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NATSICC Address

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I join with you acknowledging the traditional owners of the land on which we meet. Just prior to the 25th anniversary of *Mabo* and the 50th anniversary of the 1967 constitutional referendum, 250 Aborigines and Torres Strait Islanders gathered at Uluru in the centre of Australia to consider how you might best be recognised in the Australian Constitution which does not even mention you nor the history of your ancestors. They issued the *Uluru Statement from the Heart* telling all of us that your sovereignty is 'a spiritual notion'. They told all of us:

> [The] ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.

I was curious about this statement because I knew that not many of you 21st century Aboriginal Australians use terms like therefrom, thereto and thither. On inquiry, I found that this statement is an adapted quote from the submission put by Mr Bayona-Ba-Meya, Senior President of the Supreme Court of Zaire, who appeared on behalf of the Republic of Zaire in the International Court of Justice in 1975 dismissing 'the materialistic concept of *terra nullius*' substituting 'a spiritual notion'. Judge Fouad Ammoun, the Lebanese Vice-President of the International Court, quoted the submission in his judgment in the *Advisory Opinion on Western Sahara.*[1] This part of Judge Ammoun's opinion was then quoted by a couple of the judges in the High Court *Mabo* decision. How extraordinary that the inheritors of the longest living culture on earth would quote a Lebanese judge quoting a lawyer from Zaire to express the depths of their spiritual relationship with the land. This is a profound lesson for those of us seeking an inclusive Australia. We are able to share our diverse cultural and religious modes of expression to communicate the deepest yearnings of our hearts. Judge Ammoun observed in his judgment that the 'spirituality of the thinking of the representative of Zaire echoes the spirituality of the African Bantu revealed to us by Father Placide Tempels, a Belgian Franciscan, in his work *Philosophie bantoue.* The author sees therein a "striking analogy" with "that intense spiritual doctrine which quickens and nourishes souls within the Catholic Church".' How extraordinary that remarks by Muslim lawyers from Zaire and Lebanon echoing African Bantu and Belgian Catholic notions of spirituality

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[1] This is the relevant part of Judge Ammoun's decision [1975]ICJR at pp. 77-8: 'Anyone familiar with the philosophy of Zeno of Sidon or Citium and his Stoic school cannot but be struck by the similarity between the ideas of that philosopher and the views of Mr. Bayona-Ba-Meya as to the links between human beings and nature, between man and the cosmos. Further, the spirituality of the thinking of the representative of Zaire echoes the spirituality of the African Bantu revealed to us by Father Placide Tempels, a Belgian Franciscan, in his work *Philosophie bantoue.* The author sees therein a "striking analogy" with "that intense spiritual doctrine which quickens and nourishes souls within the Catholic Church".

'Mr. Bayona-Ba-Meya goes on to dismiss the materialistic concept of *terra nullius,* which led to this dismemberment of Africa following the Berlin Conference of 1885. Mr. Bayona-Ba-Meya **substitutes for this a spiritual notion: the ancestral tie between the land, or "mother nature", and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.** This amounts to a denial of the very concept of *terra nullius* in the sense of a land which is capable of being appropriated by someone who is not born therefrom. It is a condemnation of the modern concept, as defined by Pasquale Fiore, which regards as *terrae nullius* territories inhabited by populations whose civilization, in the sense of the public law of Europe, is backward, and whose political organization is not conceived according to Western norms.

would come to express Australian Indigenous spiritual aspirations to land in a foundational document.

I welcome this opportunity to offer directly to the National Aboriginal and Torres Strait Islander Catholic Council my own perspective and thinking on the way forward for Australia in the wake of the *Uluru Statement from the Heart.* Regardless of what has gone on previously in the discussions about constitutional recognition, we all need to accept that Uluru is the new starting point. But let me be insistent on this point at the outset. Though it is the prerogative of Indigenous Australians to name the starting point for constitutional recognition, the journey will be one of compromise and shared deliberation, and the destination will need to be one identified and owned by all Australians. That's why we all need to talk and engage respectfully. I look forward to participating in that conversation in the years ahead. Today I would like to stake out a way forward, if only to prompt reaction and criticism so that we can honestly and trustingly chart a way forward which has some prospect of winning broad support in the community. At the moment, I think we're all stuck in our corners 'going nowhere, *fast*' as the poet Bruce Dawe would say.

At this moment in disrupted history when trust in all manner of institutions including the Church, major political parties, the banks and the ABC has collapsed, it's worth recalling that 2018 marks the 50th anniversary of the epoch-making year 1968 which sparked student revolts and much else besides. Fifty years ago, the great Professor WEH Stanner delivered the 1968 Boyer Lectures entitled *After the Dreaming.* He had just been appointed by Prime Minister Harold Holt to join Barrie Dexter and Dr Nugget Coombs planning Aboriginal affairs policy in the wake of the successful 1967 referendum. This Council for Aboriginal Affairs being a 1960s creation was constituted only by white men.

Nowadays, it would be unthinkable to establish such an advisory body without Indigenous representation and gender diversity. Some things have changed and for the better. At least you'd hope so. However, I do note that Prime Minister Scott Morrison has appointed a white man as his envoy for dealing with you all.

In 1968, Stanner told his audience of ABC listeners: 'The subject of these lectures will be ourselves and the Aborigines and in particular the new relations which have been growing between us over the last thirty years.'[2] He was drawing on his thirty years of anthropological experience with Aboriginal Australians, particularly at Port Keats and Daly River. But, despite the topic of his lectures, his intended audience did not include those of you who are Aboriginal Australians. If he were delivering these lectures today, when speaking of 'ourselves' and 'us', I daresay he would have included both Indigenous and non-Indigenous Australians. We are now equal partners in dialogue, or at least we should be. And we ought to be equal participants in the political processes seeking the compromises needed for living together, owning our past, and embracing our shared future.

Though maintaining the 'them' and 'us' classification in his Boyer Lectures, Stanner offered some insights which are still valid today: 'Aborigines have always been looking for...:a decent union of their lives with ours but on terms that let them preserve their own identity, not their inclusion willy-nilly in our scheme of things and a fake identity, but development within a new way of life that has the imprint of their own ideas.'[3] And isn't this what we are all about at the moment trying to find a way forward after the Uluru Statement from the Heart? How can we constitute ourselves as a nation with a decent union of our lives, ensuring the inclusion of those citizens who proudly claim an Aboriginal

[2] WEH Stanner, *White Man Got No Dreaming*, Australian National University Press, 1979, p.198
[3] *Ibid*, p. 216

or Torres Strait Islander heritage, not being included willy-nilly, not being required to live a fake identity, but within a new way of life having the imprint of contemporary Indigenous ideas?

Stanner identified 'four things – homelessness, powerlessness, poverty and the continued disparity between plans and styles of life – (which) had much to do with producing the syndrome we have seen for a long time: the inertia, the non-responsiveness, the withdrawal, the taking with no offer in return, and the general *anomie* that have so widely characterised Aboriginal life during their association with us.'[4] How can we constitute our arrangements with government and with our national parliament to counter the prospects of ongoing inertia, non-responsiveness, withdrawal and *anomie* in the face of past dispossession and trauma?

Stanner pointed to a way forward when he noted with hope: 'It has seemed to me for some years that two aspects of the Aboriginal struggle have been under-valued. One is their continued will to survive, the other their continued effort to come to terms with us.'[5]

We need to avoid the pitfalls entailed in past approaches summed up by Stanner in this way: 'We are asking them to become a new people but this means in human terms that we are asking them to un-be what they now are. But many of them are now seeking to rediscover who and what their people were before the long humiliation. It is a search for identity, a way of restoring self-esteem, of finding a new direction for the will to survive, and of making a better bargain of life on a more responsive market at a more understanding time.'[6]

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[4] *Ibid*, p. 235
[5] *Ibid*, p. 240
[6] *Ibid*, p. 242

From here on, it is not a matter of any citizen being asked 'to un-be what they are now', and most especially any Indigenous citizen. We need to encourage the journey of rediscovery, that search for identity, restoring self-esteem, finding that new direction for the will to survive, making a better bargain of life for all in this land.

I readily concede that there is no point in proceeding with a referendum on a question which fails to win the approval of Indigenous Australia. So as we look for a path forward, let's walk together the fine line between substantive change and popular acceptance. We all need to do this in the light of the *Uluru Statement from the Heart* and the interim report of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples which was tabled in our Parliament in July 2018. That committee is being chaired by Senator Patrick Dodson (with great experience in these matters having been the co-chair of the Expert Panel set up by Prime Minister Julia Gillard) and by Julian Leeser, one of the few members of the Coalition parties who has dedicated energy and risked some political skin in advocating for Indigenous recognition in our Constitution.

Our starting point must be the Uluru declaration: 'We call for the establishment of a First Nations Voice enshrined in the Constitution.' I make no apology for bluntly stating that little is to be gained by those who advocate for the immediate insertion of a voice into the Constitution – sight unseen, unheard and untested. That suggestion has been rejected by the last three Liberal prime ministers Abbott, Turnbull and Morrison. So it doesn't matter where you find your Liberal Prime Minister on the political spectrum in their broad church, he or she will not be advocating or supporting a voice being put into the Constitution untried and untested. Those who advocate for that will be proposing a course that has no hope of support from the Coalition parties.

When Prime Minister, the present government envoy, Tony Abbott used speak about completing the Constitution rather than changing it. He thought the only prospect of constitutional change was if there was something in it for everybody – with some reference to Aboriginal history, the British heritage, and the modern reality of multicultural Australia with immigrants from every land on earth. In his contribution to a book on 'Indigenous Arguments for Meaningful Constitutional Recognition and Reform', Noel Pearson embraced the Abbott approach and wrote about 'the opportunity to formally bring together these three parts of our national story: our ancient Indigenous heritage, our proud British inheritance, and our multicultural triumph.' Pearson thinks, 'Indigenous constitutional recognition provides an opportunity for a long-awaited reconciliation that could perfect our constitutional union, and make ours a more complete Commonwealth.'

In the light of the Uluru Statement, I offered a threefold suggestion when privileged to deliver last year's Lowitja Oration for the 50th anniversary of the 1967 referendum. Let me restate those three suggestions.

First, we need to repeal the outdated, unused section 25 which allows the states to discriminate on the basis of race when prescribing the conditions for elections to state parliaments. The deletion of that provision is just low hanging fruit.

Second, consistent with the language used by the Expert Panel chaired by Patrick Dodson and Mark Leibler in 2012, we need to place an acknowledgment at the beginning of the Constitution:

We, the people of Australia, include Aboriginal and Torres Strait Islander peoples and peoples from all continents who have made Australia home, having migrated to be part of a free and open society.

We recognise that the continent and the islands of Australia were first occupied by Aboriginal and Torres Strait Islander peoples.

We acknowledge the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.

We acknowledge and respect the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.

We acknowledge the foundation of modern Australia, through British and Irish settlement and the establishment of parliamentary democracy, institutions and law.

We espouse respect, freedom and equality under the law for each other.

Third, we could then amend section 51(26) of the Constitution so that the Commonwealth Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

(a) the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples, and their continuing relationship with their traditional lands and waters;

(b) the constitution and functions of an Aboriginal and Torres Strait Islander Council which: (i) may request the Parliament to enact a law providing protection or support for one or more of the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples and their continuing relationship with their traditional lands and waters; and (ii) may advise the Parliament of the effect which a law has or is likely to have or which a proposed law if enacted would be likely to have on the cultures, languages and heritage of the Aboriginal and Torres Strait Islander peoples and their continuing relationship with their traditional lands and waters.

Some regard these suggestions as too minimalist. I disagree with those who say we should not worry about section 25. It is an outdated blot on our Constitution. I disagree with those who say that an acknowledgment is simply the insertion of

a brass plaque in the Constitution. If we are to have a plaque, I think it is better situated in the Constitution rather than outside it. Those who advocate an immediate insertion of the Voice into the Constitution, untried and untested, need to admit that their proposed way forward has won support neither from the Coalition nor from the Labor Party. That's why it's not only sensible but also imperative first to legislate and road test any Voice. In the meantime, I support a constitutional provision empowering the Commonwealth Parliament to set up and legislate the functions of the Voice. But I doubt the wisdom of trying to get it up at referendum before you have first constructed the Voice, so voters can see what it sounds like.

Australians will not vote for a constitutional First Nations Voice until they have first heard it and seen it in action. When first hearing about it, I presumed that the First Nations Voice would replace the existing National Congress of Australia's First Peoples which boasts, 'As a company the Congress is owned and controlled by its membership and is independent of Government. Together we will be leaders and advocates for recognising our status and rights as First Nations Peoples in Australia.' When the extensive Aboriginal consultations for the setting up of the Congress were conducted in 2009, the committee charged with proposing the model concluded, 'The new National Representative Body should be a private company limited by guarantee rather than a statutory authority.' They had 'consistently heard the aspiration of Aboriginal and Torres Strait Islander peoples that the National Representative Body become self-determining over time'. They said, 'This cannot happen if the body is a creation of Parliament whose existence is dependent on the goodwill of Parliament and the government of the day.' They thought a company limited by guarantee would have the advantage of flexibility and enhanced self-determination: 'The structures of the Body will be able to be flexible, with the members able to alter the Constitution when necessary. If the Body was a statutory authority it would have to rely on

Parliament to approve such changes and may also have unnecessary or politically motivated changes foisted upon it.'

If the Congress is to be replaced by a First Nations Voice which is recognised in the Constitution, that body will need to be set up by legislation which sets out what it's to do, the way it which it is to operate, and how representation is to be organised. My initial presumption may well be mistaken as the Congress has told the joint parliamentary committee:

> If properly funded and supported, National Congress could function as the Voice to Parliament. National Congress now counts over 9,000 individuals and 180 organisations and members. As the national peak representative body for Aboriginal and Torres Strait Islander peoples, much of the work which we do already substantially aligns with the role to be filled by the Voice: we provide input into and critique of government policies relating to Aboriginal and Torres Strait Islander affairs, facilitate consultations with communities and organisations and engage in policy development.

Those of us who are not Indigenous need to wait and hear from you who are Indigenous Australians whether you think the National Congress could or should be the Voice to Parliament. The only certainty is that there will have to be compromise within your own Indigenous ranks. It won't be a matter of unanimously finding common ground.

When ATSIC was first established in 1989, the number of Australians identifying as Aboriginal and Torres Strait Islander was less than a quarter of a million. At the last census, it was almost 650,000. The aspirations of you the self-identifying Indigenous Australians of the twenty first century are very diverse. A constitutionally recognised body would have much less flexibility than the present Congress. There is a need for a lot further discussion both within Indigenous communities and within Australian society generally about what such

a First Nations Voice might look like, and what it might do. The challenges are great.

On 12 February 2018 the Leader of the Opposition, Bill Shorten, in his Closing the Gap remarks told Parliament:[7]

In this parliament, we owe it to move past misleading scare campaigns and get recognition back on track. .... Members of this parliament mightn't feel totally comfortable with or were surprised by what was proposed at Uluru, but in this place we don't get to choose what the people tell us. In this place, we listen to what the people tell us and we implement their will. And let me also be very straight—we want bipartisanship. But bipartisanship cannot mean an agreement to do nothing. It cannot be used as an alibi for the lowest common denominator.

I ask the government to reconsider their rejection of the statement from the heart. But, if we cannot work on this together, the next Labor government will, instead, as a first step, look to legislate the voice to parliament.

Shorten went on to say:

We will begin the detailed design work in opposition, work with Uluru delegates and many other first-nations people who've led the thinking on this issue. And, if we form a government, we will sensibly move to finalise legislation which establishes the voice and includes a clear pathway to constitutional change, enshrining that basic principle that you don't make decisions about people without talking to them. In fact, I think it will be easier for a referendum to succeed and harder for a scare campaign to be run, if we already have lived legislative experience of such a body.

With respect, I think Mr Shorten is dead right. There is no point in trying to move from Uluru to constitutional recognition except by the long and tortuous path of prior legislative enactment and road testing of the model.

[7] Hansard, House of Representatives, 12 February 2018, p. 928

The Labor position has been restated in Parliament in the last month or so. Patrick Dodson who is the Labor co-chair of the joint parliamentary committee told the Senate on 14 August 2018:

One of the major issues facing the committee that we will need to work through over the next months is the question of constitutional entrenchment of the voice. Legislative advisory bodies have a chequered history, with the risk of being abolished should they fall foul of the government of the day. It was the strong view of the Uluru statement that any voice needed to be entrenched in our nation's founding documents through a change in the Constitution agreed through referendum. However, we need to work through the issue of what questions should be put to the people and whether, in order to build support, it would be sensible to legislate first and then, after experience shows the voice to be effective, put the question to the people. Others argued a different view and encouraged that the question of the voice should go to referendum now and be first in the order of things to do. This is an issue that we will continue to work through in the months ahead.[8]

Labor front bencher Mike Kelly when presenting a petition from the Sapphire Coast on the Uluru statement told the House of Representatives on 16 August 2018:

This cry from the heart needs to be answered. If we can't get a bipartisan approach to this then Labor will push on. In the absence of cross-party support necessary to achieve that constitutional change in government, Labor will legislate for a voice to honour the aspirations of the Uluru statement, to have that voice to parliament, not in parliament.[9]

I concede that some academic constitutional lawyers have followed Noel Pearson's approach that it would be possible to put the Voice straight into the Constitution. I don't doubt their academic learning. But I do question their political prudence. We should all exercise caution when even a constitutional lawyer like Professor George Williams warns that at the moment none of the preconditions for passing a referendum have been fulfilled. In his submission to

[8] Hansard, Senate, 14 August 2018, p.75
[9] Hansard, House of Representatives, 16 August 2018, p.78

the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, Williams said:[10] 'An alternative would be for the Voice to be brought about by legislation. That could provide an interim step to design and illustrate the workability of this model, pending a referendum. A legislative approach should only be adopted however if it has the support of the Indigenous community.' Today I urge you as leaders of the Catholic Indigenous community to support the legislative approach as the only realistic way forward.

Should you take that step, you will need to undertake the hard work together in telling Australian voters what your preferred model for a national voice is. Just two weeks ago, the National Congress of Australia's First Peoples published their supplementary submission to the joint parliamentary committee. The Congress has now told Parliament:

> National Congress believes that the voice should be initially created via legislation, either by amending the Aboriginal and Torres Strait Islander Act 2005 (Cth), or by creating new legislation supported by either the "race power" or the "external affairs power" contained in ss 51(xxvi) and (xxix) of the Constitution respectively. This is necessary due to the urgent need for greater input from Aboriginal and Torres Strait Islander communities in the design and delivery of government policy and programs. However, a referendum to constitutionally enshrine the voice should be sought soon after its creation via legislation, to ensure that it will not be abolished or de-funded as many Aboriginal and Torres Strait Islander organisations have been in the past.[11]

Congress is unapologetically self-promoting when they say: 'We reiterate our suggestion from our previous submission that National Congress, if properly resourced, could function as the voice.'[12] They may well be right. But this is the

[10] Submission 13 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, Interim Report, July 2018
[11] Congress of Australia's First Peoples, Supplementary Submission, 17 September 2018
[12] Congress of Australia's First Peoples Supplementary Submission, 17 September 2018, p. 25

issue on which we all now need to hear from the broad spectrum of First Nations opinion.

Though commentators like me have seen wisdom in trying to limit the role of a national voice to those legislative and policy issues unique to Indigenous Australians - those matters which would be listed in any constitutional acknowledgment, the Congress is insistent that the national voice would need the mandate, capacity and resources to comment on all manner of legislation which impacts in any special way on First Australians. They have submitted:

> National Congress asserts that the national voice must have the ability to review any legislation which it believes may have a tangible impact upon the lives of Aboriginal and Torres Strait Islander peoples. It would be highly inappropriate to restrict the ambit of the national voice to reviewing only legislation made under s 122 and s 51(xxvi) of the Constitution. Many laws disproportionately affect Aboriginal and Torres Strait Islander peoples, and yet are not explicitly related to race or the territories. The Cashless Debit Card Trial and the Community Development Program are significant examples of government programs which the voice must have the power to advise on, but which would likely to be excluded were unnecessary restrictions to be put in place. Furthermore, National Congress is concerned that such restrictions could provide incentives for politicians to seek support for legislation under alternative heads of power, thereby avoiding the voice's scrutiny.[13]

It's this sort of submission which fuels the fears of conservative leaders like the present Prime Minister Scott Morrison who see any such voice as a 'third chamber' of the Parliament – having a say on all manner of general legislation in relation to health, education, welfare, and housing, as well as uniquely Indigenous issues such as native title, sacred sites, cultural heritage and languages. As Prime Minister, Morrison has echoed the previous remarks of Liberal Leader Malcolm Turnbull and Nationals Leader Barnaby Joyce, saying, 'I don't support a third

[13] Congress of Australia's First Peoples Supplementary Submission, p. 5

chamber...People can dress it up any way they like, but I think two chambers is enough. The implications of how this works frankly lead to those same conclusions, and I share the view that I don't think that's a workable proposal.'[14] No one is advocating a third chamber. We need to be more encouraging of the moderate, considered voices in the Coalition like Tim Wilson who when speaking on the tabling of the joint committee's interim report told Parliament:

> That is what I see coming out of this report: a final recognition that Aboriginal and Torres Strait Islander people should have their say—that after the abolition of ATSIC, they have lost their voice to our country and they have lost their voice of their nationhood. No-one is trying to replicate ATSIC or trying to pretend that there weren't issues. But there is a need to give that voice back and to empower Aboriginal and Torres Strait Islander people to be able to have their say on the affairs that affect them. If we're going to go down a model of local community based representation that can build up to Canberra, that voice will only be heard in this place because of its strength and because of the common agreement that will sit behind Aboriginal and Torres Strait Islander people from country to Canberra. That is what is being realised.[15]

Urging this cautious approach today, I am conscious that some Indigenous leaders including Noel Pearson will think I am not helping the cause. I beg to differ. Recently Noel offered some observations on my proposals for a way forward. I was very privileged to be described by him as 'my great and old friend Fr. Frank Brennan, the Jesuit lawyer and priest'. But that meant I was on notice that a rocket was coming. Noel has had a sustained negative view of me for a long time often repeating his observation from the *Mabo* and *Wik* debates, 'we didn't need Frank Brennan in 1993 and we would have been better off without him in 1998.'[16] Speaking at a recent launch of a book which describes me as the Black Robe, Noel said:

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[14] Scott Morrison, 25 September 2018
[15] Hansard, House of Representatives, 19 August 2018, p. 96
[16] Quoted by Paul Kelly, *The March of the Patriots*, Melbourne University Press, 2009, p. 401

I have known Frank for over 35 years, since I was a very young man and his commitment to the Aboriginal and Torres Strait Islander people and the cause of reconciliation has been long-held and profound. However, I think the mistake Frank made in this debate and in other debates in which I have been truculent with him, is in thinking that reconciliation is about compromise. That Indigenous people should compromise their current position in order to achieve reconciliation. That cannot be the case. For people who have lost everything, how could there be an expectation of further compromise? This is about common ground, locating common ground and, for my taste, Frank has mistaken the search for common ground with his predilection for finding compromise. He was mistaken in this and I pray that in the journey that now begins afresh, he will understand that.

I think it is a very long, difficult and winding road from Uluru to constitutional recognition. On such a journey, I don't know how you find common ground except by compromise, unless of course there is agreement about the principles at stake and agreement that there is only one way to apply those principles to the challenges at hand in the contemporary context. Even amongst Indigenous Australians there is no unanimity on that. 230 years after settlement or conquest, and after generations of migration from every other country on earth, common ground will be found and occupied only by those who are prepared to come together in trust seeking compromise.

To find common ground, we must be committed to trusting conversation. We need to build bridges and forge relationships across differences. I think we need to be uncompromising in stating our principles – our understanding of what is right and wrong, our understanding of what is optimal and what is not. But then we need to be able to compromise in effecting laws and policies which give due weight to the varying viewpoints agitated in the process of political deliberation. And if that goes for laws and policies which can be drawn up today and changed tomorrow, it must go even more for constitutional change which requires a supermajority to adopt, which binds even the elected lawmakers (no matter what

their popular mandate) and which is very difficult to change once enacted. The art of leadership is found in the political deliberation able to find the solution to a problem which is appropriately principled, workable and popular.

Earlier this year, the nation farewelled one of the great public servants, Barrie Dexter. Barrie's father Walter was a decorated Anglican chaplain at Gallipoli. Barrie and his four brothers all served in the Second World War. Barrie then became a diplomat until Prime Minister Harold Holt handpicked him for a domestic role as a member of the Council for Aboriginal Affairs after the 1967 referendum. At that referendum, the Australian people voted overwhelmingly to remove the two arguably adverse references to Aborigines in the Constitution. The political effect of the strong vote for change was pressure on the Commonwealth government to act directly to improve the living conditions of Aboriginals and Torres Strait Islanders.

In his delightful self-deprecating mode, Dexter once said that Harold Holt was looking for someone who was 'honest, just, sympathetic with underdeveloped or deprived peoples, knows his way backwards through the public service and [would] not squeal when he was kicked.' When asked by Holt to join the three-member Council for Aboriginal Affairs with Coombs and Stanner, Dexter replied, 'But I don't know anything about Aboriginals.' Holt said, 'That's why I asked you to take on the job. I'm frightened by the people who think they do know something!' Dexter then said, 'Mr Prime Minister, you are asking me to open Pandora's box!' Holt replied, 'That is precisely what I am asking you to do, Barrie.' These 'three wise men' or 'the three white men', as they were often called, helped navigate the policy changes for land rights and self-determination.

The eulogy at Dexter's funeral was delivered by the nation's most distinguished Aboriginal public servant, Patricia Turner. She said:

The late Mr Barrie Dexter most certainly paved a promising pathway to right the way for Aboriginal people to live a more fulfilled and decent life in this country. When I gave the eulogy at the funeral of my late uncle Charlie Perkins, I recalled that he was an "unorthodox public servant". I know Mr Dexter would have understood that very well. Mr Dexter on the other hand, I would characterise as an "orthodox public servant" who was well equipped for his tasks. He was a career public servant who brought his significant experience, intellect and a fair dinkum sense of, and commitment to, all people having a fair go, in the many positions he held in the Australian Public Service and in CARE. His esteemed service in the Defence forces, in Foreign Affairs and his flair for speaking new languages, all added to his abilities to serve even his most neglected fellow Australians, with decency and integrity. He witnessed the most depressed of living conditions and lack of access to services for Aboriginal people and worked tirelessly to achieve improved outcomes for us.

Barrie Dexter and Charles Perkins had their differences and their blow-ups in the public service, but they came to respect each other. How fitting it was that the formal eulogy was delivered by Perkins' relative Patricia Turner one-time CEO of the Aboriginal and Torres Strait Islander Commission (ATSIC), and deputy secretary of the department of Prime Minister and Cabinet. Nothing gave Barrie greater pleasure than to see Aboriginal Australians replacing him and taking their rightful place in the administration of the nation, determining the best use of Pandora's box.

On his last day as Secretary of the Department of Aboriginal Affairs in 1977, Barrie Dexter had written an account of his stewardship to his minister Ian Viner. Viner replied, thanking Dexter for his insights and assistance, having come to his position 'as a "new chum" in Aboriginal Affairs as well as to the Ministry.' Viner confided:

It seemed to me that we had a common approach through a simple philosophy and fundamental truth – all men and women are equal in the sight of God and deserve to be accorded the dignity

of that status within the Australian community. Where it has been diminished by disadvantage or discrimination or inadequacy on the part of Governments, then that is where the resources of the Department of Aboriginal Affairs should be directed.

A tribute was also delivered at Dexter's funeral by Professor Gary Foley who as a young Aboriginal activist had been sacked by Dexter when only six weeks into his employment in the Commonwealth public service. Foley told the congregation that he used to hate Dexter, but that later in life he grew to love him. It was Foley who organised the publication of Dexter's book *Pandora's Box* recounting the activities of the Council for Aboriginal Affairs. Gary Foley said that reconciliation had to be founded on truth. Looking back over the decades, Foley and Dexter had come to appreciate each other's perspectives on difficult times which included the setting up of the Aboriginal tent embassy in front of the old Parliament House.

Espousing the need for principled compromise, I want to revisit briefly two other anniversaries which we mark this year – the 25th anniversary of Paul Keating's *Native Title Act* and the 20th anniversary of John Howard's comprehensive amendments to the *Native Title Act.*

I will always remember the spirit of celebration and reconciliation in the Senate chamber 25 years ago when Paul Keating's legislation was finally passed after the Aboriginal 'A team' had negotiated with his Cabinet and the Aboriginal 'B team' had then negotiated with the minor parties in the Senate. The all white Senate chamber paid tribute to those in the public gallery which included the leading Indigenous members of the A team and the B team. Nowadays things are better but more complex. We now boast indigenous members in our national parliament and on both sides of the aisle.

Twenty years ago, the legislative process was far more exhausting and strained with three Senate debates on a complex set of amendments culminating in legislation which reflected a deal cut under cover of night by John Howard and Brian Harradine. Harradine apologised to Aborigines for their exclusion from the last round of negotiations on Howard's *Ten Point Plan* saying, 'I was concerned that if others were involved there might be leaks and the horses might be frightened and they'd bolt.' That day, Gatjil Djerrkura, the Chairman of ATSIC, issued a statement on the Howard-Harradine deal describing it as 'an advance on the government's original bill'. Still concerned about various aspects of the legislation, Djerrkura nonetheless praised Harradine saying, 'We suspect Senator Harradine has taken the Prime Minister as far as he could to avoid a race-based election. I think he has demonstrated courage and integrity throughout this debate.' Though Noel Pearson had praised Harradine earlier that week saying that Harradine had won the penalty shoot-out against Howard four-nil giving 'full credit to Senator Harradine for having promised us that he was going to hold the line. He's surely held the line', he like a number of other indigenous leaders then reversed his position and was very critical of Harradine and of anyone who supported Harradine's stand.

Some indigenous leaders like Noel Pearson remain highly critical of Harradine and those who advised or praised his efforts at the time, one of whom was me. It took some years for Harradine's critics to concede that he had improved Howard's land rights package more than was originally hoped for. Seven years after the *Wik* debate, when Harradine was retiring from the Senate, Andrew Bartlett, Deputy Leader of the Democrats, made this acknowledgment of Harradine's acumen on Wik: 'The agreement he reached on the *Wik* legislation was one of the few cases I would point to where John Howard was bested in negotiations. Whilst the legislative merits of the *Wik* agreement were less than ideal, the sort of race election, focused on Indigenous people, that our country would have faced in

1998 if that agreement had not been reached would have been far worse even than the one we endured in 2001.' More recently, it was very heartening to hear David Marr (no great fan of the late Senator Brian Harradine) say on ABC *Insiders* that Harradine 'did do some wonderful things and the best thing he did in the Senate by horse trading was great things for native title.'[17] How true, and how long it has taken for this to be acknowledged. Politics is a complex business. When Ellen Fanning asked Paul Keating on ABC *7.30* how he convinced Brian Harradine in 1997-8 to vote down the media changes which John Howard wanted, Keating answered, 'He was an intelligent guy. He understood the stuff and he had a good social heart.'[18] Sometimes it takes 20 years for the truth to out. Harradine's good social heart beat all the more strongly for Indigenous Australians and their native title than it did for those concerned about media ownership rules.

Stanner's lectures were the wake-up call to Australia that those who had exercised political power and legal authority in the past had violently dispossessed the First Australians and failed to honour their entitlement to self-determination. Fifty years on, we still have much to do - together. Stanner concluded those lectures, perhaps a touch too optimistically, when he said, [T]he content of modern Australian history in respect of the Aborigines has shown heartening signs of conforming to Acton's principle – "the emancipation of conscience from authority". The process may be inconvenient, but I hardly think it is now reversible, and I like to believe that its terminal is not as far off as it used to seem.'[19] Individual conscience and the conscience of the community are essential to move the traditional entrenched thinking of those who exercise power in society. We need to do that together with strong faith, nurturing our strong youth, and with hope in a strong future – the theme of this year's NATSICC Conference. It will take both Indigenous and non-Indigenous leaders coming together in trust.

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[17] ABC *Insiders*, 25 March 2018
[18] ABC *7.30*, 26 July 2018
[19] WEH Stanner, *White Man Got No Dreaming*, Australian National University Press, 1979, p. 248

Otherwise we will all continue to circle each other around the base camp. It's time to start the trek towards constitutional recognition via the path of legislation, road testing the Voice. This will require orthodox and unorthodox thinkers and actors able to effect compromise so that in the end a majority of people in a majority of the states will support the constitutional recognition of an Indigenous voice to Parliament which henceforth will always include Indigenous and non-Indigenous members.