

**Speech by Mark Leibler AC, Co-Chair Reconciliation Australia  
at the HRLRC Seminar**

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Blake Dawson Waldron  
Level 39, 101 Collins Street, Melbourne

**Achieving Social Justice for Indigenous Australians**

Before I begin, I want to acknowledge the traditional owners of the land on which we are meeting today, the peoples, particularly the elders, of the Kulin Nation. I acknowledge the vibrancy and importance of their ancient and continuing culture. And I acknowledge their contribution to Melbourne's unique identity.

Thank you Phil for inviting me to take part in this seminar.

I want to talk this evening about the opportunities I see open to us at this time to make real progress in advancing social justice for our first peoples, and how we might take advantage of those opportunities.

It's also my wish that you leave here with a greater sense of our special responsibility, as lawyers and community leaders, to facilitate positive change, and to explain and protect human rights in this country.

Social justice is, of course, an absolute pre-requisite for reconciliation. As we make progress in one, by definition we will be making progress in the other. Reconciliation without social justice just doesn't make sense and anyone who pretends otherwise, underestimates the significance of the task and the vision of what's possible.

Just last week, Reconciliation Australia and our partners at BHP Billiton hosted a gathering here in Melbourne called *Reconciliation: taking the next step*. The two main speakers were the Prime Minister, John Howard, and my fellow director at Reconciliation Australia Professor Mick Dodson.

The appearance of these two leaders on the same stage was in itself an important indication of current opportunities in reconciliation. Some essential compatibility in their messages about the way forward should leave us in no doubt that in the lead-up to next year's 40<sup>th</sup> anniversary of the 1967 referendum, the stars are in alignment if we're ready as a nation to follow them.

Mick hasn't shared a platform with the Prime Minister since Corroboree 2000 when he delivered a speech that focussed on a gaping hole in the relationship between the Australian Government and those of us who believe in reconciliation based on respect and equality of opportunity between Indigenous and non-Indigenous Australians.

Compare Mick's words from last week, when he said that success had become his guiding light.

That the Government's policy position had the potential to take us closer than ever before to a respectful relationship.

That he believed John Howard was the best placed Prime Minister since Federation to do what's necessary in Indigenous affairs.

The Prime Minister took these words seriously and his response to Mick reinforced a message he has consistently delivered in the last 12 months that he intends to work hard in this area with a greater understanding now of what's necessary in getting us there.

I'm not trying to suggest that we're about to toast the achievement of reconciliation.

The current environment also carries great uncertainty and risk.

There is still much on which the Prime Minister and Mick disagree but as Mick pointed out last week, the issues around which there remains disagreement need not prevent us from making progress in areas on which, increasingly, we are able to agree.

And these important aspects of agreement have a lot to do with the issues we're here to talk about this evening – social justice, self determination and treaty-making.

On the latter, as Mick pointed out in his paper for the AIATSIS treaty series, we must move beyond arguments about whether it is to be called a treaty or some other term, and towards the substance on the ground, where the real work of reconciliation is to be done.

Another Reconciliation Australia co-director, Fred Chaney, recently reminded me that the Queen has described Australians as “a moderate and pragmatic people, more interested in practice than in theory”.

I share this view.

I envisage an Australian future in which there exists a national record of a voluntary understanding arrived at between representative Indigenous and non-Indigenous parties, seeking to confirm the terms of their relationships with one another, based on more localised agreements already reached.

A symbolic substantive agreement or accord could perhaps be the final step after national standards have been agreed upon to guide development of local solutions to local problems, creating in turn more equitable relationships and greater empowerment for Indigenous communities.

That’s my view. Others, of course, are entitled to theirs. Whatever divided views there are on treaties, there is virtually universal support for agreement making, including support from all governments.

Mining companies are leading the way on the ground. Furthermore the Commonwealth amendments to the *Native Title Act* in 1998 introduced Indigenous Land Use Agreements as a new approach to dealing respectfully with native title issues. Since then, the Commonwealth, in its pursuit of Regional Agreements and Shared Responsibility Agreements, has confirmed this approach.

Government policy explicitly acknowledges that the only way to overcome disadvantage is to support Indigenous people in identifying local problems and shaping their solutions. This is a very different kind of engagement from what we’ve seen in the past and it takes us much closer to realising the respectful relationship at the heart of reconciliation, at the heart of self determination and any meaningful agreement between us as Australians.

Australia has been on a slow learning curve when it comes to acknowledging that government or business or anyone else trying to develop health, education, justice and other policies without the close, constant and respected involvement of Indigenous communities are on a road to nowhere.

It is this well-overdue insight about putting control into the hands of Indigenous people that provides a foundation of common ground between the main stakeholders.

But if the insight is to lead to improved outcomes and progress towards reconciliation, it must be backed with very different structures and practices from what we’re used to.

The bottom line is this:

1. it must be understood that real progress won’t be made unless and until Aboriginal and Torres Strait Islander communities are given real power to make decisions for themselves. Call it self determination, call it whatever you like but it’s been demonstrated around the world to be the essential ingredient in improving health and other outcomes for Indigenous peoples;
2. Indigenous communities must be supported, encouraged and trusted to take the responsibility government and others reasonably expect of them; and
3. government agencies and the corporate sector in particular must also build **their** capacity to work with Indigenous communities in a way that has not so far been evident except in small pockets.

A good example of what can be achieved at local levels on the basis of Indigenous informed consent is the Yorta Yorta cooperative management agreement, which the Yorta Yorta peoples reached with the Victorian Government in 2004. Since 1993 and continuing, my firm, Arnold Bloch Leibler, has had the honour of representing the Yorta Yorta peoples on a public interest law basis during their monumental struggle for land justice.

In that time, after 10 years of hard fought, bitterly contested litigation, the Yorta Yorta were told by the highest Court in the land that they weren't the peoples they considered themselves to be; that in effect they were living under a cultural concoction.

Liberated from the shackles of this unjust litigation at the end 2002, the Yorta Yorta worked long and hard over the following 2 years to convince their former adversary, the Victorian Government, to finally treat them as a unique people with inherent human rights, rather than as a problem.

And they succeeded, with the Victorian Government acknowledging by the cooperative management agreement that the Yorta Yorta have a right to care for Yorta Yorta country, as its traditional owners.

Despite this, teething problems have since arisen from a bureaucracy slowly coming to terms with the contractual obligation of honouring an agreement that shifts power to a people who were formerly viewed across the trenches of litigation. Even so, by the agreement an important first step towards true reconciliation has been taken.

Similar issues apply to the Commonwealth Government's shared responsibility framework. Reconciliation Australia has made it plain that to date the implementation of it is not meeting the stated policy intent.

We are seeing serious problems in the bureaucracy's capacity to deliver on this very different approach.

And when government Ministers suggest, as they have in recent weeks, that self determination has failed, it clearly doesn't generate confidence that the shared responsibility agenda has anything to do with a necessary transfer in decision making power.

An approach that has never been tested cannot be deemed a failure.

What we've had in Australia, at best, is a kind of self-administration, where Aboriginal communities have been responsible for delivering basic services, like garbage collection.

And these responsibilities currently in the hands of Indigenous communities were not self determined, but imposed, by organisations including the Aboriginal and Torres Strait Islander Commission (ATSIC), which was not an Indigenous creation.

Associated with the myth about self-determination having been a failure is another one that says Indigenous people are without capacity. Both self-determination and the exercise of agreement making which is embodied in the idea of a treaty must recognise and build on significant examples of success across Indigenous Australia.

Reconciliation Australia runs a program in partnership with BHP Billiton that identifies, analyses and celebrates high achieving Indigenous organisations. And what we've uncovered in the first two years of the Indigenous Governance Awards has changed everything we say and do around reconciliation.

As Mick said to the Prime Minister last week, these stories are very important because they provide a completely different picture of Indigenous people to what we normally hear or see reflected in mainstream Australia.

We know now that one of Reconciliation Australia's main tasks is to promote good news stories to Indigenous and non-Indigenous Australians who wish to see them replicated across the country.

The other side of the equation is this: We must be prepared to acknowledge the current lack of capacity within the bureaucracy and the private sector to support Indigenous driven solutions and agreement-making. These relationships are essential if any shared responsibility agenda is to garner results.

And we must understand that these relationships depend on mutual respect, which is still sadly lacking in too much of the commentary about Indigenous Australia.

How can Indigenous Australians be expected to assume responsibility when their culture is described by people who should know better as "preliterate and prenumerate" and unworthy of being taught in schools ?

Or when Indigenous culture is defamed by people who would have us believe that it condones paedophilia.

Or when among all the mitigating circumstances taken into account in the sentencing of criminals, our courts are told that they should not take cultural factors into account.

Criminal law in this country has always allowed for mitigating circumstances, which take into account a person's background. Cases of inadequate sentencing hit the headlines from time to time and where appropriate, a sentence is reviewed and increased – as it was in the recent case involving the rape of a young girl.

No level of mitigating circumstances, cultural or otherwise, can justify a one-month sentence for such a crime. And this is what our justice system determined.

Cultural factors must be considered just like a whole range of other factors, which are taken into account in the sentencing of any Australian. The issue here is not whether these factors should be applied, but that they must be applied appropriately. And they must be properly understood, to avoid further denigration of Indigenous peoples.

As lawyers, we must never accept these kinds of attacks on the human rights of our fellow citizens.

We need to accept our own personal and professional responsibility in supporting self-determination and agreement-making in all the myriad of forms these ingredients of reconciliation are starting to take across our community.

The current possibilities will not be realised if we leave it all to government.

Nor will very real risks be averted.

I've said before that my own personal sense of responsibility is accentuated by being Jewish and easily able to empathise with a persecuted minority, blamed for their own suffering.

What I understand of the aspirations of Indigenous Australians is that, apart from securing their just recognition as the First Peoples of this country, what they seek is to be full participants in Australian society while maintaining their cultural traditions and status.

I feel that this is what the Jewish community has been able to accomplish in this country, and it should be seen by all Australians as an absolutely reasonable and absolutely achievable objective for our First Peoples.

My firm's public interest law practice is an example of how an organisation of professional service providers can take a principled, structured, 'whole of firm' approach to working with Indigenous communities for the benefit of both parties.

At Arnold Bloch Leibler we take what we are best at in our private commercial practice and mirror it in our long-term pro bono collaborations with Indigenous communities.

We do not patronise. There is no place for paternalism. And we recognise the mixed motives for doing the work – not only is it the right thing to do, it is good for staff morale, sharpens skills, leads to other work and helps attract the brightest and best talent to the firm.

In short, we recognise that these relationships, like the one we are privileged to share with the Yorta Yorta warriors, are very good for business and central to the firm's identity, not just a 'feel good' adjunct to it.

The Yorta Yorta, Ord Stage 2 and Argyle Diamonds agreements all confirm that lawyers have a very important role in warning of the perils of the litigation threshing machine, as well as ensuring that negotiations occur on even terms, and that outcomes are reached by informed consent.

It's part of our responsibility to ensure that Shared Responsibility Agreements meet those exacting legal standards.

As we approach the 40<sup>th</sup> anniversary of the most successful referendum since Federation in which more than 90 per cent of eligible voters said "Yes" that Indigenous people should be counted as Australian citizens, it's an opportune time for all of us to do more to make the referendum result really mean something.

Equality of bargaining power is key, as is proper respect for and accommodation of Indigenous perspectives.

If Indigenous and non-Indigenous Australians working side by side in the referendum campaign could achieve such a resounding result, imagine what we can do 40 years later with all that we have learned from our own experience and from evidence around the world.

This is why Reconciliation Australia has developed a National Program of Action whereby organisations in all sectors have begun signing up to serious, measurable, action focused plans toward closing the 17 year gap in life expectancy between Indigenous and non-Indigenous children.

The Prime Minister announced the first of these action plans last week from blue chip corporates, government agencies, non-government and community organisations. There are many more of these action plans on the way, and I urge you to leave this seminar thinking long and hard as I will about our own responsibilities and the opportunities we have at our disposal to be part of this national movement for social justice.

A theoretical discussion about treaties is all very well, but there is a politically uncontentious job to be done now. And its one we can all contribute to, in our pragmatic Australian way.

As I say, the stars are in alignment if we choose to follow.