

## **INTRODUCTION: HEARING THE STATEMENT FROM THE HEART**

I first became involved in the politics of race over fifty years ago. It was in 1967, at the time of the referendum to amend the Constitution. Two small changes were being proposed. One made it possible for the first time to count Indigenous Australians in the national census. The other gave the federal government power to become engaged in Aboriginal affairs, hitherto a state government preserve. But for the electorate at large it represented a chance to welcome Indigenous Australians into the political community. And perhaps, even more significantly, it permitted the federal government to take the leading role in both developing and funding new Indigenous policies. It was one of the milestones on the long road that slowly wound its way away from white Australia's colonial and racist past. There have been other milestones on the journey. There was the bark petition sent by the Yirrkala people of Arnhem Land's Gove Peninsula in 1963 attempting to overturn the decision to excise land from the Aboriginal Reserve to facilitate bauxite mining. In 1988, then prime minister Bob Hawke signed the Barunga Statement foreshadowing negotiations to precede the signing of a treaty. His successor, Paul Keating, delivered his Redfern Speech in December 1992

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calling for recognition that indeed white Australia had a black history, declaring ‘that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the diseases. The alcohol. We committed the murders. We took the children from their mothers.’<sup>1</sup> In 2008 the newly elected prime minister Kevin Rudd delivered a formal apology to the Stolen Generations.

In May 2017 the nation was presented with what has come to be known as the Statement from the Heart, drawn up after a meeting at Uluru of 250 delegates ‘coming from all points of the southern sky’. The statement was the culmination of a process that followed the appointment of a sixteen-member Referendum Council in December 2015. Council members gathered evidence from over a thousand participants meeting at twelve locations around the country. There was not universal Indigenous support for the statement, but it was undoubtedly the most widely canvassed document that has ever been addressed to the wider community by representatives of the First Nations. It was also a masterpiece of forensic advocacy – succinct, with scarcely a wasted word, utilitarian where necessary, elegant, even poetic in places. It is a document that will endure. But its lasting political impact is yet to be determined.

The proposal that attracted most discussion was the call for the establishment of an institution to provide for a permanent Indigenous ‘voice to parliament’. It was dismissed with peremptory expedition by then prime minister Malcolm Turnbull, who declared that it would become an unacceptable third chamber of parliament. Other suggestions in the document have so far escaped critical attention, but their long-term

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significance is likely to be considerable, presenting a feisty challenge to both Australian jurisprudence and the nation's perception of its history.

The delegates at Uluru called for the establishment of a Makarrata Commission to supervise a process of both agreement-making and truth-telling in our history. Makarrata is a Yolngu word describing a process of conflict resolution, peacemaking and justice. It would represent the first official and adequately funded body to examine the fraught history of relations between the First Nations and the European invaders. It would have to tackle questions that have been deeply controversial and much contested during the last two generations, ones that have been central to the culture wars still being fought out in parliaments, the media and the nation's school rooms. On the other hand, it would bring Australia into line with the many countries that, while dealing with troubled histories, have over the last thirty years or so established truth commissions. The South African Truth and Reconciliation Commission is probably the best known of these, but they were also established in South and Central America and in Eastern Europe. They provided venues for victims to be heard, and for atrocities to be documented in such a way that they will never be forgotten.

So while the Statement from the Heart urges Australia to come to terms with a radical new version of the nation's history, it throws up an even more challenging interpretation of the law and in particular our understanding of the imposing question of sovereignty. A passage of great eloquence declares that the Aboriginal and Torres Strait Islander peoples were

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the first sovereign nations of the Australian continent and possessed it under their own laws and customs:

It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

... we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.<sup>2</sup>

We have here a series of assertions that have the rhetorical power of compacted common sense. But common sense is not the same thing as the common law. The idea that First Nations' sovereignty survived the invasion collides with the fundamental premises on which law in Australia was based from the first hours of colonisation. For good or ill, they remain undisturbed, buried deep in the legal foundations of the state.

The Statement, then, contains a challenge to legal doctrine more unsettling than the jurisprudential revolution ushered in by the High Court's *Mabo* judgment in 1992 and the *Wik* judgment four years later. Our first task in this book then is to re-examine the traditional doctrine of sovereignty, from the appearance of James Cook on the east coast of Australia in 1770 and the arrival of the First Fleet in Sydney Harbour eighteen years later, and bring it forward until 1992, when despite themselves the High Court judges in the *Mabo* case changed property law forever and intimated that the traditional doctrine relating to sovereignty might eventually have

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to change as well. Is it possible that the sovereignty of the First Nations has survived? Was it ever extinguished? Can it coexist with the sovereignty of the Crown? And what of truth-telling? Is there an appetite for it in contemporary Australia? Or is the need for comforting national stories too compelling? Are home truths just too difficult to accept?

These questions have interested me ever since I arrived in Townsville from Tasmania in 1965 to begin a teaching career at the new university college, which became James Cook University in 1970. I was asked to teach Australian history, which I knew very little about. I knew even less of the fraught relations between white Australians and the Aboriginal and Torres Strait Islander peoples. And it was a time of rapid change. Torres Strait Islanders had only been allowed to live on the Australian mainland for a few years, after having worked on rebuilding the Townsville–Mount Isa railway line. By 1966, many young men had brought wives and family members to live in Townsville and Cairns. At the same time there was what can only be called a reurbanisation of Aboriginal communities. Families were being allowed for the first time to leave hitherto closed reserves and missions. Others were being encouraged to walk away from pastoral stations in the vast hinterland as demands for equal pay grew louder.

The 1967 referendum marked the beginning of a new era in community relations. In Townsville the tensions accompanying rapid and radical social change were apparent every day and were, as a result, inescapable. And much of what one could see and hear was shocking. Old white Australia was resisting loudly and often violently. It was all totally new to me and in

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many ways unexpected. I was seeing aspects of Australia that I had known nothing about.

The students in my small classes knew that race was a question of pressing importance. Many of them had come from small towns, from pastoral stations or from Aboriginal missions where their parents taught. So how was I to bring these themes into my teaching? It was still in the era of what the anthropologist Bill Stanner called, in his 1968 Boyer Lectures, 'the great Australian silence'.<sup>3</sup> The textbook set for my course scarcely mentioned Aboriginal people. They did not even have an entry in the index. There were very few relevant books in the small university library. So I began, tentatively at first, to research Queensland history and then widen out my exploration to embrace the whole country. And at the same time I started some rudimentary exploration of oral history among the Aboriginal and Torres Strait Islander community, working with my friends Eddie Mabo and Noel Loos. For the first time I had the chance to see, vicariously, Australian history from the other side of the frontier. And having done so I could never again see our national story as one of triumphant progress and peaceful pioneering. It was not heroic, I came to realise, but tragic. I began to write a different sort of history, which was controversial and, for many people, deeply challenging. I became a leading practitioner of what was to be given the pejorative title 'black-armband' history.

My original focus was on the history of the shifting frontier where resident bands confronted the intruding white men. The accompanying violence was ubiquitous and therefore inescapable. But other themes emerged. The land rights

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crusade thrust legal questions to the front of both the political and the historical stages. It was a subject I knew little about, an ignorance remedied by many weeks of intense study in the practitioners' Library in the High Court in Canberra. And examination of land law led on to the related question of sovereignty. It became progressively clear that to bring the First Nations back into Australian history meant to challenge the hitherto imposing edifice of both the nation and the state. They could not be housed in a lean-to at the back of the building. The whole floor plan had to be redesigned.

Research, politics and law came together in a series of fateful meetings with Eddie Mabo and Noel Loos in my office in James Cook University. We told Eddie that his ancestors' land had been expropriated a hundred years before when, in 1879, the Queensland colonial government had annexed the Murray Islands. He was astonished, horrified and outraged. There was the extraordinary injustice to begin with, but also the grotesque imperial overreach permitted and sanctioned by the law. So, as far as Eddie was concerned, Queensland's claim of sovereignty was as dubious as the expropriation of his land. Had he lived he would have pursued that question with equal vigour and would likely have been one of the signatories of the Uluru Statement from the Heart.

I learnt so much from conversations with First Nations' friends and acquaintances all over Australia, but particularly in and around Townsville. But of equal importance have been the innumerable discussions I have had over many years in many parts of Australia with students, audiences in halls and churches, and attendees of conferences and literary festivals.

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I have had many conversations with perfect strangers and have listened in to relevant discussions in which others were engaged. People were frequently supportive of my project, but not always so. I have been accused of disloyalty, of irresponsible troublemaking and of hating my country. During the Cold War, I was often denounced as a communist. More commonly I was called a ratbag. I quickly came to realise how difficult these questions were, particularly for older Australians who had grown up when a much more benign version of Australian history was taught in schools and was woven through our cultural life. Despite what many people thought, I was aware that 'black-armband' history was deeply disturbing, and I understood those many people who took the view that a troubled history was best forgotten, that it was preferable to look to the future and not to dwell on the past. But it was always hard to equate those sentiments with that most revered phrase in Australian history, 'Lest We Forget'.

Australians are sensitive about their past and most people have strong views about First Nations people. It is a subject about which almost everyone is willing to express an opinion, no matter how poorly informed. Certainly, the last twenty or so years have seen a remarkable growth of historical awareness and a far more realistic understanding of the whole process of colonisation. There is now a better chance than at any time in the recent past to initiate a process of truth-telling. But not everyone will be happy with the process, and opposition may make it hard to establish bipartisan support for the Makarrata as proposed by those many delegates at Uluru who had come 'from all points of the southern sky'.



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My own individual contribution to our national truth-telling will begin with the arrival of the British when, in 1770, James Cook's *Endeavour* sailed along the east coast and then in January 1788, when the First Fleet arrived at Botany Bay before moving a few days later to the more promising site on Sydney Harbour.