

**2010 Wentworth Lecture
Transcript**

**Justice The Hon. Michael Kirby, AC, CMG
First Australians, Law and the High Court**

Russell Taylor

Distinguished guests, ladies and gentlemen. My name's Russ Taylor and I'm the Principal of AIATSIS, the Australian Institute of Aboriginal and Torres Strait Islander Studies here in Canberra. And I'd like to sincerely and warmly welcome you all here this afternoon for a very significant event in the life of AIATSIS.

First of all can I acknowledge that we meet today on the ancestral lands that for time beyond memory have hosted the camps and the campfires of the Ngunnawal peoples. I acknowledge and pay my respect to their elders, past and present, and also acknowledge and respect their continued practice on country. I'll also of course like to acknowledge the AIATSIS Council members here with us this afternoon.

The Wentworth Lecture as I said is a very significant event in the public life of AIATSIS, and it was established by AIATSIS to honour the contribution of the late Bill Wentworth, and Bill's contribution to indigenous studies in Australia. But more importantly as a means to honour and encourage all Australians to gain a better understanding of issues that go to the heart of the development of Australia as a nation.

And I guess as Principal I'm also very proud to say that today brings to a close what has been an extremely busy fortnight. Last week of course AIATSIS was very proud to host and co-sponsor our annual Native Title Conference, brought together over 600 delegates from across the country, and the highlight of that event we would emphasise being the Mabo Lecture by Professor Marcia Langton.

Also this week our Council have come together for their June meeting and addressed what was a very busy and perhaps demanding and challenging agenda. However, we are particularly pleased to be able to conclude the week by today's activity. That is the delivery of the 2010 Wentworth Lecture. And of course we're particularly honoured and pleased to be able to say that this year's Wentworth Lecture is to be delivered by a person, a preeminent such as Michael Kirby.

To say a little bit more about the context for the address, and also to introduce our honoured speaker and guest, can I introduce you to our Chairperson, Professor Mick Dodson. Thanks Mick.

Michael Dodson

Thank you Russ and good afternoon everyone. I'd also like to pay my respects to the traditional owners on whose ancestral lands we stand today to honour the memory of the

late William Charles Wentworth. I'd also like to acknowledge my fellow Council members who have made the ultimate sacrifice and spent another cold night in Canberra in order to be here today. And in particular on behalf of the Council, our members and the staff of the Institute I'd like to welcome Bill's daughter Georgina and his granddaughter Mara to today's lectures.

And friends, Bill Wentworth was a passionate advocate for the rights of Aboriginal peoples. He was the founding father of the then Australian Institute of Aboriginal Studies. The establishment in 1964 of the Institute was the culmination of his vision and his efforts that commenced in 1955 with the writing of a nine page document entitled 'An Institute for Aboriginal Studies'. This document reflected Bill's concern for the recording and preservation of Aboriginal languages and cultural materials. His efforts culminated in December 1961 in the establishment of an interim Council of the Institute, which operated until the *Australian Institute of Aboriginal Studies Act* was passed in 1964, and I might say with very strong cross-party support. I had a dream of the good old days.

Bill was also Minister in Charge of Aboriginal Affairs from 1968 until 1971. In fact he was the first federal Minister to have sole responsibility for Aboriginal affairs. Bill was an ardent campaigner for the rights of Aboriginal people on other fronts as well. Introducing a private members' bill for amendments of the Constitution, the 1967 referendum, which is considered a watershed in Aboriginal affairs.

In many senses Bill Wentworth was a man before his time. He retained his strong relationship with the Institute for more than 40 years including as a member and also serving as a member of the Institute's Council, and in 2011 Bill, along with the Institute's first Aboriginal Chairperson, the late Mr Ken Colbung, opened the new building on Acton Peninsula. And as a tribute to Bill's contribution in 1978 the Institute established this biennial lecture series, the Wentworth Lecture.

And Bill never lost interest in emerging issues. He always had plenty of fire in his belly, and until the end was as tenacious as ever. And they, I suggest, are qualities that are indispensable for making a genuine contribution to the advancement of our peoples. And Bill Wentworth's passion and advocacy for indigenous peoples and his achievements in indigenous affairs stands as a legacy to his memory. His is far too often lone voice and his indomitable spirit are indeed sadly missed.

So it now gives me great pleasure to introduce today's 2010 Wentworth lecturer. Like Bill, Michael Kirby is a prolific speaker and writer, who really doesn't need any detailed introduction by me, but allow me to say a few short things. Michael is a former Justice of the High Court of Australia, and Australia's longest serving judicial officer, having served as a Justice of the High Court of Australia, our highest constitutional and appellate court, for 13 years before his retirement in February last year. He previously served for 12 years as President of the New South Wales Court of Appeal. He held a commission as a Judge of the Federal Court of Australia during 1983 and '84, and he served as Deputy President of the Australian Conciliation and Arbitration Commission from 1975 to 1983.

Among his many achievements he has received Australia's highest civil honour, the Companion of the Order of Australia. He is also a recipient of the Human Rights Medal, and was awarded the Companion of the Order of St Michael and St George for his services to law. Over the last decade he has been an outspoken and passionate advocate on issues such as privacy, equal opportunity, freedom of speech, indigenous rights and domestic application of international human rights treaties. We are indeed very, very fortunate and grateful that Michael is able to be here today, having landed back in Australia from Europe only two days ago, and I understand he is heading overseas again in a matter of days. Do the washing, repack the suitcase and off. So it's my very, very proud duty Michael to welcome you to deliver this year's Wentworth Lecture. Thank you.

Michael Kirby

Professor Mick Dodson, Russell Taylor, Principal of the Institute, Professor Barry Dexter and members of the Wentworth Family, Georgina and Mara, who are here today. Just as Bill Wentworth was always here when his health held out to be present at the presentation of his lecture and to offer a few well-chosen critical comments on the lecturer, something which I expect that Georgina and Mara will stand up at the end of these words and offer to me.

I, like those who have gone before, offer my respects to the traditional custodians of the land. A genuine respect. A respect such as we hear given in New Zealand and not perfunctory, but a moment of reflection upon the wrongs that have been done to the indigenous people of our continental land. And a reminder of our obligation, our citizens, to ensure that wrongs are repaired, not just with words, but with actions.

My remarks today, like Caesar's Gaul, will be divided into three parts. The first part will be a tribute to Bill Wentworth, because I don't think you should come along to give a named lecture and just ignore the person in whose name the lecture is given. You'd be amazed at how many people do that, but the whole point of the lecture is for us to remember, and take inspiration from, the life of Bill Wentworth and similar spirits.

Second, I propose to say a few words about the time that I spent in the High Court of Australia when issues of Aboriginal law came before the Court on a number of occasions, just across the paddock here in the great building of the High Court where I was proud to serve as a Judge in the final national Court of this nation.

And thirdly, I propose to say a few words on the issues of the Northern Territory intervention and the case, very little reported in the media, that came before the High Court just as I was about to leave office in February 2009. The case was *Wurridjal v The Commonwealth*, indeed the very last case in which I delivered a decision as a Justice of the High Court at 2.15pm on the last day of my sitting. It's something that hasn't really been noticed much in the media or in the community generally. But it will, I hope, be of interest and of use to be reminded of it. There's not much point in having these great

decisions, of constitutional moment decided in the High Court, if no one knows about them. The media of our country are altogether too concerned about infotainment, and not sufficiently concerned about matters of justice, of principle, of constitutionality and of law. And I propose in my remarks to try in this lecture to correct that default.

So first of all to some reflections on Bill Wentworth. I knew him because of my service from 1975 to 1984 as the inaugural Chairman of the Australian Law Reform Commission. I was told that the driveway to my home in those years, which is still the driveway to my home in Rose Bay in Sydney, was, with a driveway to Bill Wentworth's home, the hardest navigational feat that Commonwealth drivers had to accomplish. I see that Georgina and Mara get the point. I never had the pleasure of being invited to Bill Wentworth's home, but certainly he was famous, or perhaps more notorious, amongst Commonwealth drivers. I don't think I'll say anymore about that subject in light of the events that later unfolded in my life. Suffice it to say that both Bill Wentworth and I had only the nicest relationships with Commonwealth drivers, and that they were only too happy to assist us up and down our steep driveways.

Bill Wentworth was involved in the project of the Law Reform Commission on the recognition of Aboriginal customary laws, a project which was led by Professor James Crawford, one of the most distinguished academic scholars that Australia has produced, who is now Whewell Professor of Law at Cambridge University in the United Kingdom. The report, which hasn't been implemented in full, not even in large part, but is the most popular report of the Australian Law Reform Commission if that can be judged by the hits on the ALRC website. It still stands before us as a reminder of the unfinished business of working out the precise relationships between Aboriginal customary laws and the laws of this country. Bill Wentworth had many ideas on the subject, made them well known to us, and I got to appreciate his quirky, somewhat difficult, informative, but insistent personality which was an unusual one for people in public life, who, as we know, are often all too tamed and bland because of their desire to wedge their opponents and to avoid anything that might act to their disadvantage. Bill Wentworth didn't mind what people thought of him. He was more interested in the ideas that he presented, and we need more politicians of that calibre.

In a decision to which I was a party in 1998, two years after I arrived at the High Court of Australia, a decision in the case of *Kartinyeri v The Commonwealth*, I referred to Bill Wentworth and his dedication to the cause of the Aboriginal people. The question in the case was whether or not the amendment to Section 51(26) of the Australian Constitution, to remove the exclusion of people of the Aboriginal race from the provisions whereby the federal parliament was empowered to make laws with respect to people of any race for whom it is necessary to make special laws, was to be interpreted beneficially, so that for whom it is deemed necessary to make special laws was interpreted as meaning for the benefit of whom it was to be a law, or whether it simply meant for in respect of whom, so that there was no inference that the laws were only to be laws of a beneficial character. In the end, the majority of the High Court took the second interpretation, that is that 'for' meant merely in respect of, and didn't carry an inference that the amendments of the laws by the federal parliament had to be for the benefit of people on the ground of their race.

I took a different view, and I did so by reference to the parliamentary record and many other things. My view was partly agreed in by Justice Gaudron, but the other Justices didn't take the same view, and accordingly, the law of our country is as stated by the majority, that Section 51(26) in authorising laws for people of any race, for whom it is deemed necessary to make special laws, can include nice laws or awful laws, beneficial laws or antagonistic laws. They don't have to have a beneficial character.

In seeking, contrary to that majority opinion of the High Court, to demonstrate that the purpose of the amendment effected by the great constitutional referendum of 1967 was to ensure that race power in the Constitution was only used beneficially, I drew upon the history of steps that had been taken in which Bill Wentworth played a significant part. Part of my reasons for judgment included these words: "In March 1966 Mr W.C. Wentworth, later the first Australian Minister for Aboriginal Affairs, introduced a private members' bill to amend the Constitution to substitute for the race power in paragraph 26 a new provision, 'The advancement of the Aboriginal natives of the Commonwealth of Australia'". I proceeded: "Mr Wentworth also proposed a new Section 117A of the Constitution. This would forbid the Commonwealth and the States from making or maintaining any law which subjected any person born or naturalised within the Commonwealth, 'To any discrimination or disability within the Commonwealth by reason of his racial origin'. The proposal contained a proviso that the Section should not operate 'So as to preclude the making of laws for the specific benefit of the Aboriginal natives of the Commonwealth of Australia'. One of the reasons given by Mr Wentworth for his amendment was his concern that the deletion of the exclusion of people of the Aboriginal race from paragraph 26 could leave them open to 'discrimination adverse or favourable'. He suggested that 'Power for favourable discrimination was needed, but there should not be a power for unfavourable discrimination'. His bill was supported by the opposition Labour Party, but it ultimately lapsed."

Remember at the time Mr Wentworth was a member of the Menzies government, and according to the entry in the *Australian Encyclopaedia* about him, he didn't advance during Mr Menzies', Sir Robert Menzies' time as Prime Minister, into the ministry, because Sir Robert didn't always agree with the somewhat robust and independent minded attitude that Bill Wentworth took on a large number of controversial subjects, including the subject of Aboriginal and Torres Strait Islander advancement.

I should mention that Bill Wentworth wasn't picky and choosy in this respect. During the Second World War, when the Labour Party was in government, he lost office in a role he had in the military because of the fact that he demonstrated that Sydney in 1942 was extremely vulnerable to foreign invasion, and he was immediately punished for being so bold as to raise that issue, and he was punished then by the Labour Government. So Labour or Liberal, they both found Bill Wentworth difficult to live with, and perhaps we need more people of that kind in our Commonwealth because they stimulate the process.

As you know, the 1967 referendum subsequently proceeded to remove the provisions relating to the exclusion of Aboriginals from the races power. The races power was then

left in its pristine state, applicable equally to the Australian Aboriginal people and to the Torres Strait Islander people. The net result was that the power, which was historically inserted in the Constitution to allow the new federal parliament to make laws which were adverse to the interests of Chinamen (as they were then described during the 1890s) became available to be used in respect of the Aboriginal people.

The net result of this was that the power to make special race laws was available to do good things and not so good things, beneficial things and adverse things, and the history of our Commonwealth since 1967 has shown the wisdom I think of Bill Wentworth's concern and his wisdom in asserting the need to have something in the Constitution that made it clear that in the light of the history of the terrible wrongs done in a civilised country like Germany during the Second World War in racially designated legislation was such that you had to make absolutely and abundantly clear in the constitutional text that it was only for "advancement of people on racial grounds", or "so that no discrimination or disability may be imposed by reason of racial origin", should restrict the powers of law makers because law makers will often do beneficial things under a racist power, but as history has shown, they will sometimes do things which are not beneficial, not beneficial to the people involved and not beneficial on the grounds of their race. So I'm very pleased to be here and particularly glad that Georgina and Mara have come to be present during this lecture.

In the High Court when I arrived in 1996, the issue of Aboriginal rights and the interface with the law was one of the major factors on the agenda of the Court at that time. Remember that the *Mabo* decision, *Mabo v Queensland [No2]*, had been reached by the High Court in 1992. So that was only four years before my appointment. There is no doubt that the *Mabo* decision of the Mason Court was a decision of the greatest importance for our country, and also for the indigenous people of the country. It was unquestionably a bold decision. It was a decision that took a step which showed foresight, insight and courage. It was a majority decision of six Justices to one, and the decision was one which had to overcome a series of earlier decisions in common law of Australia and a decision of the Privy Council which held that, upon the acquisition of sovereignty over the Australian continent by the British Crown, all pre-existing rights to land of the indigenous people had been expunged and vested in the Crown. And that therefore no recognition would be given under Australian common law to the interests in land of the indigenous people.

How to overcome that long standing series of decisions? How, in particular, to overcome a decision of the Privy Council so holding at a time when the Privy Council in England was the final Court of appeal in the Australian judiciary? The answer to those questions was provided by Justice Brennan, later Chief Justice of the High Court. In his reasons at *175 Commonwealth Law Reports* Page 1 at 42, Justice Brennan invoked the universal principles of human rights. He said that the earlier decisions of the Privy Council, and of Australian Courts denying recognition to the rights in land on the part of indigenous people was a principle of law which had at its heart a racial discrimination, and that, if there was one principle of universal human rights which was not acceptable in the

international community of civilised countries today, it was that you cannot deprive people of rights simply on the basis of their race.

That invocation of universal principles of international human rights law was the key that unlocked the door that barred the way of the High Court of Australia to stating a new principle of the common law in terms which were not infected with racial discrimination, and it was on that footing that by six Justices to one, Justice Dawson dissenting, the High Court set aside the old statement of the common law and embraced the new statement, which was one without the flaw of racial discrimination. That, of course, set in train a very large public debate, as is natural and proper in a free democracy. It also set in train large numbers of assertions by pastoral and mineral interests that it would be the end of civilisation as we knew it, that it would destroy investment in the country, that it would mean that nobody would have any certainty in their land, that the homes of people throughout the country would be at risk, and that this would greatly damage Australia's standing in the international community, and in particular, the international economic community because it would make unstable something which every society demands to be absolutely stable, namely legal interests in land.

Nothing of the sort happened. The world seemed to accommodate itself to the statement of the new principle of the law in Australia. The economy went on and had a record decade, and the Australian community, as it came to appreciate the great injustice that had been done in the earlier statement of the common law, came I think to appreciate what a very important decision the *Mabo* decision was, and how proud we could be that the highest Court in the land had corrected the errors of insight of earlier judges over a hundred years and restated the common law on a basis which was not racially biased.

It goes to demonstrate, yet again, how important it is to have independent judges in conversation with the elected parliaments. For those who say that elected parliaments will fix up in Australia every wrong that is ever done to any group, and in particular wrongs done to minorities, and especially wrongs done to sometimes unpopular minorities, it's very important for us to remember always *Mabo*. We had 150 years of elected parliaments in Australia before *Mabo* was decided. Australia is a land with some of the oldest continuous elected parliaments in the world. We nonetheless did not correct that basic injustice in our parliaments, and it took a decision made in the number one Court across the paddock from where I'm standing, in the High Court of Australia, by six Justices to one, to do so. Please keep that in mind when you next hear politicians and the media saying "We must never have a Charter of Rights in Australia. We must never give unelected judges power. We must always keep everything in parliament, because parliament always does things." That is not always the case. Parliament often does correct injustices, usually does correct injustices. But sometimes they need a little help from its friends, and that was what the High Court did in the *Mabo* decision.

Now I can take neither credit nor blame from the *Mabo* decision. It happened four years before my appointment to the High Court, and it was a given at the time I arrived. But in the first year of my arrival, indeed in one of the very first cases after I arrived, a question arose concerning the application of the *Mabo* principle to pastoral leases. Were pastoral

leases excluded from the *Mabo* principle, or by, the operation of the *Mabo* principle, were pastoral leases cut out from the application of claims for native title or were they not? Ultimately, that question was argued before the High Court in a decision which was made at the end of 1996 in the *Wik Peoples v Queensland*, and that was a decision which upheld, by majority of four to three, the assertion by the Wik Peoples that the *Mabo* principle applied in pastoral leases. The four in the majority were Justice Toohey, Justice Gaudron, Justice Gummow and myself. The minority were Justice Brennan, Justice Dawson and Justice McHugh.

Had another person been appointed in February 1996, and not myself, it would have depended on that person to be the deciding vote in *Wik*. But the fact is that I was there, and that deciding vote was in favour of applying the *Mabo* principle, so important was the essential foundation of the *Mabo* principle as explained by Justice Brennan.

So that was my first exposure to the issue of Aboriginal title and Aboriginal law. For our pains, the majority were lambasted in parliament and in the media and in many areas of the community. We were called “a group of basket weavers” by the then Premier of Queensland, Mr Borbidge. We were also described as the “kings and queens of Canberra”, and otherwise excoriated for our decision. But the decision was a simple matter of the application of the basic principle of law, and it really was simply the application of the *Mabo* principle to new factual circumstances. So it wasn’t a particularly difficult legal decision, at least so far as I was concerned.

After the *Mabo* decision, we had a number of other cases concerned with the application of the *Mabo* case, apart from *Wik*. Those cases included the case of *Fejo* in the Northern Territory which held, contrary to the assertions in parliament and elsewhere that the title of property held in freehold, that is to say what we normally conceive of as ownership of land, were not diminished by the *Mabo* principle, and that people’s ownership of their homes, whether in the Northern Territory or anywhere else, was safe. That was so held by a unanimous Court in *Fejo*. There was then a decision in a case of *Ward v Western Australia* which dealt with many other particular aspects of land. And there were numerous other cases concerned with land and other rights, rights over water and so on, as the Court, interpreting the *Native Title Act*, gave meaning to that Act and to the application of the principles expressed in the earlier decisions. So it was a lot of work in the High Court concerned with Aboriginal title, and that was inevitable and natural once you accepted that *Mabo* changed the direction in which the law had been travelling and laid down a new principle which required numerous readjustments.

There were two other important decisions concerning Aboriginal Australians during my time on the Court. One of them was the *Kartinyeri* case which was the case concerning the meaning of Section 51(26) of the Constitution that I referred to earlier. Was the races power by the language and the use of the word ‘for’ confined to beneficial legislation so characterised, or was it simply at large in respect of? So that was a very important decision, and that was decided in 1998.

Shortly before I left the Court an important decision, a constitutional decision, was reached in the court in the case of *Roach v Electoral Commissioner*. Ms Roach was an Aboriginal Australian who had been convicted and imprisoned for a crime of fraud. When she was in prison she decided to do two unusual things. First, she decided to do university studies, and studies for a doctorate. Second, she decided that she didn't like legislation that was enacted by the federal parliament in 2006, depriving her of the right to vote in federal elections, and she therefore began to look around for someone who would help her to challenge that legislation in the High Court of Australia, asserting that it was constitutionally invalid. The legislation changed the long standing law, which had deprived people from voting in federal elections if they were in prison. That legislation had deprived people who were imprisoned and who were serving more than a three years in prison. The new legislation, in 2006, was enacted through the parliament when the then government gained control of the senate, and it went through, depriving all prisoners.

Evidence was placed before the High Court that very large numbers of people are in prison for very short periods of time. Often they're there because they can't afford to pay their fines, and therefore, on the face of things, a disqualification from the important right of the franchise for all prisoners would seem to have been a disproportionate response by the parliament to their antisocial conduct. But the question was whether or not that was a matter that was left by the Constitution to the federal parliament to decide, one way or the other. Ms Roach, pointing to the fact that a considerable portion, certainly disproportionate to their numbers in the population in prison were indigenous Australians, said that the legislation was disproportionate and that steps should be taken by the Court to uphold the right of electors to vote as central to their rights, and in Australia their duties, to take part in the political process for which the Constitution provided. Ms Roach also pointed to various other inconsistencies between taking away the rights to vote of other groups of all Australians, and she argued that although our Constitution didn't contain a bill of rights or a specific statement about rights, it did contain very detailed provisions about the elections to the federal parliament, and that those provisions were written on an assumption that prisoners would take part in the vote, at least prisoners who were not in prison for a lengthy period, and that parliament couldn't take away the right to vote of all prisoners.

In the end, the High Court upheld Ms Roach's argument, and I want to pay a tribute to the lawyers who acted on her behalf *pro bono*. When I was a young lawyer I did a lot of work *pro bono*. It tends to be interesting and exciting. It's generally much more interesting than the high paying work that lawyers perform, much of which is really glorified debt recovery. But the lawyers who acted in the case included Mr Ron Merkel, QC who had been a judge in Victoria and who had been a great friend of Ron Castan, QC and a great friend to Aboriginal causes, and also, Allens Arthur Robinson Solicitors, a very famous and old legal firm who acted *pro bono*.

That case also relied on the introduction into Australian law of principles derived from international law. In his decision in favour of Ms Roach, Chief Justice Gleeson referred to decisions of the European Court of Human Rights in a case called *Hirst v The United*

Kingdom, and a decision of the Canadian Supreme Court in a case called *Sauvé v The Queen*, where in both cases, British legislation and Canadian legislation, the removal of all prisoners from the vote was struck down, and so it was in the case of Australia. The legislation of 2006 was held to be unconstitutional, as incompatible with the design and implications of the Constitution as to the right to vote, and therefore most or many of the prisoners in Australia, certainly all of those who were in prison for offences and punishment of less than three years, were given the vote in the federal election of 2007. And that is the law of this country as it stands.

Two Justices dissented, Justices Hayne and Hayden. Both of them not only dissented in the result, but strongly dissented to any reference by the majority to principles of international human rights, which they declared were completely irrelevant to the consideration of the meaning of the Australian Constitution. The slow but certain, inevitable and predictable impact of international law, and in particular, international human rights law on the understanding of our legal rights in Australia, and in particular of our Constitution, will come, come ever come. It is inevitable, and the case of *Roach* is merely one further step in what I consider to be the right direction.

I now reach the third part of this lecture. It is a part in which I would suggest will demonstrate the wisdom of Bill Wentworth in his feeling that if our parliament in Australia were to be given a power to make racial laws, it should be limited to racial laws for the advancement of the race concerned or at least not to discriminate against the race concerned. That approach to racial laws would seem to be borne out by the terrible wrongs that were done in Germany under the Nuremberg Laws by the Nazi regime, and done in South Africa after the advent of the government of Dr Verwoerd and the National Party in South Africa during the Apartheid years, laws which were enacted to discriminate against black people on the basis of their race and to reduce their dignity and to diminish their legal rights.

The case of *Wurridjal v The Commonwealth*¹⁵ arose in the High Court of Australia on a technical issue. It arose under a process called demurrer. Demurrer is a process that the English law devised for the purpose of allowing a party, who is sued in a court, to respond to the suit by saying, "Even if everything you say in your Statement of Claim is accepted factually, you have no legal foundation for the case, and therefore, I should not be troubled and harassed by your case, and it should be stopped". You'll see therefore, that it's quite a sensible procedure. It's designed to stop people being troubled by expensive, time consuming and sometimes stressful litigation if the other party doesn't have a leg to stand on. And so a demurrer was brought when Mr Wurridjal and his colleagues sought a declaration from the High Court of Australia that the Northern Territory intervention legislation was constitutionally invalid.

The challenge to the Northern Territory legislation was actually brought before the High Court in 2008, and it was therefore defended in the High Court by the Solicitor General acting on the instructions of the present federal government. The Court, in the usual way of the development of argument in these things, was taken most carefully through the language of the legislation, and through the parliamentary record, and to certain

documents which preceded the enactment of the legislation. Those documents included the report of the special committee in the Northern Territory of Australia concerning the protection of precious children, which had been written by a committee headed by Mr Cox, QC, and which had suggested that steps needed to be taken to protect children in Aboriginal communities in the Northern Territory from instances of child abuse and a lack of support and nutrition.

The report which Mr Cox and his colleagues produced insisted, repeatedly, on the crucial importance of consulting the Aboriginal community before any steps were taken, and insisted that such consultation was an absolute prerequisite to the proper introduction of remedial laws and policies. The speed with which the legislation was introduced, some eight weeks before the 2007 federal election, would be enough to make one concerned about the legislation and about its purposes. Speed could of course reveal a somewhat belated interest of the then government and parliament to respond to the report of the Northern Territory, even though since self government it would have been normal, at least in the first instance, for the matter to be considered by the government of the Northern Territory, and the responsibility taken for consultation and steps to respond to the Northern Territory report in that territory of the Commonwealth.

The speed has been described by the President of the Law Council of Australia as “outrageous and unsettling”, and it was a speed to which I referred in my reasons and in particular to the fact that so hasty was the legislation, that it was drawn up in a matter of days of its announcement. It encompassed about 300 pages of printed text, and although a perfunctory enquiry was conducted in the senate, it was simply impossible, under the impetus of the haste that was demanded by the then government, and in particular by the Prime Minister and the then Minister for Aboriginal Affairs Mr Brough, that it was pretty plain that no real attention would or could be paid to criticisms of the legislation..

The legal point that was ultimately contested in the High Court, as I saw it, was whether there was an argument on the part of Mr Wurridjal and his colleagues concerning their contention that the imposition of five year compulsory leases upon Aboriginal communities in the Northern Territory failed to accord with the obligations of the Australian Constitution, which unusually contain a human rights provision. That human rights provision says that if there is, putting it generally, to be a federal acquisition of property, it can only happen in this country on just terms. That provision doesn't apply to state legislation, and an earlier decision of the High Court in a case called *Teori Tau* had held that it didn't apply to Territory acquisitions, and therefore the first contention of the Commonwealth, in support of its demurrer, was that the demurrer should be upheld because the constitutional requirement of 'just terms' did not apply to the acquisition of Mr Wurridjal's land and the land of others in the Northern Territory and their property, because they were in the Territory and therefore they weren't covered by the general provision which only covered specifically federal legislation, operating elsewhere than in the Territory.

If *Teori Tau*, the decision of the Barwick Court, stood, then that would have been a good demurrer point, and it would have knocked out the case, and it would have been revealed,

at least so far as to claim based on the failure to accord just terms was concerned, it would have been fatal to the case. However, in a number of earlier decisions doubt had been cast in the High Court about the correctness of the *Teori Tau* decision. In a case called *Newcrest*, decided in 1996, the year of my arrival in the High Court, the High Court had said that the principle in *Teori Tau* was now a dubious principle, and four of the Judges of the Court had cast doubt on it, but it hadn't been formally overruled.

So that was that the preliminary question that had first to be decided. On that question, a majority of the High Court, Chief Justice French, Justice Gummow, Justice Hayne and I, held that *Teori Tau* was wrongly decided, and that therefore, the 'just terms' requirement did apply to federal legislation applicable in the Territory, just as much as to federal legislation applying anywhere else in Australia. So that ruling knocked away the first and primary and, one might think, chief, argument of the Commonwealth that the legislation for the Northern Territory intervention didn't have to give just terms and therefore that the claim of complaint about the failure to give just terms was not legally correct.

That drove the parties to the second line of argument. And the second line of argument was that there is a distinction in the Australian Constitution in the requirement for 'just terms'. Pretty clearly that provision was borrowed from the provisions of the Fifth Amendment to the United States Constitution. The Fifth Amendment is part of the Bill of Rights of the United States, and it contains a specific statement in the United States that if your property is taken by the federal government or under the federal legislation, the government must give 'just compensation'. The distinction between the American requirement to give 'just compensation' and the Australian requirement to give 'just terms' was a distinction drawn to notice by that great judge of the High Court of Australia, Justice Dixon, in a case called *Nelungaloo* some 40 years ago. He said that, if it had been intended to require only that the federal parliament provide for just compensation, it would have been so easy just to copy the American provision. But instead, a nuance was put on it with a requirement that a person whose property is taken has to be given just terms. And so a question in *Wurridjal* was what was the requirement of just terms in the type of legislation that was under consideration there for the Northern Territory intervention? And specifically the submission was put that 'just terms' required fairness in dealings, and that therefore required not just that the Commonwealth provided money, as would be required by just compensation, but that the Commonwealth would, in a way appropriate to the case, engage in proper consultation and prior discussion in order to ensure the provision of just terms.

The Commonwealth contested this argument, and said 'just terms' and 'just compensation' meant roughly the same thing and in any case, that just terms were provided. Certainly money compensation was provided. But in my opinion, it was at least legally arguable that the Aboriginal interests could maintain a contention that they had not been given just terms, because they hadn't been consulted at all..

In the course of my reasons I said this. "If any other Australians selected by reference to their race suffered the imposition on their pre-existing property interests of non-consensual five year statutory leases, designed to authorise intensive intrusions into their

lives and legal interests, it is difficult to believe that a challenge to such a law would fail as legally unarguable on the ground that no property had been acquired or that just terms had been afforded, although those affected were not consulted about the process and although rights cherished by them might be adversely affected. The Aboriginal parties are entitled to have their trial and day in Court. We should not slam the doors of the Court in their face. This is a case in which a transparent, public trial of the proceedings has its own justification”. I then supported the order that the demurrer should be overruled. The majority rejected that contention. They gave effect to the demurrer and struck out Mr Wurridjal’s claim.

In the course of his reasons, Chief Justice French, who had only been at the Court for a matter of weeks when the *Wurridjal* case was decided, wrote this in his opinion, “The conclusion at which I have arrived does not depend on any opinion about the merits of the policy behind the challenged legislation, nor contrary to the gratuitous suggestion in the judgement of Justice Kirby is the outcome of this case based on an approach less favourable to the Plaintiffs because of their Aboriginality.” I responded to this in my opinion, “The issue for decision is not whether the approach of the majority is made on a basis less favourable because of Aboriginality”, with a footnote to Justice French’s reasons, “It is concerned with the objective fact that the majority rejects the claimant’s challenge to the constitutional validity of the federal legislation that is incontestably less favourable to them on the basis of their race and does so in a ruling on a demurrer. Far from being gratuitous, this reasoning is essential and, in truth, self evident. The demurrer should be overruled.”

Earlier in my reasons I said this. “History, and not only ancient history, teaches that there are many dangers in enacting special laws that target people of a particular race and disadvantage their rights to liberty, property and other entitlements by reference to that criterion. The history of Australian law, including earlier decisions of this Court, stands as a warning about how such matters should be decided. Even great Judges of the past were not immune from error in such cases. Wrongs to people of a particular race have also accord in other Courts and legal systems. In his dissenting opinion in *Falbo v United States*, Justice Murphy of the Supreme Court of the United States observed in famous words ‘That the law knows no finer hour than when it protects individuals from selective discrimination and persecution’. This Court should be specially hesitant before declining effective access to the Courts to those who enlist assistance in the face of legislation that involves an alleged deprivation of their legal rights on the basis of race. All such cases are deserving of the most transparent and painstaking of legal scrutiny”.

The reference in my reasons to “history, and not only ancient history, teaches” was a reference to the words of Justice Dixon in the *Communist Party* case, a case in 1951, certainly one of the greatest decisions of the High Court of Australia, which struck down as unconstitutional the legislation of the Menzies Government which purported to dissolve the Communist Party of Australia and to impose on Australian communists various disadvantages in their civil liberties and so on.

Now, recently I was sent a book. The book is titled *This is What We Said*, and it's a book in which Aboriginal people and others give their views on the Northern Territory intervention. It's as well, at this time, when the legislation is before the Australian Parliament, for us to reflect upon some of the words that are expressed in that book. Our Chair here today, Professor Mick Dodson, Australian of the Year for 2009, said "The intervention is a bully boy approach handed with no respect to the Aboriginal people". And in other statements, Mr Malcolm Fraser, former Prime Minister and Liberal leader said "The intervention was based on old fashioned paternalism, an arbitrary process that of course implied no respect for the people that one was trying to help, no partnership and that someone in Canberra knows best".

Professor Larissa Behrendt, a most notable scholar and leader in the indigenous community, but also in the law, said "The profound flaw of the intervention package is that the whole approach is predicated on dealing with the symptoms, rather than the causes of dysfunctional Aboriginal community".

Mr Rex Wild, I think I called him Mr Cox, it's Mr Rex Wild who was the Chair of the committee, Mr Rex Wild said "Why is it that after all of the reports, it's now necessary to move in a patronising, paternalistic way which is the very same thing that has caused all the difficulties in the last 200 years?".

And Sir William Deane, a past Governor General said "Indeed, in seeking to advance true indigenous reconciliation or to address the awful disadvantage which still afflicts our country, adequate and informed dialogue with full indigenous participation is not only desirable at every stage, it is absolutely essential and let me digress to express the hope that that unfortunate word 'intervention' will disappear from our language, at least as far as government policies affecting indigenous Australians are concerned".

Following the change of government, a Special Rapporteur of the United Nations, Professor James Anaya, who is the Special Rapporteur on the situation of Human Rights and Fundamental Freedoms of Indigenous People, came to Australia, and with the assistance of the Australian government, conducted his enquiries and a detailed examination. His report, which was produced in February of this year, contained what can only be described as an extremely critical review of the enactment of the legislation, of the haste and lack of consultation that attended its enactment, and of the serious discrimination that was involved in the provisions of the legislation, and of the fact that in order to justify such serious discrimination it was essential to do so to a very high standard, and to establish that it was proportional and necessary to attain a valid objective.

Professor Anaya accepted that it was part of the obligations of the Australian government, and indeed governments everywhere, to protect people and in particular women and children, from cases of abuse, and that that was actually part of the obligation of the Australian government to ensure the upholding of the human rights of those Australians who were affected. However, Professor Anaya, in his opinion, responding to the responses of the Australian government, said whilst reiterating the need to purge the

legislation of its racially discriminating character, the government of Australia was obliged by international law to conform to the relevant international standards and to do so “through a process genuinely driven by the voices of the affected indigenous people”.

I think it should be said that it is a source of pain for many Australians that, despite reports of this kind, and despite views that have been expressed in Australia by many distinguished observers since the Northern Territory intervention legislation, that the steps that have been taken have not completely dealt with the paternalistic and discriminating legislation that was enacted by the Parliament in its previous manifestation, and one would hope that the prudent, cautious and balanced words of the United Nations Special Rapporteur will be given very close attention. Closer attention than it has perhaps to date, in the final enactment of the laws that remove the discriminating provisions that exist in the legislation, and that don't seem to be in the amendments that are being proposed. This is a matter where our national honour and reputation are at stake. But more fundamentally, it's a matter where the human rights of our citizens are at stake and the human rights of citizens. If you read this book, *This is What We Said*, you will see the sense of disquiet which the Special Rapporteur says is “growing in its intensity”.

Of the members of the communities that are affected, the sense that they have been dishonoured by being treated in a way that is second class. That they have been dishonoured by having signs placed outside their communities with strong statements about offences, the imposition of fines and other offences for bringing alcohol and pornography into the place. And they have been treated in a way which, if it were ever done to Australians of Irish ancestry or Australians of Greek ancestry or Australians even today of Chinese ancestry, it would be a national outrage. And I commend to those who have not seen it, the words that were not asked for before the legislation was enacted, and that have still not been sufficiently heard since the legislation was enacted, *This is What We Said*, Australian Aboriginal people give their views on the Northern Territory intervention, because these are words that we should hear and that our parliament should hear, and that our leaders should hear. That these are the words that speak to us, the citizens of Australia. And it's in my opinion essential that our community should hear those words, reflect on them, attend to them and act on them.

I'm pretty sure that, if Bill Wentworth were here at this lecture today, although it was in his nature always to try to find faults, and to find inadequacies, and to find defects many of which he would be able to find in these few remarks of mine today, that he would nonetheless agree with the central message of what I have had to say. People should read the *Wurridjal* case. Not enough people bother. Not enough people know about the case. Not enough people know about the working of the Court. What do they talk of in the media about the High Court of Australia? It's generally matters of infotainment and personality. It's not matters of substance. Well, I've come along here today not to unnecessarily recontest the matters that were decided in the *Wurridjal* case, because it's all there in writing and on the internet, and nothing I can do can add to those words. They are there. But attend to them. Read them. Listen to them. Listen to the debate which was expressed in the High Court on matters of high principle.

And I hope if those words are listened to and if the words of the Aboriginal people of the Northern Territory are attended to, then our parliament will take action, and without more delay.

Russell Taylor

Ladies and gentlemen, I suspect that most of us would disagree with Michael Kirby on one point, and that point being that even the insightful scrutiny of Bill Wentworth would probably fail to find fault with that address. And to sort of conclude, and we are going to make a very modest presentation to Michael Kirby, can I just say I spoke, as did my Chair, about the pride and pleasure that our Council had in having Michael Kirby accept the invitation to be the Wentworth lecturer for 2010. And I think that you would also agree with me that in both the content, the delivery and the spirit of delivery our pride and pleasure is well and truly justified. So thank you very much Michael. Could I ask our Chair to assist in making a very modest presentation from AIATSIS, as I say a token of appreciation to Michael Kirby for the 2010 Wentworth Lecture.

And as a final again modest token of appreciation to Georgina Sandrock for coming along and once again supporting the Wentworth Lecture. Thank you very much. And finally can I say a final thank you to Michael Kirby and ask you to express that appreciation by acclamation. Thank you very much.