

TRANSCRIPT OF SPEECH BY NOEL PEARSON

Thank you very much Danny and Gilbert + Tobin for your kind invitation for me to address this auspicious occasion. I too pay my respects to the traditional owners of this land and to the Indigenous people of Sydney. Let me say that I wish the American Bar Association all the very best for your deliberations at the conference. Distinguished ladies and gentlemen I feel humbled to offer some thoughts about the predicament of Australia's original peoples and to offer some comparisons of the predicament of our brothers and sisters in North America. It was always going to be the case, but the question of land justice would consume the societies as long as they remained unresolved. And in this country it remained unresolved for a very long time. Australia was the only former colony of the British Crown that had not deal with the question of Indigenous rights to land until the very last years of the twentieth century. We were some 200 years behind in the failure of our legal system to accord to native Australians any respect for their ancient ownership of the continent. Australia was absolutely singular. There had been entire law libraries filled with cases in the former British colonies in Asia, in Africa and of course in North America. New Zealand had had its equivalent of our most famous case *Mabo* in the middle of the nineteenth century. Of course the starting point for the judicial discussion of the theory of native title to land might well be the decisions of the Marshall Court in the United States in the 1820s. And Justice Dean in the High Court of Australia anticipated that one day our courts would belatedly turn to the question of Indigenous entitlement when he said in an early case in 1985 in *Gahardy v Brown* that almost two centuries on the generally accepted view remains that the common law is ignorant of any communal native title or other legal claim of the Aboriginal clans or peoples even to ancestral tribal lands on which they still live. If that view of the law be correct, and I do not suggest that it is not, the common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823 when Chief Justice Marshall in *Johnson v McIntosh* accepted that subject to the assertion of ultimate dominion including the power to convey title by grant by the State, the original inhabitants should be recognised as having a "legal" as well as a "just" claim to retain the occupancy of their traditional lands.

It fell to the *Mabo* case mounted in the 1980s and finally determined on 3 June 1992 to finally deal with the question of Aboriginal title to Australia. This belated decision by our highest court came at a time when the country had to grapple with it seems to me, two remorseless realities: firstly there was the undeniable question of the original occupancy and possession of the land by its Indigenous peoples. Australia could no longer go on in denial of that truth. So facing the High Court of Australia in the lead up to its decision was the truth that this question was never going to subside until it was properly dealt with. But arraigned against that was the reality that there had been two centuries of colonial dispossession of the original inhabitants and acquisition of titles over large areas of the country. And the High Court in *Mabo* had to try and reconcile those two realities: the original ownership and to the fact of 200 years of history. And the Court put forward a proposition that really is the structure of the *Mabo* decision, and it followed up in a subsequent decision that our people were involved in called a *Wik* case, and established a third principle in relation to this historic compromise

on the question of land justice. I've often said that if you want to understand the nature of the compromise there might be three principles suggested in those decisions. That first principle was undoubtedly the principle of the accumulated rights of the colonists could not now be disturbed. The first principle of the *Mabo* case was to confirm white land rights. Challenging the many titles enjoyed by the settlers and their descendants was not made justiciable in the courts and the relentless reality in the High Court's decision was to confirm that colonial dispossession could not now be disturbed.

The second principle of *Mabo* was to say that, of course, the remnant lands under the period advanced by the Court should now be forthwith accorded to its traditional owners. The remnant lands where extinguishment had not occurred and the people had not been annihilated should forthwith be determined in favour of its traditional owners. So the structure of the compromise was that the original peoples were to get what was left over. And the third principle articulated by the High Court in the *Wik* decision was to say that there are various categories of land such as pastoral leases and national parks where there was a possibility of co-existence, co-existence of the crown grants with the original titles held by the traditional owners. That should have been the structure of the compromise. The colonists keep what's theirs, the Indigenous keep everything that's left over and there should be honour in relation to the determinations that should result in the wake of the decision and there are categories of land where titles can co-exist and the formula in the *Wik* case gave that co-existence, gave superiority in that co-existence to the holder of the crown rights. So wherever there was an inconsistency between the native title and the crown grant, the rights under the crown grants superseded the native title. I felt that given the reality of history and the possibilities for the future and the fact that the ongoing process of dispossession would continue as long as there was not a settlement of remnant rights, I felt that the compromise was one that the country ought to seize upon. It was the only compromise available without resort to anything but the courts of law. It was a compromise proffered by our highest institution as a means of resolving the two centuries' grievance; and all of our febrile hopes rested on the idea that the country might accept the basis of that compromise, after all, we argued in the wake of the *Mabo* decision. After all, the basis of this compromise had its foundation in the law of the colonists. It was the law of England which respected Indigenous title to land. It was the law of England that apprehended the Aboriginal peoples as following the acquisition of sovereignty now subjects of the British Crown but then also entitled to the protections offered by British law and that principle protection being that those in occupation of land should be presumed to be in possession. And we thought the people of Australia would draw upon their own legal traditions to say that at this juncture *Mabo* ought to be a cornerstone for reconciliation and a new relationship between the Aboriginal peoples and the rest of the country. *Mabo* provided to this country what I described at the time as a once in a lifetimes opportunity for a nation. Nations only get one chance like this to get it right. And we squibbed it. Over the past 18 years we have seen a grudging determination on the part of the Australian people to put to absolute proof every native title claim launched by traditional owners in relation to their remnant lands. There have been court cases that have cost far in excess of the value of the land in the market place. A pastoral lease costing \$2 million cost \$12 million worth of case law. Such has been the resistance of this country to the idea that

native title provided a potential cornerstone for reconciliation and justice. Essentially, the response of the adversaries of native title was thank you very much for principle number one we are now going to put you to proof in relation to principle number two.

I don't think the opportunity of *Mabo* is completely lost to the country, but it is in severe decline. It is going to slip from the hands of the country as long as the political and judicial response to the original 1992 decision remains as poor as it has been. Can I say that one of the key areas in which the law has deteriorated in relation to native title in this country has been in relation to the question of the form of title that native title represents. Let me take you back a few steps. The key issue facing the High Court in 1992 in *Mabo* was the question of whether the Aboriginal connection with the land in this country was the type of connection that English law would recognise and respect. There was a famous decision to which the then Justice and later Chief Justice Brennan referred in the *Mabo* case and a decision of the privy council in *re Southern Rhodesia* in 1919 which captured the issue facing the Court and Lord Sumner spoke on behalf of the counsel when he said that the estimation of the rights of Aboriginal peoples is always inherently difficult – some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be breached. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. And of course in *Mabo* it fell to Justice Brennan and the majority to put behind us the discriminatory view in *re Southern Rhodesia*. And Justice Brennan famously said that if the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support, the doctrines of the common law which depends on the notion that native peoples maybe so low in the scale of social organisation that it is idle to impute to such people some shadow of the rights known to our law, in *re Southern Rhodesia* can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be, nor be seen to be frozen in an age of racial discrimination.

So the great social Darwinian estimation of peoples according to some hierarchy was dismissed by the High Court of Australia in *Mabo*. No peoples, whatever their cultures and social organisation and religions and beliefs and relationships to country, occupy land without possessing it. All peoples are to be accorded respect by the common law in respect of the occupation. There is no justification for a racial discrimination that gave priority in recognition to certain cultures in societies and not to others. But then having made that breakthrough, the Australian law immediately descended into an estimation of discriminatory exercise in relation to the nature of the title that could be enjoyed pursuant to that occupation. So in the Australian law that has accumulated over the last 18 years, there is a bizarre jurisprudence that posits the idea that native title in this country is the sum total of whatever berry picking rights Indigenous claimants must be able to prove by reference to their traditional laws and customs as they existed in 1788. So, in the Australia law, the Indigenous hardly own the economic property on the lands they successfully claim. And they are left in this bizarre historical zoo by virtue of

the mistaken idea that native title is to be determined by reference to traditional laws and customs. You see, the key question that has been misunderstood in the academic and judicial discussion of native title in this country is this: even as we have accepted that traditional rights survive the acquisitional sovereignty by the crown, even as we all accept that, that the rights survive the acquisition of sovereignty under what is known in the Canadian law and in some of the Australian discussion as the doctrine of continuity, even as we accept that, the mistake arises in relation to the question of what continues? Is it those rights and interests that are established as a matter of proof by reference to the traditional laws and customs of the group? Or is the right to continue the occupation of the land pursuant to the authority of one's traditional laws. Is it the occupation that founds the right to possession that survives the acquisition of sovereignty? I have been of the view that the correct interpretation is that it is the right to possession that has survived sovereignty. And indeed in a classic analysis by Professor Kent McNeal, an academic from Canada, in the classic analysis that he outlined in 1989, the position of Indigenous people at the moment of sovereignty is this – they are in occupation of their traditional lands pursuant to the authority of their laws and customs and on the basis of that occupation English law accords them a presumption of possession. Occupation is proof of possession and a possessory title is not a title limited to whatever incidents might be proven by reference to one's understandably arcane traditional laws and customs back in '70 and '88. The same arcane traditions and laws that the Englishmen holding title back in 1400 would have evidenced as a matter of proof as well. But the Englishmen in possession of his estate in 1400 had within his entitlement the right to build a nuclear power station. The right to build a nuclear power station was an incident of his possession even though he could never imagine at that stage that that was a right that he wanted to enjoy. As Justice Isaacs once said in a famous Australian case - the fee simple, the rights that attend to the fee simple have never been fully enumerated. The rights that are incidental to possession include rights that we have not yet imagined. Subject to whatever derogations have been validly enacted by the legislature or whatever reservations validly affect Native Title because the Crown has reserved to itself ownership of certain, in the case of Australia's history, certain mineral products. So the Australian law in the past 18 years has become an absolute quagmire of jurisprudence that has meant that Native Title claimants are subjected to absolutely strange requirements of proof in relation to their traditional laws and customs and we're left with the ridiculous situation where the title of an adverse possessor under our law is more complete than the title of a Native Title group claiming communal tenure on behalf of their group. Because the adverse possessor only has to prove his control of the land and all of the incidents of possession are presumed to be held by him. But the Native Title claimant is in a far inferior position to that of the adverse claimant. The Australian law on Native Title since the original 1992 decision has been an absolute travesty of misconception and intellectual shortcoming by the academics who contributed to the misconceptions, to the advocates who provided poor guidance to our Federal and High Courts in relation to these questions and we have had a High Court and a Federal Court that, in my view, have ill served the Indigenous people of this nation. Let me say one last thing about the jurisprudence of Native Title since *Mabo's* case in 1992. One of the great difficulties facing Native Title claimants in this country has been in relation to the question of compensation for past dispossession. According to Australian law

whilst the extinguishment or derogation of Native Title in history is not compensable, the effect of the Racial Discrimination Act in 1975 would have founded potential claims for invalidity of Crown Grants and with the validation of those uncertain titles by virtue of legislation enacted in 1993 Native Title holders were entitled to compensation for the extinguishment of Native Title by virtue of the 1993 Act. Potentially in that period between 1993 and 1975 large parts of Australia had been subjected to grants adverse to Native Title therefore giving rise to entitlement to compensation. And at the time of the legislation's passage in 1993 there was a vigorous national debate particularly in relation to the question of compensation and who would bear it and a deal was made between the Commonwealth and State governments of the time that the many anticipated billions of dollars of compensation would be split according to a certain formula between the two levels of government. Now I am not aware of one dollar's worth of compensation ever having been paid in the ensuing period. None of the entitlements under the Native Title Act have fallen due to those entitled to the compensation claims under the legislation. This has been because the scheme under the legislation places a weight upon claimants to prove the original existence of their title, to prove the quantum of their loss and Indigenous groups have been absolutely unable to pursue claims because of the likelihood that the costs of running the compensation claims are likely to far exceed the payment of compensation for the losses suffered. And the resistance of State and Territory governments and the Commonwealth, the vigorous resistance to Native Title claims, has meant that not one dollar's worth of compensation has been drawn down upon as anticipated by the original legislation. And I foresee no solution to this issue until there's a serious change in the way we approach the question of the constitutional guarantee of the payment of just terms for property loss. The just terms provision applies to the loss of Native Title by virtue of governmental action, however, the difficulties facing Aboriginal land owners are very very great indeed. The prospect of traditional owners mounting compensation claims is daunting because there appears to be no principle in our constitutional law that guarantees some kind of proportionality between the benefits gained by acquirors and the entitlement to compensation guarantee by the Constitution. All the Native Title Act does is that it tautologically repeats the constitutional guarantee. If legislation validates rights and vests rights in certain parties, you would think that there ought to be a constitutional principle that says - well the third party has gained instantly the moment of validation, surely there should be some proportionality in respect of a person whose property has been acquired receiving his or her compensation. This is an area of law in this country that is extremely ill developed and for the rest of the country the entire country received the benefits of validation instantly upon the passage of the 1993 Act and yet the procedures and hoops through which those who lost properties can gain their entitlements under the Constitution are so daunting that I assume that in my dotage I will stand before audiences such as this arguing that perhaps not a dollar has been paid.

Let me now turn to another aspect of the predicament of Indigenous peoples and that is our social and economic recovery. It is a matter to which we are equally engaged in my region of the country - very difficult questions of how it is that Indigenous peoples take a fair place in this their own country. The statistics of economic and social disadvantage are notorious. A life expectancy of less than 50 years and a range of social and economic indicators that only those who have known the similar

predicament of Native Americans and other Native groups throughout the Commonwealth would understand. How do we turn around a life expectancy deficit of 20+ years? And many of these indicators are not on the improve. They are getting worse. The number of Indigenous children in child protection systems and in foster care is on the rise. Across a whole range of indicators you would have to go to some parts of sub Sahara and Africa to find life expectancy rates like some parts of this country. Imprisonment rates, 3% of the population in some of our jurisdictions, are contributing 40% of the prison population. 3% of the population are contributing 60% of youth and juvenile detention. These are problems that are not going to be turned around in short order but what we must first realise before we pursue the policies that have some hope of working is that we have made many efforts in the past. We have come to many similar conclusions about the immorality of this situation in the past. We have come to many sincere junctures where we've said things have got to change, things have got to get better and our policies and programs and budgetary commitments have got to be renewed. And yet like groundhog day we come to that juncture again five years later when a whole range of new indicators illuminate a deteriorating situation. We have long argued from our part of the country that we have got to get our thinking straight first and our critique of welfarism has been central to our re-thinking, it was obvious that we needed welfare reform but the problem of relegating the country's original peoples to a position of mendicancy was not just a symptom of the problem, it was the cause of many of our problems and if it wasn't causal of many of our problems, it certainly exacerbated any existing problems we had and certainly frustrated and prevented any of the solutions that we proposed so we had to get on top of welfarism, substance abuse and the social breakdown that was occasioned, particularly in the past three to four decades. It was my analysis, and it still is my analysis, that through 200 years of mean history in the teeth of inhumane racism, aboriginal people had as the slogan said they "survived". They had mustered together some strength that had seen them survive in the teeth of a heartless society. We had some strengths in the '50s and the '60s and those strengths were largely social and family-based strengths where people would continue to fulfil their responsibilities to their children and had taken responsibility because at the end of the day responsibility was all that they had, even if their rights were not fully accorded to them. I was struck by an analysis by the conservative African American intellectual, Shelby Steele, that struck a chord with me in relation to what might have happened at the moment of our citizenship in 1967. I think a grievous mistake was made when the doors of citizenship finally opened. Instead of holding on to our responsibility and enjoying our newly guaranteed rights we ushered in an era where a combination of white guilt and black victim hood made a bad situation worse and deferred the day when we would take our rightful place in the country because no salvation at the end of the day was to be found in white guilt and black victim hood. We keenly understood that victim hood was ultimately not a posture that would benefit our people, it was not a mentality for continued survival. If our ancestors had adopted a mentality of victim hood we would never have survived colonisation but the tragic deal struck in the argument of Shelby Steele in the wake of the 1965 Civil Rights Act and with a parallel in the wake of the '67 referendum in this country was this Faustian pact we made about white people were going to redeem their history through guilt and the aboriginal peoples and black Americans would cultivate an outlook unfortunately that had too many strains of victim hood within it. So we have

been pursuing a responsibility agenda. A student of the great dialectical struggle between W.E.D. Debois and Booker T. Washington, a student of that great struggle between those two ideas in the history of African Americans and the United States consumed my own thinking about it and my own view was that the whites argument of Dubois and the responsibility argument of Booker T. Washington was a struggle that had to be keenly pressed and the greater the tension between the two would locate the answer. We needed strong recognition of our rights and a strong affirmation of our responsibility and in that struggle between those two ideas I suppose I personally fall on the Booker T. Washington side of that, that debate. I fall on that side of the debate because it's the uncool side. I fall on that side of the debate for this argument, so let me propose this argument: It is because at the end of the day it is taking responsibility for yourself that is your most guaranteed defence, it is your most guaranteed position and if we, and people of our ancestors, can draw upon our history for confirmation that people can survive provided that they have the strength of their own responsibility, even in the teeth of oppression. I think that one of the causes of social unravelling in our communities has been the idea that somehow it was the Australian welfare state that was going to save the indigenise and once we internalise the idea that somebody else was going to save us, we had internalised a fatal conceit. So for the future I have always drawn upon the example of the Jews. They are a community who have never forgotten history and they never allow anybody else to forget history, they fight staunchly in defence of the truth, they fight relentlessly against discrimination but what they have worked out as a people is that they never make their history a burden for the future, they defend racism but they never make racism their problem. They never make racism their burden and properly understood, racism should be a problem of the races, not our burden. As long as we understand the problems that result when we take on racism as our problem, we remove a great power from ourselves and to black Australians and to other peoples in a similar predicament I say to them the example of the Jewish people is a salient example for us. It is an example about how it is that we might grapple with the past but engage for the future, it is also an example about how we might maintain a community and a sense of people hood, religion, tradition, culture, history over millennia and yet at the same time engage at the cutting edge of whatever the world has to offer. This is an example of a community that is able to maintain a thread of people hood notwithstanding diasporas and the idea of people maintaining an orthodox heart at its centre whilst the rest of the community engages in orbits around that gravitational centre and engage according to their own choices with the rest of the world. That is a vision for an aboriginal future in my part of the country. I want Cape York to be the point of gravitation, to be home, to be the heart for our people but I want our young members in the future to orbit around that heart and to engage in the world and we can maintain a sense of people hood and common identity and religion and language, we can maintain tribes but if we think that tribes can prosper under the current model of deadening socialist communalism that is in truth only a product of administrative history more than being based upon our ancient tradition. We have a stultifying communalism that is the product of our bureaucratic dealings with the State rather than being a true reflection of our ancient traditions and until aboriginal reservations, and I suspect Native American reservations, break out of the scriptures of communalism and maintain community but at the same time free individuals and families to prosper and to pursue a

better life in their own right, then we will continue to wallow in disfunction and misery. The Jews are an example of people who have maintained a communal identity as a people whilst never placing strictures on individuals as to their jealous pursuit of their own interests and that of their families. It is the way people prosper in the world and that is one thing we have woken up in relation to our predicament in Cape York. The Liberals are right when they say that there is a power in individual choice and jealous regard for one's own immediate family. It's the engine of development the world over and I don't think indigenous peoples are exempt from that principle. If we want to enjoy prosperity then liberal thinking is right in relation to the power that individual choice and self interest represents for development. It is the very engine of development and so we have to find a way, just as the Jews have to reconcile a vehement self-interest and a vehement individualism, and reconcile that with a common identity with our fellow members of our tribe. I think that there are sufficient examples of peoples that have managed that reconciliation and who manage it very successfully and the lesson for us in Cape York Peninsula is a lesson which says that we can maintain a sense of people hood that captures our ongoing traditions, our language, our connection with the country, our religion, whilst at the same time enabling individuals to participate in the world according to their own likes and according to their own passions and according to their own talents. Thank you very much.

DG So I'll ask a question. Noel, you talked about the judiciary, unfortunately all the High Court were sitting today, so they couldn't be here to hear your remarks, but there are several Federal Court judges here to have the benefit of your views and they'll be the richer for them. The kind of role of government at the time of the Native Title Act, and what was done with that Act, to, I don't know whether it is undermined, but to undermine or to subvert or to send out a different kind of route to the *Mabo* and *Wik* decisions, do you have any comment about that? The role of the legislature that is representative of us, because there was a very great debate at that time about the justice of that piece of legislation.

NP The Australian High Court has interpreted a crucial provision of the Native Title Act in a way that was completely unintended by the Parliament and those of us who participated in the debates and negotiations around that legislation. Section 223 of the Act defines Native Title and those of us who participated, including the politicians always understood that section 223 was really just a statement to the effect that Native Title was whatever the common law of Australia said Native Title would be, But unfortunately there was an interpretation that was eventually made by the High Court that the clauses that were drawn from one of the judgments in the original *Mabo* case represented a statutory codification and this was a complete difference to what our original understanding was. Our anxiety when we negotiated the legislation was to preserve the common law institution of Native Title. We did not want to create a statutory codification of the concept and we never understood this definition to have done that. But a High Court decision in the *Yorta Yorta* several years ago completely confounded that original understanding and the Federal and High Courts have departed from the understanding of the Prime Minister and the Attorney General at the time and the understanding of the government lawyers and our lawyers

that the legislation was merely a preservation of the common law, not a codification of it. So that's the technical answer to Danny's question about how it is that the Mabo decision has been severely derailed. But can I say that we advocates for indigenous claims were partly responsible for this deteriorating direction, because there is a question about whether the statutory definition, the bar for proof would be equal to the common law. Where was that bar, or did it set a lower bar and advocates for aboriginal claimants, I think vested their hopes in the idea that the statutory provision would represent a lower bar than what would be expected in a straight common law claim. What we have ended up with is in my view a bar that is in fact higher than the common law. It would be easier under proper pursuit of common law principles to prove claims than is currently the case under the Australian jurisprudence. A massive slight of hand was able to be committed as a result of this because from the moment that you determined that it was section 223 that defined Native Title you could completely disregard the entire common law of Native Title. So our Australian cases make no references to the hundreds of cases in Canada and in the United States and in the privy Council because those cases are said to be irrelevant to the developing Australian law, the Australian law of Native Title has turned into a statutory interpretation exercise. Whereas the Mabo decision, there are scores of cases of the United States Supreme Court cited in the original judgment, scores of cases on the part of the privy Council and the Supreme Court of Canada, the entire common law internationally was mined by the High Court in the original Mabo decision but once the High Court decided in Yorta Yorta's case that the statutory definition was the starting place and ending place for defining Native Title the difficult business of trying to relate the Australian position to the position in North America and in other jurisdictions could be put aside. All of the difficulty of grappling with the differences in our approach to the approaches adopted in these other jurisdictions resulted in a determination on the part of the Australian courts to simply treat this as an Australian exercise. So we can't go to the High Court of Australia today and say, well in Del Gamook, the Canadian Supreme Court actually approaches the proof of Native Title in an entirely different way from the way in which this court has ruled and this is their reason and the situation is completely analogous to ours so why is it that the Canadian position is so much easier than the position articulated by this court? It is not possible to do that in the Australian law as stands now because a critical provision of the Native Title Act has been treated in a way that was completely unanticipated by all of us who were parties to that legislation.

DG I think, there are criticisms that can be made of the government today with the Native Title Act but Noel's determined not to let the lawyers off the hook is fair enough.

Q If one can't persuade the judges, can one persuade the legislature? Any efforts at amending this?

NP The members of the Court themselves have made pronouncements that it needs to be fixed up by parliament rather than by the courts. The difficulty is that the whole thing is so fraught and the stakeholder positions are so entrenched that any opening up of any provision will result in

massive conflagration, political conflagration and in my view the onus lies with the courts on abandonment of responsibility, back to the legislature I think is a cop-out and in my view the claims under the Native Title Act ultimately will need to be put aside in favour of original claims under the original jurisdiction of the common law because the outcomes of Native Title Claims in Australia are so poor compared to the American outcomes and the Canadian outcomes. In America and Canada the rulings by superior courts have accorded to native owners the ownership of such surface and of the subsurface and other resources on the land and so on, the Australian law comes nowhere near that position and in my view the heart of the misconception as I said is that we simply haven't accorded to native occupants of land the entitlement to position that English law accords to anybody occupying land and evincing dominion over it and its that discriminatory position, a failure to accord to a native occupant that which the common law would accord to an adverse possessor is really what it all boils down to.

Q Noel thank you again for a great presentation, just in terms of the US experience, we have tended to do one of three things, first we have either tried a complete assimilation and attempt to break down the cultural traditions of the native people and say if you are going to be able to prosper in an occupied country then you have to adopt the culture and value of the occupiers, the, that approach has not worked, it has been destructive for native families and the culture, it hasn't eliminated, it has only impoverished the groups. The second approach that we have had is one which says ok, well, we will isolate, give them lands, give them some resources but that as you have described has created a dependency culture which has also been ineffective and then the third thing we have done occasionally is tried to empower these groups by providing opportunities for jobs, training, schools and some of the things that you are talking about but we always run out of political will and money in short order and so the question is, how long do you think its going to take and how much money is it going to require to achieve some success in such programs you are describing on the Cape?

NP I think the parallels in terms of phases are absolutely the same over there, the assimilation phase and the separate development phase are now our sincere desire to empower indigenous people. Whilst at the same time there is a danger of harkening back to assimilation as an absolute solution, I think that empowerment will necessitate integration which has some features of assimilation, I think we have got to get to thinking straight on that engaging in the wider society does imply and does involve a measure of assimilation but the idea that people be forced to abandon all of their culture and all of their patrimony by unilateral policies is the thing that can't be allowed to become policy again. We say in the, we are really engaged by the Nobel Laureate, Amati Assen who kind of laid out a formulate that really galvanised us and it was a formula about what policy should be, he said, you know, people should be in a position to have the capabilities to choose lives they have reason to value. Capabilities to choose lives they have reason to value. That's what I would like for the future of young Cape York people. That they have capabilities to choose the lives they have reason to value, so there's no

prescription about whether the person has more or less a traditional orientation or a parochial or orthodox orientation versus a world engaging and ambitiously orbiting orientation. That's a choice for the individual to make, but the important responsibility that social policy has is the question of well, its not enough to just say people have a choice, Amati Assen's great insight is that true choice comes with capabilities and the key capabilities of good health and good education and good social support with opportunity and you know we, I think the problem with that second phase that we talked about was that there was a period when we thought that indigenous people would be accorded the right to choose the nature of their orientation but you know you can't really say that a young aboriginal girl with poor health and a disastrous education in a remote community has real choice. She has simply not been armed with the capabilities to choose, so I see that there has got to be, and I mentioned this concept to the Ambassador in our discussion this morning that, the big challenge for extreme minority groups such as ours and such as Native Americans is how does the 3% mouse hold its own in a democracy against the 97% elephant and the existing systems of democracy don't put the indigenous peoples in a position to hold their own in that relationship and I think that's the big rethink that has to be had in our country. In order to maintain and hold real power in parliament, part of the power we will need is to be on a level playing field with the 97% elephant because the elephant will crush us with its well-meaning efforts if nothing else and so I think that rather than creating separate jurisdictions where indigenous people are able to exercise autonomy away from the main game, I think the new era has got to be focused on the question of what is the interface between, what is the fulcrum that we need when the elephant is sitting on one side of seesaw and the mouse is on the other, what is the fulcrum that will deliver some parity in the relationship because the importance of having a level bargaining field is as much directed in my estimation to trying to keep the leviathan at bay as much as anything else because I think the part of the challenge of indigenous recovery will be for the State to retreat while we build indigenous responsibility and rebuild indigenous people taking charge of their own lives. I think the collapse in indigenous responsibility is directly related to the assumption of responsibility by the welfare state and it won't retreat in my view unless we have a structural solution to that problem and so I'd like to see the day when indigenous Australians are able to sit on a level playing field and negotiate a mutual commitment on the part of the greater society and indigenous Australians that we will pursue a set of policies that are aimed at indigenous people being part of the nation.

- Q: Can I perhaps move it to the international level given the nature of our colleagues here and I think the tension you describe between rights and responsibility is a fascinating one and, of course, most of us gravitate towards rights I think as lawyers. Can I ask about the United Nations dimension, in particular the declaration on rights of indigenous people which I understand Australia did not originally embrace, but as of last year have signed up for. How do you respond to those sorts of efforts to muster solidarity amongst indigenous populations

worldwide and then of course for the second time it would be the rights approach rather than responsibilities approach.

NP: I counsel people that there are some equalities that are not going to be achieved by political and legal fiat. They are only achievable by practical action. The rights of a child enumerated in international conventions are ultimately going to be achieved when parents ensure their safety and carry out their responsibilities to their children and are supported by the wider society, and obliged by the wider society in doing so. I think the problem with lawyers is that we imagine that social change and justice can be achieved through a legal fiat without understanding that the law can be a prompt and a goad to action, but it can never deliver the kind of practical realities that require hard work and require the reconstruction of communities and families and so on. So I urge the view that there are a whole lot of things and the law can deliver through fiat, but a whole lot of things where the law is doesn't have much impact at. And the problem arises I think is that when we set all our hopes on the delivery of rights as the main strategy. I think that's when the problem arises, that we think that pursuit of the right strategy is going to then, in the wake of it produce the kind of social transformation we are seeking. I think we've got to work on both ends. In relation to the question of indigenous empowerment and indigenous power my argument has been that we have a right to take responsibility. That is our greatest right. There is a real power in responsibility. At the end of the day the greatest power lies in responsibility and I have urged the view, with no great amount of traction I must say, that it is our right to take responsibility. That is our most keen right, and the day comes when we are accorded our right to take responsibility is the day when we will have true power. I learnt this lesson at the feet of an indigenous from Greenland actually, many many years ago, when he said that responsibility is hard work. And he was the one who planted in my head the idea that at the end of the day our key right was the right to take charge. Our right to take responsibility. And I think that formula, the right to take responsibility, is actually the radical centre between this tension of rights and responsibilities. The radical centre is located in the idea that at the end of the day it is the right to take responsibility that is the greatest right.

Q: Can you tell us what the current status and approach of cases being litigated on the land title issues is? Are cases being filed piecemeal by individual occupants or is there some organised approach where better cases are targeted that might have a greater impact?

NP: We've chucked everything in the bucket. Two things....one a great array of cases that are not particular co-ordinated. Two the speed at which the law has evolved. I really think that the Australian law has developed very quickly over a very compressed period of time and the law is as a result not very good, and these are massive cases and you see a great tendency towards dealing with critical questions in a perfunctory way.

Q: I'm struck by the difficulty in proving these land claims and I'm wondering if, what the racial makeup of the body that's making these decisions is? Is there any indigenous representation in

the commission or the board that is looking at this evidence and making these determinations of title?

NP: No these are the mainstream courts. The Federal Court is the principal forum for claims and there are no indigenous Federal Court judges. The question of whether an alternative tribunal ought to be established to deal with indigenous claims is one that I think ought to be reconsidered, but, you see the critical turning points in the law of the United States in my view and Canada, as much as in Australia, had been points where the Court has been principled and then quite very ruthlessly pragmatic when facing critical issues like compensation. So the original Mabo decision dealt with the question of compensation in a line. It was like the two judges of the court that joined the majority said that the extinguishment of native title didn't give rise to compensation in about one sentence. It was like the deal. In order to provide their support to the majority judgement. So there's moments of ruthless pragmatism as well as very elegant honouring of what Chief Justice MacLauchlan in the Supreme Court in Canada once said, the time honoured methodology of the common law. So in raising the questions of extinguishment or eminent domain by the state and in cases of the compensation bill and so on, the courts have been less than convincing if you are an indigenous adherent of the common law as I suppose I am.

Q: In Australia as in the United States recently water rights are very key to power in these areas. In the United States native Americans have certain priority rights under what is called the winter stock group. Is there anything equivalent or has there been any attempts to get indigenous people to achieve water rights.

NP: I couldn't answer that question. I don't practice in the area and I only am a real dilettante in the details of the land, but the chief problem is that the native title in this country has been almost completely denuded of any economic character. It is basically the status of a cultural recognition and the successive positions of the court have entrenched... and the irony of it is that we were turned very much to Lord Sumner's old formula in Southern Rhodesia which is that this is an ephemeral cultural form of tenure that is denuded of economic rights to property because the social organisation of the people justifies that. So on the one hand in relation to whether native title is part of the law of Australia, we moved beyond Lord Sumner's formula, but in relation to what survived for the benefit of the indigenes we very much returned to a hierarchy of right where the indigenous right is seen as economically inferior to a right that would obtain possession.

DG Another famous indigenous leader, , Patrick Dodson, has said that that they gave us the Native Title Act and yet they put the onus of proof on the dispossessed, not the dispossessor, a similar sort of thing we are talking about.

Q Its such a really great pleasure to meet you and to learn more about you. Its not always been easy to find your work in the United States, so were happy to say that your book is published now and it makes it more accessible and in your book you write in the forward that you've changed your mind about some people, like Prime Minister Howard. How over the years you have changed your opinion on and in one of the chapters of your book you write about Barrack Obama about the bittergate scandal that you didn't think that he did a very good job on handling. That was a while ago that you wrote that and I'm just wondering what you think he has been doing in the meantime. If you have any advice for him when he comes here, what would like him to address when he comes here, what you would like to hear him say?

NP I'm a keen student of American history and particularly the experience of African Americans in that history and "Up from the Mission". My take on Booker T. Washington's famous autobiography "Up from Slavery". As I said, that great tension between Dubois and Washington is the framework in which I think about questions of race and disadvantage here in Australia. I, I suppose as I say, I think the president is on the Dubois side while I'm slightly on the Washington side. But you know with any kind of struggle like that there's never a for all time resolution, you know you've got to keep pushing on both sides of the tension.

Q You mean two feet both going in the same direction?

NP I recently wrote about idea, the metaphor that a boat never sails on an even keel, the boat of progress does not sail on an even keel, and sometimes in order to turn a boat you have to throw all of your weight one side in order to get a genuine turn and it depends on the prevailing winds and the currents and so on. I think that yes, in articulation of philosophy we might be absolutely balanced in our approach. But in the real world, in order to get the boat moving and turn a direction, sometimes you have got to throw all your weight on one side in order to get the requisite change of direction. In the case of the situation with welfarism in Australia I have felt that the weight needed to be thrown very heavily on the side of responsibility and so on, whilst understanding myself that of course rights are absolutely critical and I spent a greater part of my address concerned with the question of rights but at the same time I think that we, if progress is going to be made and I am sure it will, we are as the ambassador said, in that first phase and we have got to get it right, but I would say that one of the things that leaders too often forget, particularly outsider leaders is that the means by which we have succeeded, now possibly its going to be the means by which our people have to succeed and so that's why I'm at the moment very concerned with the idea, we have got to unleash the importance of individuals being in a position to be free to choose. The empowerment that the ambassador refers to is ultimately an empowerment of individuals and their families and I think that you know we have been very much engaged in the debates in the United States both in relation to African American policies but also in relation to Native Americans and there are so many areas in which I think our country can really learn from some of the breakthroughs that are happening with

education and so on and I would obviously look to America for many of the really exciting and cutting edge ideas.

Q Noel its an absolute delight to listen to you here today. I was a final year law student when the Mabo decision came out and certainly there was a feeling among us law students that this was a revolutionary decision that was well overdue again, as you said, a real opportunity for a different kind of Australia moving forward. Its sad to listen today having been out of the country for many years to listen to the ways in which that opportunity has been squandered and yet you still seem to be optimistic about the remnants of Mabo itself perhaps being able to be resurrected and I wondered how you see that happening and perhaps what opportunity can be given to the current High Court to you know take, have the right to take responsibility for their decisions.

NP I mean I think what can be recovered after Mabo is basically the idea, that blackfellas are here, they are not going away and they have rights and whatever is left over should be properly accorded the regional islanders and we shouldn't be grudging and we shouldn't prolong that process of recognition and restoration and so if we restore the, an attitude of honour in relation to the terms of that deal, however it might be expressed in my view, its probably more valuable to get a title in fee simple than to get a determination under the law of Australia dealing with Native Title, but whatever way in which that deal is honoured, it has to be honoured in full, there has been too much chipping away at that remnant piece and so I'm not, I'm not and maybe there is a point at which we can have an ownership and in my view Mabo should be a national day 3 June should be a national day for the country when it's a testament to the equivocation on the part of white Australia and understandably given the history of the equivocation on the part of indigenous people about whether we have responded to the High Court's formulation with the kind of honour that it deserves. I hope that at some point we will come to realise just how precious an opportunity it was and that we make Mabo a national day of recognition rather than, what's celebrated not just the general ownership but celebrated the law England, you know an achievement of the law England, a law of the colonisers and I hope that at some point we going to mature and that will come about.

DG I want to acknowledge and thank Elizabeth Avery from our firm for organising today's function and when Elizabeth approached me some time ago now to hold this function she said "can you think of someone who might be interesting, it would be good to have an interesting speaker" I said we'll get a brilliant speaker - I give you Noel Pearson. I also like Glenn Hendricks, the chairman of the international section of the ABA wanted to make a presentation as thanks to you and perhaps to say a few words as well.

GH Mr Pearson, its been a real honour for us to hear this, it's a very powerful presentation and I know I have learned a lot you know I think at turn of the last century I believe it was Lord Curzon made the remark that foreign travel, the real benefit was not so much that it made the foreign

country less foreign but it made your own country seem more so and the point being that you know by going abroad and hearing different perspectives you have the opportunity to look at your own country, your own society through a different prism and you have done that for us, I think you've give us a glimpse not only on some very important issues in Australia but also I think some insights to our own country so we are very grateful and again very honoured that you are today so thank you very much.