

The Six Challenges for Engaged Indigenous Researchers

Opening Keynote Address

Higher Degree Research Retreat
Rydges Eaglehawk, Canberra
4 August 2012

Professor Frank Brennan SJ AO

I join Professor Mick Dodson in acknowledging the traditional owners of this place. It is a great honour for me as a non-indigenous Australian to be invited to address you - the nation's leading indigenous scholars and scholars in indigenous studies. It is also a great delight and consolation to see the number of you now present. Recently, Professors Mick Dodson and Megan Davies joined me and Alison Page, a feisty Aboriginal businesswoman, on ABC Radio National to discuss the matter of constitutional reform. I made the observation that it would have been impossible for people of my parents' generation in Australia to engage in a public discussion about any topic with two indigenous law professors and an indigenous businesswoman. There were none.

Today I want to put before you six challenges:

1. Know your discipline.
2. Know your mob.
3. Know the system.
4. Be bridge builders.
5. Be builders of trust.
6. Be critical thinkers, not just for your own mob, but for all Australians. I might even suggest that it is necessary for some of you to be radical thinkers, if not a militant activists.

Speaking yesterday with my friend Patricia Turner who has retired back to her home country in Alice Springs after a lifetime of service in the Commonwealth bureaucracy, I asked her what I should say to a group such as yourselves. She asked me who would be in attendance. Giving a brief overview, I mentioned a few names. She said, "Oh, Terri Janke, is she still studying?" She urged me to challenge you with the situation back in some remote home communities as being the most distressing she has ever known. She wonders how it will be possible for those who have the opportunity for higher education and training to make real contributions back in those home communities. I recalled the first time I ever travelled to Yarrabah on the public bus from Cairns in North Queensland. Sitting next to me in 1982 was an Aboriginal teacher who had been brought up on Yarrabah. I asked him if he would ever

contemplate returning to Yarrabah to teach. He told me he would not. He told me, "These are shame places."

I was a first year law student at the University of Queensland in 1971, the year in which the first ever Aboriginal land rights case, *Milirrpum v Nabalco*, was decided. Years later I remember Gough Whitlam asking me why so many social activists emerged from Queensland in those years. I replied, "That's easy. With a premier like Joh Bjelke-Petersen, we had something and somebody to react to." During my first year as a law student, we were subjected to a state of emergency proclaimed under the *State Transport Act* as part of the government's response to the Springbok rugby tour and the threatened student demonstrations against the South African apartheid regime.

Unknown to me, in 1971 Charles Perkins who had spent two years employed with the Council for Aboriginal Affairs, had written a 23 page memorandum to Dr Coombs, Professor Stanner, and Barry Dexter outlining his concerns about the Council and Office for Aboriginal Affairs. In this 23 page memorandum, he wrote: "There is little doubt the Council and Office have failed to live up to the high expectations implicit on the wave of optimism which followed the successful yes vote in the referendum. However on the basis of its restricted terms of reference it probably achieved the maximum possible considering the insurmountable obstacles placed in its path by short sighted governmental policy and the concept of States rights." Having been involved on off with issues to do with Aboriginal Affairs for the last 30 years, I thought the time had come to reflect upon the role of non-indigenous Australians in agitating for Aboriginal and Torres Strait Islander rights.

It's not that Perkins was overtly hostile to these three white men. In fact he noted in his memorandum, "It is important to note also the Chairman and Director are the best white men ever to become involved in Aboriginal Affairs. The staff in the office generally are the best collection of sincere people ever to administer Aboriginal Affairs. I would be most unhappy to not see this potential exercised to its fullest extent."

His recommendations will come as no surprise to those who are scholars of indigenous policy in Australia. He recommended that the Council for Aboriginal Affairs "refrain from making important decisions without the aid of Aboriginal advice. A nationally elected Aboriginal council should sit with the Council every three months to give the Council policy directions. The Council in turn can support the Aboriginal Council in deciding on the feasibility or otherwise of such proposals as they may wish to consider." Perkins thought that 2 elected Aboriginal members from a National Aboriginal Council should be members of the Council for Aboriginal Affairs on a full-time basis. He was strongly of the view that liaison officers should not be stationed in Canberra but located in appropriate regions throughout Australia where heavy aboriginal population resides.

Barry Dexter wrote to Dr Coombs setting out his response to the Perkins paper. He wrote: "Even making allowance Mr Perkins natural impatience (which I share), I must confess to being somewhat disappointed that so little of the basic approach we have adopted in the

difficult circumstances in which we find ourselves, and so little knowledge of our actual programmes, have rubbed off on him. This fact demonstrates both the need for full briefing of officers within the Office and for more contact between the Council and officers; and, if Mr Perkins can work inside the office with so little comprehension of what it is aiming to do and how, the probable existence of complete ignorance on these matters in Aboriginal circles outside the Office."

Five months later Mr Perkins was writing again expressing his frustration with the Council for Aboriginal Affairs. He expressed the need for greater militancy by both the Council and Aborigines. He also called for greater knowledge amongst and support by Aborigines of the proposed advancement measures. On 11 January 1972, just one fortnight before Prime Minister McMahon's infamous policy statement on land rights and the establishment of the Aboriginal Tent Embassy in Canberra, Professor Stanner wrote to Dr Coombs expressing his frustrations with Charles Perkins' viewpoints. He thought that Perkins was being "simply romantic and rhetorical". Here are a few of Stanner's observations: "It is up to individual Aborigines and organisations to decide themselves how militant they want to be, and what exactly they mean by militancy. If they ever ask my advice which is unlikely it will be that in my opinion they will be wasting their time and will lose support they really need. I think he is completely mistaken in his view that aborigines are 'the only great force that will bring change in Australian society to suit their needs'. By themselves the Aborigines are not 'a great force' and doubtfully a force at all. By themselves they cannot exert a sufficient influence. They'll be able to do so only by alliance with Europeans. It is up to them to make their choice between Europeans. Mr Perkins had better clear his mind on this matter. He might consider, for example, what the Aboriginal situation would be like if all European reformist elements (Council, Office, church organisations, academics and other well-wishers), plus the grants, subsidies, loans and so on which their influence has largely helped to obtain, were suddenly and permanently removed from the scene."

Addressing the issue of militancy, Stanner went on to say, "But, as far as the Council and Office are concerned, militancy is a matter of horses for courses. I'm sorry to see Mr Perkins falling into the same class as many of my half baked academic associates, who seemed to think that all the Council or Office need do is explain carefully to the Minister, or the Prime Minister, what the Aborigines need and want, and that it will be forthcoming; or if it is not everything can be changed by becoming militant. This is stuff for children, unless Mr Perkins is prepared to regard persistence, patience, manoeuvre, and constant renewal of effort as militancy. If so, I don't think Council or Office has reason to reproach itself for being insufficiently militant."

In what I would see as a still existing challenge to indigenous leaders such as yourselves, Stanner went on to state: "Mr Perkins' theory of what is needed is largely wrong. The government machine does not respond to emotional submissions or to vague programmes in uncontrolled words. It is embarrassed and held up by them until they are translated into forms the machine can handle. The only Aborigines who will be of any use on the Council or 'in high administrative positions' in the Office are those who, while retaining real links with and understanding of their own people, can learn to accept the natural limits of the

government machine and how to make the machine work in their interests. My guess is that men of that kind will end up working very much as Dr Coombs and Mr Dexter have worked. I think it romantic nonsense to suggest that whether an official is an Aboriginal or European will make much difference at that level to the machine."

The need to trust and for good relationships with senior bureaucrats dealing with the complexity of policy issues is nicely highlighted by the internal Council correspondence in relation to the McMahon Government's folly in wanting to close the Aboriginal Tent Embassy in July 1972. Barry Dexter wrote to Dr Coombs who was on economic business for the government in London stating: "Another matter we will be considering at tomorrow's Council meeting will be what if anything we can do to prevent the government's mad approach to the question of the Aboriginal embassy outside Parliament House. Without ever seeking our advice the government seems to have decided to make an Ordinance making camping illegal and has stated its intention of removing the Embassy as soon as this Ordinance is through in the next week or two, this despite an assurance which Neville Bonner states he was given by the government that nothing would be done while Parliament was in recess. Incredible though it may seem it also appears as if the Minister was not privy to the government's decision! In any case just before he went off to Stockholm he sought the council's views, which we were reluctant to give, and wrote quite a terse letter to Mr Hunt saying that he had not been consulted and that the Council was opposed moves to remove the embassy because this would create martyrs and was unnecessary. Mr Hunt is trying to have the best of both worlds and has been trying to cajole FCAATSI whose representatives he has seen in Canberra over the last two days, to seek the leasing of land on which to construct a national centre for aboriginal organisations: this he sees as a sop to Aboriginal organisations to closure of the 'Embassy', though he keeps maintaining that the two issues – of closure and the centre – are not related. I have advised FCAATSI to say that it appreciates the indication of Interior's readiness to make a site (and other assistance?) available for a national centre but is not prepared to apply for such a site while the embassy is under threat. A point we have made strongly to the Minister is that the embassy stands for Aboriginal land rights and that therefore no compromise seeking to buy the Aborigines off with some other proposal is proper or would be acceptable to the bulk of the Aborigines."

In his characteristic mode Dr Coombs provided a comment on the closing of the embassy on 20 July 1972. He said he would not comment and proceeded to comment! Here is the text of the comment which was issued to the ABC and to *The Age*. "I have no comment to make on the closing of the embassy. This is a government decision and it's a matter for them. I have heard the reports of protests and that there has been some violence. I regret the violence very much. The only comment I would make is that the closing of the embassy has cut off one channel of protest open to Aborigines and others interested in their cause. But Aborigines and others have a right to protest about these matters and there remain other avenues for protest which I hope they will continue to use."

Two months later Joh Bjelke Peterson was complaining to Peter Howson, then Minister for the Environment Aborigines and the Arts, about the Federal government's funding of militant groups particularly in Queensland. On 13 September 1972, Coombs wrote to

Howson saying, "The Council has always stood ready to confer with any *bone fide* group of Aborigines whatever their political attitudes, and indeed believes that to refuse to do so because of reported militancy would be improper as well as unwise. We believe that militancy in Aborigines can best be dealt with by: (a) showing obvious willingness to hear and consider grievances, (b) a policy obviously directed to greater social justice for Aborigines, (c) the promotion of communication between Aboriginal groups of all kinds and between them, the rest of the community, and the Government, and (d) providing outlets for 'militant' zeal by involving Aborigines in the conduct of their own affairs and in organisations promoting the welfare of their own people."

He went on to say, "It is our firm conviction that a policy which listens only to conservative opinion is likely to alienate those of more radical views from their fellow and produce distrust and involve serious danger of promoting rather than discouraging extremism."

Listening to these reflections of Stanner, Dexter, and Coombs, particularly as they respond to the criticisms of Charles Perkins, critical of non-indigenous Australians, I think that the challenge to you as indigenous scholars and as indigenous leaders is not only to know your discipline, and know your mob, but also to know the system. It is a particular obligation of yours to be bridge builders and builders of trust, hoping and knowing that there are people within the system who are fully sympathetic to your causes and wanting to provide the space for your full engagement. One of the great things about a pluralist liberal democracy with a competent public service is that one can expect that critical thinkers will be found both **within** and **without** the system. It is up to you to know those persons, to build trust with them, and to engage with them as critical if not radical thinkers, and not just for the good of your own mob but for all Australians.

Recently I had the pleasure of writing the foreword for Tim Rowse's forthcoming book. As I reflected on Tim's writings, I was ably assisted by my own philosophical and theological tradition concluding that in recent years there has been insufficient attention by the proponents and the thinkers about the different meanings of justice when it comes to Aboriginal claims within a postcolonial society. In my Catholic tradition, we have long distinguished between commutative justice, distributive justice, and social justice.

Commutative justice is the relevant consideration when looking for example at the terms of a contract or when correcting a relationship between two persons or parties, one of whom may be the state, or in putting right historic wrongs such as land rights. We have all had to admit that land rights if properly applied may result in some Aboriginal groups becoming the land rich and others remaining land poor. Land rights is not primarily a matter of social justice nor even of distributive justice. It is a matter of acknowledging the due property rights of groups and individuals who have not been dispossessed of those lands by means of title being granted to other persons. Just as there will be some non-indigenous persons such as Gina Rinehart and Clive Palmer who become land rich, there will be some indigenous Australians who are land rich while others are land poor. Let's not forget that the first land rights legislation in Australia for the Pitjantjatjara in South Australia resulted in a vast area of the State being set aside for a very small percentage of the population. And that was just.

Distributive justice on the other hand is concerned to ensure that there be a proper distribution of assets and income so that persons within the society might achieve their full human flourishing. In the past we have had schemes like the Aboriginal secondary grant scheme which was aimed at wholesale redistribution of wealth and opportunity so that those who had been greatly disadvantaged in the past might at an accelerated rate have the possibility of an education appropriate for all Australian citizens. Race was simply the convenient indicator of a major disadvantaged group in need of a leg up.

One mistake in recent times has been to confuse distributive justice with social justice, as if social justice is simply about a redistribution of wealth from the rich to the poor. I recall many years ago conducting a one-day workshop for Aboriginal teacher aides in western New South Wales. We met in Bourke. As a thought experiment I suggested to the group that the day might come when they were no longer poor, disadvantaged and dispossessed. There might come a time when some indigenous Australians were not poor, were not disadvantaged, and are not dispossessed. The question then would be whether or not there would still be some special entitlements for indigenous Australians precisely because they are indigenous? Would there be some special requirements that should be made for the protection of rights of indigenous citizens? If so, we would put this under the heading of social justice.

As part of the thought experiment I said to the group: imagine that one day you saw an Aboriginal person driving down the main street of Bourke in a Rolls-Royce, what would you think? With characteristic Aboriginal humour, one teacher aide responded immediately, “It’s stolen.”

As part of this presentation I was asked by Megan Davis over dinner last night to tell a story or two. I happily take this opportunity to recall some of my involvement in those difficult days of the *Wik* debate in 1997-8. I tell the story as an example of how we might better get to know the system, being bridge builders, the builders of trust, and critical thinkers not just for our own mob but for all Australians.

This was a ripping yarn at the time, fracturing a number of relationships for some time. The Howard government had been elected with a commitment to wind back Paul Keating’s *Native Title Act* which had received a top up from the Greens on its way through the Senate. No sooner was Howard Prime Minister than the High Court expanded on *Mabo* with a 4-3 decision in *Wik*. In the Senate, the Catholic Senator Brian Harradine held the balance of power. This made for a poisonous political cocktail. Howard’s proposed legislation failed twice in the Senate. It is very rare for a government to present legislation to the Senate a third time in the same Parliament. Harradine told me that he thought Howard would come back a third time. I doubted it and headed overseas for a human rights conference in Taiwan. One of the other delegates at the conference was Les Malezer who kept me informed about events back home. It was of course no part of my role to determine what was acceptable to

indigenous people seeking a just outcome to the *Wik* debate. But once they and their lawyers had indicated the points on which they were prepared to compromise, it was appropriate for others like myself to try and carve out some ground with government for the achievement of that compromise.

Given that there was absolutely no electoral advantage for government in conceding ground, and given that there was no desire by government members to concede additional ground, it was not only appropriate, but necessary, to develop arguments highlighting the internal inconsistency in the government's proposals and demanding that the proposed legislation achieve the moral and political objectives which government claimed to be fulfilling. That I did before I left Australia, including writing at length to Tony Abbott. The National Indigenous Working Group (NIWG) and Labor Party lawyers led by Ron Castan QC drafted the provision which would guarantee some protection of Aboriginal sites on pastoral lease lands considered for mining.

The political circuit breaker was the 1998 Queensland election. Peter Beattie got over the line and One Nation did very well. This was the double pincer move needed to bring Howard to the table on the compromise. Borbidge was off the scene and Pauline Hansen would have taken a swag of Senate seats if Howard opted for a double dissolution. Howard needed a non-electoral resolution of *Wik* and Harradine had provided him with a solution within reach. Just before heading overseas, I urged Harradine to strike while the iron was hot. While I was overseas, Tony Abbott phoned urging me home to assist with the discussions. Fortunately I had heard a report that Ambassador Andrew Peacock in Washington had complained that *Wik* was a mess because I had failed "to deliver Harradine". So I decided not to change my plans. I was in no hurry to return. I was in Jakarta when I received a media phone call at 4.15am to ask what I thought of the deal. I pleaded ignorance. Some hours later the *Sydney Morning Herald* faxed me the exchange of letters between Howard and Harradine. I then wrote to Harradine congratulating him on delivering the compromise (and some more) to Aboriginal Australia. He had forced John Howard to concede on the four major sticking points which Howard had insisted during the second Senate debate were non-negotiable. Howard had already protested that the Senate's amendments in the first debate had "substantially altered the thrust and the intent of the legislation" making them "in the eyes of the government, completely unacceptable".

No one disputes that what Harradine delivered in July 1998 was an improvement on what the NIWG (and the Labor Party) unofficially supported three months earlier. The sunset clause was scrapped. The threshold test was loosened to allow members of the Stolen Generations and those locked out of pastoral properties to claim. The discretions to be exercised under the *Native Title Act* were to be exercised consistent with the *Racial Discrimination Act*, pursuant to a clause fine-tuned by the government lawyers and the other legal teams led by Ron Castan QC. And an alternative to the right to negotiate labelled "the non-exclusive area impact procedure" was approved consistent with the draft proposed by the legal team led by Ron Castan QC. While I flew through the night

back to Australia, Noel Pearson went public with his own congratulations of Harradine who had won the "penalty shoot out". Pearson told Kerry O'Brien on the ABC's *7.30 Report*:

It looks, on the face of it, in this penalty shoot-out situation, Brian Harradine's won four-nil. Full credit to Senator Harradine for having promised us that he was going to hold the line. He's surely held the line. He's held out on a stubborn position. It appears that Senator Harradine has substantially saved the position which will give Aboriginal people procedural rights on pastoral leases, which from one point of view at least looks like a right to negotiate under a different guise.

When I arrived home next morning, my assessment of the compromise was published as an *Op Ed* in the *Sydney Morning Herald*. My view was basically consistent with Noel Pearson's remarks on television the night before (though obviously I had not heard them). Paul Keating rang me at my presbytery and abused me. He then wrote in the *Sydney Morning Herald*, "Talk about meddling priests! When Aborigines see Brennan, Harradine and other professional Catholics coming they should tell them to clear out." He claimed that Harradine and I had "saved Howard from paying the price of his folly, and made the Aborigines pay instead."

Before the legislation was introduced again in the Senate, Noel Pearson changed his public assessment of Harradine, condemning the Howard-Harradine compromise. The compromise originally sought by the Aboriginal leadership and drafted by their lawyers was labelled a sell-out which was the responsibility of Harradine and anyone who had ever spoken to him! On that weekend's Channel 9 *Sunday* program, Lawrie Oakes pursued Brian Harradine about the central plank of the compromise ("the non-exclusive area impact procedure") and he obtained this public admission:

Oakes: Just to pin you down though. You're a truthful man. Is it true that Ron Castan first suggested this proposal and that you were led to believe the Labor Party would support it before Easter if you put it up? Harradine: Well, if somebody has ... if that's public knowledge, that is true.

Harradine apologised to the Aborigines for their exclusion from the last round of negotiations, saying, "I was concerned that if others were involved there might be leaks and the horses might be frightened and they'd bolt." On the day of the apology, Gatjil Djerrkura, Chairman of ATSIC, issued a statement on the Howard-Harradine agreement which he described as "an advance on the Government's original bill". Though concerned about the weakening of the right to negotiate, he acknowledged that progress had been made. Still unconvinced about the overall bill, Djerrkura nonetheless praised Harradine for his initiative: "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."

Harradine had avoided the risk of a race based election which would have followed if *Wik* were left unresolved in 1998. He delivered on the four sticking points. Two of the sticking points could not have been resolved but for the legal acumen and dogged persistence of Ron Castan QC. Castan's legal compromises would have got nowhere but for Harradine's political nous and unflinching commitment to an improved legislative outcome for Aboriginal Australians consistent with what key Aboriginal leaders had earlier thought the best achievable result with the Howard government's unsatisfactory original bill.

Prior to the third Senate debate some Aboriginal leaders tried to explore an alternative solution with pastoralists and miners. The pastoralists were prepared to come to the party if the native title holders conceded all economic rights on pastoral leases. But the mining companies were not interested in pursuing any alternative to John Howard's original ten point plan. If *Wik* had been left unresolved, Howard would have had no option but to return to the matter after an election in which his ten point plan would have been an electoral issue, at least in the bush. Howard would have won the election, and One Nation would have obtained a handful of seats in the Senate. And one way or another, the ten point plan would have been legislated - either with support from One Nation in the Senate, or by a joint sitting of the Houses if there were a double dissolution. No one seriously suggests that Beazley could have won an election in 1998 with *Wik* unresolved.

Senator Harradine was quite justified in his declaration when announcing his retirement from the Senate when he said his role in the native title *Wik* debate was one of his greatest achievements:

The Government didn't want to have the stolen generation and victims of locked gates able to re-register; I knocked that in the head. The Government wanted a sunset clause for six years for legislation; I knocked that in the head. The Government needed an exemption from the native title registration on the operation of the *Racial Discrimination Act* and I knocked that in the head.

And he got the government to accept the Castan alternative to the right to negotiate for native title holders whose lands are subject to pastoral lease. No matter what the rhetoric of federal Labor, all State Labor governments were keen to wind back the right to negotiate because they saw it as too great a disincentive to investment by mining companies. Under the Howard-Harradine compromise, with Labor governments in power in all states and territories, there was no Howard backed impediment to a nationwide restoration of Paul Keating's right to negotiate for all native titleholders. But no one has ever been much interested. Many Aboriginal leaders still think Harradine betrayed them. He gained them more in adverse political circumstances than even they and their legal advisers thought possible. Of course, I admit my own self-interest in this assessment. But if real progress is to be made in achieving more indigenous rights in

this country, you will need to work closely with those who know the political system intimately maintaining a strong commitment to your cause.

I wish you well in your deliberations and leave you with the injunction that you know your discipline, know your mob, know the system, be bridge builders, be builders of trust, and be critical thinkers, not just for your own mob, but for all Australians.