OCCASIONAL ADDRESS

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I am proud to have received today an honorary degree from what I can say without any pretence of impartiality is a great university with a great Law School. My pleasure is but slightly dimmed by the knowledge that the award of honorary degrees is far from an exact science. The criteria laid down in university handbooks are replete with what my old teacher Julius Stone would have recognised as categories of uncertain, meaningless, or circuitous reference.

When it has been decided to award an honorary degree, it is necessary to construct an ex post facto justification in the form of a citation, listing supposed achievements, which is read out while its embarrassed subject stands exposed to the sceptical eyes of the Chancellor and the Faculty. The older the recipient the longer the list. As I listened to the lengthy list read out today, it seemed more like a random series of events that had befallen me - a monument, not to my purpose and determination, but to my inability to say no when someone has asked me to do something for which I am not qualified.

The invitation to be Foundation Dean of the Law School was no exception, but it was irresistible. It was at the end of the glorious 1960s, and although I had never actually been a hippie, and had had even less contact with drugs than President Clinton, let alone Mr Downer, many of the hippie tenets had struck responsive chords in me. I was reacting against many of the same things, although not in the same way. I believed, as I still do, that universities should encourage the minds

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and personalities of students to flower rather than press them into conformity; that what you were was more important than what you had, and that love and justice needed restoring to a primary place in public values. I believed that lawyers thought too much in terms of cases and too little in terms of clients, too much in terms of the law as a closed system and too little of its role in shaping a more just or even a more functional society. I believed that law schools thought too much in terms of academic publications and formal qualifications and too little about what students got out of their time at law school, in developing their skills, maturing their personalities, increasing their understanding of social processes, and simply enjoying some of the most important years of their lives.

I was fortunate to be able to gather a young faculty who shared these beliefs and could realise them far more effectively than I could ever have done, and with them I spent four rewarding years. One of the things that happened to me and to the embryonic faculty during that period was the Aboriginal Legal Service, which was the first in Australia, and had its home in the Law School for the first months of its existence. This fitted well with my belief that the law paid too little attention to the rights of the poor and underprivileged and to glaring injustices in society.

This association led to the University adopting, operative from 1971, what I suspect was the first program of special Aboriginal admission to an Australian university. The Law School became the leading centre for Aboriginal legal education in Australia, and for study and teaching about Aboriginals and the law. In the 80 odd law graduates today, I was delighted to see three Aboriginals. All this began 20 years before Government equity programs made such an orientation financially attractive to universities. Today a number of universities around Australia have more specialised programs and more Aboriginal students, but it is pleasing to see that UNSW has recently added to its long-standing Aboriginal Law Centre, a general Aboriginal Research and Resource Centre.

In the last twenty odd years much has changed and much has remained the same.

One thing that has remained much the same is that Aboriginal people are still the most alienated and disadvantaged group in Australian society, whether one looks at health, education, housing, access to municipal services, employment, life expectancy, infant mortality, arrest and imprisonment, alcoholism or almost any other social measure. It is clear that these are not a series of separate problems but part of an interlocking web of disadvantage and alienation which has considerable resistance to piecemeal change.

The relatively little change that resulted from two decades of well-intentioned paternalism backed by substantial Government expenditure has, I think, convinced all but the most smug and self-righteous that necessary change cannot be imposed from the outside, but must come from within the Aboriginal community. We on the outside can only work to reduce the physical, financial, psychological and social barriers to its emergence. The hard part for white Australians is to abandon the ingrained assumption that we know best what Aboriginal people need, and instead seriously listen to them. Only then can we give real meaning and effect to policies of self-determination and reconciliation.

But there have been many changes since 1970, none more dramatic than the *Mabo* decision in 1992, when for the first time, the High Court was asked to consider the effect of the British annexation of Australia on Aboriginal rights. The actual decision was quite conservative. Essentially it gave Aboriginal people nothing that other Australians had not always had. It simply recognised that, like other Australians, Aboriginal people were entitled to have their rights to land protected by law and to pass on their rights to their descendants, but, by the decision of a slim majority, it did not accord them the security of title that other Australian enjoyed.

Thus, the Court wiped away the doctrine of terra nullius and recognised, as honesty demanded, that Aboriginal people in their various communities had possessed title to lands in Australia prior to the arrival of Europeans. But it held that although this title had not been automatically destroyed by the assumption of British sovereignty, the Crown had the right, which it enjoyed in relation to no other form of title, to extinguish native title at any time without compensation, and once extinguished, the title could not be revived. Thus, any Aboriginal community claiming native title to land today has to surmount two hurdles: firstly there must be a continuous unbroken line of title in an Aboriginal community for two hundred years, and secondly, in all that time the Crown must never have extinguished the title by alienating the land or putting it to some inconsistent use. Ironically, the more injustice a community has suffered in the way of dispossession, forced movement and institutionalisation, and suppression of its traditional culture, the less chance it will have of establishing title. If, as seems likely, pastoral leases are held to have extinguished native title, there will not be a great deal of potentially claimable land, except in remote areas of desert or wilderness that have not attracted even the most optimistic settler or investor.

Given the very limited effect that the decision is likely to have, the reaction from many leading figures in the Australian establishment was quite extraordinary. There were literally howls of outrage, extravagant criticism of the judges, historical obfuscation and misinformation, and irrational, prejudiced, and just plain silly denigration of Aboriginal people. It was distressing to see that some of those who acted in this way were people of eminence in the legal profession. Some of their most virulent criticism was directed at the historical comments of Justices Deane and Gaudron. While one can understand that elderly lawyers amongst the critics may be unaware of the great body of historical work published since they left school, one cannot so excuse an eminent historian like Professor Blainey, who wrote some of it himself, yet castigated the judges for statements they could well have based on his own writings.

It was clear that a major disturbance to the Australian psyche had taken place, and this is the clue to *Mabo*'s long term importance. It compelled the non-Aboriginal Australian community to confront an issue that it had previously been able to ignore or misrepresent, namely that our nation has been built on the dispossession, often violently, brutally and cruelly, of the previous owners of Australia, the Aboriginal people, who still live among us as the most disadvantaged group in the community.

How should we see the role of the *Mabo* decision? I think that Paul Keating put it very well in his Redfern speech in December 1992, in which for the first time an Australian Prime Minister, explicitly, eloquently and with obvious personal conviction, acknowledged the injustice, the dispossession, the devastation and the cruelty that white Australia had inflicted on its indigenous people for over 200 years, and pledged the nation to form "a new partnership" with them. He said:

> We need...practical building blocks of change. The *Mabo* judgment should be seen as one of these. By doing away with the bizarre conceit that this continent had no owners prior to the settlement of Europeans, *Mabo* establishes a fundamental truth and lays the basis for justice. It will be much easier to work from that basis than has ever been the case in the past.

Paul Keating's metaphor of building blocks is apt. There are no easy solutions or quick fixes to the situation that white Australia has created by the way it has dealt with Aboriginal people over the last 200 years. We can only gradually build an acceptable solution, patiently and carefully, block by block. If we look back over the past from this point of view we may take encouragement from the fact that the last four years has seen the fashioning of an extraordinary number of building blocks.

First, the establishment in 1990 of ATSIC, the Aboriginal and Torres Strait Islander Commission, as a result of which the administration of major areas of Aboriginal affairs, including control of government expenditure, passed into the hands of an elected Aboriginal body; secondly, in April 1991 the National Report of the Royal Commission into Aboriginal Deaths in Custody, whose detailed recommendations over all areas of Aboriginal policy, premised on the recognition of Aboriginal people as a distinct people and on their empowerment and self-determination, were broadly accepted on a bipartisan basis, federally and by States and Territories; thirdly, in September 1991 the establishment of the Council for Aboriginal Reconciliation whereby the Commonwealth pledged itself to work for a basis of reconciliation with our indigenous people, leaving open the possibility that the terms of reconciliation might be expressed in a constitutional amendment, treaty, or other formal document; fourthly, in June 1992 the *Mabo* decision emerged; fifthly, in December 1992 the Prime Minister's Redfern speech; sixthly, in January 1993 the appointment of an Aboriginal Social Justice Commissioner as a member of the Human Rights and Equal Opportunity Commission, with statutory powers and duties to monitor and report on the recognition and protection of the human rights of Aboriginal people; seventhly, in December 1993 the *Native Title Act*, whereby the Commonwealth embraced and sought to give practical support and recognition to the native title declared in *Mabo*; eighthly, a land acquisition fund to buy back land for dispossessed groups which could not establish native title claims. And still in the future, a promised Social Justice package to increase the participation of Aboriginal people in Australian economic life and to safeguard and protect their culture.

This is an impressive list of achievements and promises, but they are simply building blocks and we have a long way to go before we have the structure of a settlement with Aboriginal people. But I believe that if we think in terms of building blocks, rather than grand solutions, it will help us to identify some of the

further steps we must take and some of the further building blocks we must fashion in negotiation with Aboriginal people.

Part of what needs to be built is the trust and confidence of the Aboriginal community; another part is the understanding and responsiveness of the general public; another is the building by Aboriginal people of the national representative structure which traditionally they did not need and did not have, but which is required if they are to negotiate settlements with non-Aboriginal Australia.

We should not think in terms of 'final settlements'. It is to be expected, rather, that there will be a continuing re-definition of relations between communities over the years. What seems just to one generation may seem unjust to another, what is important to one may be unimportant to the next, what is seen as beyond contemplation in one era may be contemplated with equanimity in another. Relations between communities go on into the indefinite future and change and grow; the search for just accommodations is likely to be a continuing one.

One curious but recurring resistance to the quest for a just outcome is from those who beat their breasts and say that they are not personally guilty for what happened. Why is it only in Aboriginal affairs that concern for justice should be confined to circumstances of personal guilt? It is not a matter of whether we feel personal guilt for what happened 200, 100 or 50 years ago, or last week, but whether we want to be citizens of a country in which the consequences of past injustices live on.

As Paul Keating said in his Redfern speech:

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

The reference to 'all of us' is not mere rhetoric. It does fall to each of you and to me. For all its many faults, the society we live in is an essentially democratic one, not only in the sense that we have a vote every few years, important as that is, but in the sense that public opinion, to which each of us contributes every day, does count in the end. Mining companies, police, bureaucrats and politicians may wield a direct power that you and I don't enjoy, but in the end they can't go on doing things of which you and I seriously disapprove. They can't do things in this country that they can do in some other countries, and they can't do today in Australia what they did thirty years ago. Mostly they don't even want to. They are restrained by the values of a culture to which we all contribute.

We inherit that culture as it was lived by those who went before, but we recreate it and modify it every day by what we individually say and do in our homes, our workplaces, in classrooms, taxis, and sports-fields. What we pass on to our children is different in important ways from what we get from our parents. We all help to shape it, whether we think about it or not. Hopefully, one result of our time at university will be that we will think about it more often and that we will care about the world we are making, not only for ourselves, but for everyone else who will share it during our lives and after we are gone.