite its historic significance, the Mabo decision will give little more than a sense of justice to those Aboriginal communities whose native title has been extinguished or lost . . . their dispossession being total, their loss complete. While these communities remain dispossessed of land, their economic marginalisation and their sense of injury continue'.

The purpose of the fund was to acquire land and to attribute to such land a synthesised native title. In fact, I made clear that I intended that the fund could acquire pastoral leases and convert them to a synthesised native title. That is, where Aboriginal people who own or acquire a pastoral lease and who the Federal Court determines would satisfy the criteria for native title, but for the existence of the pastoral lease and wish to convert their holding to the equivalent of native title, could do so.

The land fund was the centrepiece of the Keating government's social justice measures arising in association with the Native Title Act. The fund, which was the subject of its own act in 1994, became the Indigenous Land Corporation, set up with the aim of becoming self-sustaining with over $1 billion of Commonwealth-subscribed capital.

The Indigenous Land Fund Act locked in allocations to the fund and the Corporation for ten years. I designed the Act to make it extremely difficult for a future government to undo what I had put into place. As it turned out, I succeeded in making it Howard and Costello-proof; vandal-proof. It galled them that the ILC's budgetary appropriations were beyond their executive influence.

By 2010, appropriations to the Aboriginal and Torres Strait Islander Account stood at $1.421 billion. Payments from the Land Account to the Indigenous Land Corporation stood at $650 million. The ILC is now in an advantageous financial position such that it is able to expend funds on assets other than simply the purchase of land. The land

fund and land corporation initiative stands as another successful outcome from the 1993 Native Title Act negotiations.

Let me, perhaps, finish where I began.

I accepted this invitation to give the Lowitja O'Donoghue Oration out of respect for Lowitja as a remarkable person and a leader of Aboriginal people. As I said earlier, her unfailing instinct for enlargement marks her out as a person of great significance in the Australian political firmament.

I like to think that together, she and I were able to lead our respective political forces towards an historic outcome for a race of people dispossessed and decimated by the process of settlement.

Without having been lobbied or cajoled, I took the opportunity of the Redfern Park speech in 1992 to lay out, openly and truthfully, the history of our inhumanity towards and thoughtless disregard of Australia's indigenous people. For the nation's integrity and moral clarity, I thought it necessary it face up to the truths of our colonial history. Similarly, I saw the Mabo decision and the Native Title Act as an opportunity to transcend the history of that dispossession—to put right an historic wrong. An opportunity to restore the age-old link between Aboriginal land and culture, to declare Aboriginal culture a defining element of who we are: to make clear that our spiritual enlargement as a people could best be accomplished when that enlargement included a secure and prosperous place for the first Australians.

Lowitja O'Donoghue has been and remains an important part of this national transformation. This oration in her name is testimony to that reality.