SPEECH BY THE HON. KENNETH HAYNE AC QC

ON THE TOPIC 'TRUST, CONFIDENCE AND PUBLIC INSTITUTIONS'

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THE SIR ZELMAN COWEN ORATION

TRUST, CONFIDENCE AND PUBLIC INSTITUTIONS

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I began to write what I would say tonight long before Covid-19 burst upon the world. Those days seem now so far away. But they are not. And the issues that confronted us then, about trust, confidence and public institutions, have not gone away. I hope that we may come through the challenges of the present times with respect for the way in which governments and our society responded to those challenges. I hope that all our public institutions and our society more generally learn from, and implement the lessons of, these times. But what we learn remains to be seen.

In Australia, our governments, and our society more generally, have so far responded to the pandemic without significant partisan division. There has been general agreement about the nature of the threat we face and the need for a united response.

General agreement of this kind is rarely found. It remains critically important, then, to understand not only what we can learn from these times, but also how and why trust and confidence in public institutions had reached the point it had before the pandemic struck.

The pandemic has tested all political leaders in every country. Countries whose leaders told their people the truth, whose leaders *sought* trust and confidence by *having* trust and confidence in their people, have done so much better than countries whose leaders did not. Countries whose leaders did not tell the truth have

suffered great harm. The lesson seems obvious. But will it be learned? Will our responses to the pandemic be treated as extraordinary responses to extraordinary times which either cannot or should not be applied to other issues? Will we return to "politics as normal"? If we did, what would be wrong with that?

In recent times I have tended to focus upon three issues that press upon us all: whether our democratic institutions are operating as they should; indigenous recognition and understanding; and climate change. Many would say that there is a fourth, equally pressing and important issue to consider – about how Australia, and the Western liberal democracies more generally, deal with and respond to China in a way that will preserve national sovereignty and protect vital national interests. But, in this address, I will leave this issue aside.

As I will explain, the three issues upon which I focus – democratic institutions, indigenous recognition and understanding, and climate change – are connected. They are connected because all of them illustrate what would be wrong with returning to "politics as normal". They are connected because all of them illustrate how hard it has been in recent years to have a respectful and reasoned debate about issues that divide us. Instead, reasoned debate about policy was supplanted by three or four word slogans. Political and other commentary focused upon what divides us rather than what unites us. Trust in institutions, both governmental and private, had been damaged, even destroyed. Before Covid, our future was framed as some return to an imaginary glorious past when the issues that now beset us had not arisen. Now, our future seems to be framed as return to a glorious past thought to have existed before Covid. But is that what we should seek to return to – a time when trust in institutions, governmental and private, had been damaged or destroyed; when slogans replaced reasoned debate?

Slogans supplanting reasoned debate about policy may go some way to explaining why, in recent years, difficult issues of public policy have often been referred to Royal Commissions and other external inquiries. Those bodies generate reports that are, or should be, independent and reasoned. Frequent use of independent commissions of inquiry may suggest that governmental structures can now deal effectively only with the immediate emergency and cannot deal with the larger issues that face us. One reason that may be so is that, as I have said, the space left by the absence of reasoned debate is filled with slogans coined by partisan participants. And this happens even where the basic information on which reasoned debate would be based is freely available to the whole community.

We have seen the space that should have been filled with reasoned debate filled with slogans in other countries. In the United States, we saw it in connection with the Mueller Report on the Investigation into Russian Interference in the 2016 Presidential Election. In the United Kingdom, we saw it, and continue to see it, in connection with Brexit. In both cases, the repeated shouting of competing slogans that passed for debate took place without participants reading the Mueller Report and without participants pausing to recognise that Brexit was not a moment but a process. The notion of "getting Brexit done" did not acknowledge that unwinding the interconnected-ness of the United Kingdom with Europe could not be done at the stroke of a pen. Yet the Mueller Report and basic information about what Brexit would require and entail were available for all to read.

Here in Australia, we have seen the proposal for an Indigenous Voice that emerged from the Uluru Statement from the Heart caricatured as a claim to a third

House of Parliament. As the Hon Murray Gleeson, formerly Chief Justice of Australia, rightly said, what is proposed is a voice *to* Parliament, not a voice *in* Parliament.[1]

Describing what is sought as a "third House of Parliament" may be a convenient slogan for opponents of the proposal but it is simply false. The Voice would advise Parliament. It would have no power to take any legislative step. The Parliament would prescribe the structure, composition and functions of the Voice. The Parliament could change any or all of those elements at any time and from time to time. What would appear in the Constitution would be the minimum requirements necessary to guarantee its continued existence and its essential characteristics. Yet still we hear this description of the Voice as a third House peddled by those who oppose responding to the Statement from the Heart.

Similar levels of sloganeering and peddling of false and misleading ideas can be seen throughout this country's response to climate-related issues. Still we see climate-change portrayed as a matter of ideological belief rather than as a matter of scientific observation and extrapolation. Climate-change remains part of continuing "culture wars". And those who had the temerity to point out the connections between climate-change, extreme weather events and changing bushfire patterns, when eastern Australia suffered unusually early and very destructive bushfires in November 2019, were then seen as contributing to those culture wars. Perhaps the horrific fires of January 2020 have brought about some change in public perception. Perhaps the pandemic has shown the importance of scientific observation. Perhaps the pandemic has shown that science does not have all the answers but provides the best light we have to see our way through to safety. We shall see.

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1 Gleeson, *Recognition in Keeping with the Constitution* (2019) 93 Australian Law Journal 929, 934.

What joins these various observations about such diverse subjects as responding to the Mueller Report, Brexit, the Voice and climate-change? Several different threads can be seen. At their core, however, lies an unwillingness to grapple with truth.

In November 2019, I heard the Chancellor of Oxford University, and sometime Governor of Hong Kong, Lord Patten, speak on Political Leadership. Of the many matters he discussed, I mention only one. He said that it is always necessary to distinguish between power, title and leadership.[2] A person may have large and important powers, but having power does not make the holder a leader. Holding an office, will give the holder the title of that office, but having that title, even one of the great offices of state, does not make the holder a leader. What makes a leader is the will and the ability to walk ahead of others, along the path chosen by the leader, and have others follow the leader along that path, no matter whether the path, or steps along it, are familiar and comfortable. To do that, the leader must teach – to explain to those who follow *why* the leader walks this path and *why* others should follow.

If leaders are to lead, they must teach. They must teach *why* they take the path they would have us follow.

At first blush, this appears to entail that leaders *must* grapple with the truth. How else could they explain why they want followers to go down *their* path? And yet we know that this is not so. Nativist populist leaders have come to the prominence they now occupy by endless repetition of slogans accompanied, too often, by

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[2] The Rt Hon the Lord Patten of Barnes CH, 2019 Fraser Oration – Political Leadership, University of Melbourne, 6 November 2019, referring to the work of Doris Kearns Goodwin. See https://about.unimelb.edu.au/__data/assets/pdf_file/0013/117130/2019-Fraser-Oration-.pdf

repeatedly denying the undeniable and shouting down those who would speak truth to power.

So if a thread that joins the subjects I have mentioned (responding to the Mueller Report, Brexit, the Voice and climate-change) is an unwillingness to grapple with truth, what are we to do? Nativist populism founded in slogans and denial has succeeded elsewhere, why would it not succeed here?

Those who will not now grapple with the truth will not do that until they feel compelled to do so by those upon whom they depend for success. Those who now resort to slogans and untruths will continue to rely upon those tactics until they feel that those upon whom they depend for success require them to abandon those tactics and engage with issues through reasoned and respectful debate. But how can we begin to do that in the age of social media and a perpetual news cycle?

If I am right to ask whether trust in institutions of government (as well as trust in other systemically important institutions) has been damaged, rebuilding that trust will not be easy. If members of the community no longer trust the beneficial intent or the competence of governments and the public sector, how can that trust be restored in the age of social media and a perpetual news cycle?

All of us must play our part. To do that we must value and strengthen our institutions of government. If those within the institutions of government do not grapple with the truth, others must. If those within the institutions of government seek to lead by resort only to slogans, others must do whatever can be done to provide reasoned and respectful debate, based in truth, for all to see and judge. And we must not be content with hearing only what we want to hear. We must recognise how uncomfortable the truth can be.

None of this is easy. It is not easy because everyone seeks simplicity. None of us wants to be told only that there is a problem and the problem is very difficult. All of us seek solutions. Simple explanations or solutions are so much more persuasive and easier to convey than complex explanations or solutions. All of us want to be presented with some solution that allows us not to think about the problem any more. Hence, to say that a proposal will achieve, or help achieve, some universally desired end is deeply appealing to the listener. It tells the listener what that person *wants* to hear. But when a slogan is used, what is not explained is how or why the proposal will have that desired result. And omitting that connecting middle step can amplify mistrust and doubt.

So how do we set about strengthening our institutions of government? How do we persuade those who seek or hold political office that they must grapple with truth? How do we persuade ourselves and others to hear what we do not want to hear because it challenges us to look again at our beliefs or preconceptions?

The first and most obvious step is to insist upon absolute honesty and integrity of those who hold office in the institutions of government (elected or not). And that requires imposing appropriate consequences on any who depart from those standards. (There is of course a whole week's seminar to be held on what mechanisms are best used to monitor compliance with standards and then deal with allegations of departure from them. I do not stay to examine those issues now.) For the moment, the important point is that, as a society, we cannot tolerate the emergence or continuation of a belief within or outside our institutions of government that "bending the truth" or being "economical with the truth" is normal and acceptable behaviour. To accept it is to embed mistrust. Whatever mechanisms we devise for monitoring and dealing with departures from standards of absolute honesty and integrity in our public institutions, we, as individual members of society, have to do whatever is within our power to reinforce the importance of maintaining

those standards. As I have said earlier, those who seek to benefit from "bending the truth" must know that those upon whom they depend for success will punish them for doing it.

Transparent honesty and integrity are necessary but not sufficient conditions for maintaining and restoring trust in our democratic institutions. The public will not trust our democratic institutions unless persuaded that what the political branches of government do is relevant and important and is done properly.

Relevance and importance are too often lost in the fog of partisan rhetoric. Issues are framed in ways that obscure what is at stake by suggesting that only one answer is possible. And what follows is a dialogue of the deaf in which no side of the debate dares admit that there is a case for and a case against the course of action that is proposed. Those who see political dialogue in tribal terms may be content with, even reassured by, this one-dimensional view of life; those who seek relevance and importance in our democratic institutions are unlikely to find any satisfaction in it. And lack of satisfaction breeds distrust and disengagement. Distrust and disengagement eat away at the heart of democratic institutions.

Calling for an end to sloganeering and seeking to explain why it is corrosive of trust in and respect for democratic institutions is of little value unless the call is heeded. And, as pointed out earlier, calls of this kind will not be heeded unless those who seek or hold office in our democratic institutions are persuaded that electors demand more than slogans.

Slogans seek to simplify issues (and their solution). Decades of establishing ever closer connections between Europe and the United Kingdom were reduced to "Get Brexit Done". The immense complexity of the problem was reduced to three words of little obvious content.

Whether framed in the slogan that is proffered as solution, or framed more directly, how a political issue is framed is critical. Professor George Lakoff of UC Berkeley has written much about the subject of issue framing in US politics.[3] But without delving into the accuracy of his views, or their possible transportation across the Pacific, all of us are instantly familiar with the difference between framing an issue as being about freedom of individual choice or as being about societal obligation. Tax "relief" conjures up a different frame of reference from tax "reduction". A "war on drugs" is seen as radically different from "harm-minimisation". The examples can be multiplied. Euphemism and metaphor are standard elements in any debate about disputed or disputable questions of policy. And the euphemisms and metaphors can obscure the truth of not only what is proposed but also why the proposal is thought to work.

Often there will be little doubt about what is proposed. Perhaps important details of how it will be done may be obscure. (How often do we hear that "the devil is in the detail" or that "we must wait for the draft Bill before deciding our position".) But too often, even if we know *what* is proposed and *how* it will be given effect, *why* the proposal should be adopted lies buried behind the impenetrable barrier of some slogan like "Keeping our economy strong" or "Supporting working families".

A slogan will almost always be cast in terms that command universal agreement. After all who would not want to keep our economy strong or support working families. But dig a little deeper and the slogan begins to lose its substance. (What does it really mean to say "Get Brexit Done"?) And the connection between the proposal and whatever substance the slogan has becomes even harder to see.

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[3] See, eg, *Moral Politics: What Conservatives Know that Liberals Don't* (1996); *Don't Think of an Elephant: Know Your Values and Frame the Debate* (2004); *The Political Mind: Why You Can't Understand 21st Century American Politics with an 18th Century Brain* (2008).

The listener cannot judge how the proposal will advance whatever general goal is wrapped up in the slogan.

The listener is then left to evaluate the proposal without any statement of how or why it advances the good of society. Instead, the listener is asked to make an act of faith – to accept the slogan at face value, without demonstration that the proposal really is for the general good. Those who are already part of the proponent's tribe may do that. Those who hear what they *want* to hear may do that. Others will not.

Presenting an argument clearly and simply is a difficult art. Showing how and why a particular proposal will advance the general good of society is especially difficult. That difficulty is magnified when the argument reveals that choices have had to be made between competing considerations. And there are very few policy choices available to government that have no competing possibility.

On issues of the kind I mentioned earlier – indigenous recognition and voice, climate-change and responding to changes in the geo-political dynamics in our immediate region – those who lead must educate. And if they will not, others must take on that task. More than anything, it is necessary to teach, and keep teaching, some basic truths. And it is necessary to trust the listener to discriminate between arguments. That is, trust and confidence must flow both ways – from the people to the institutions of government and from those who occupy office in government to the people.

Let me give an example of what I mean.

Issues about indigenous recognition and voice must begin from truths that are undeniable. Aboriginal peoples have inhabited this land for more than 60,000 years.

European settlement and assertion of sovereignty brought dispossession (often violent dispossession). As Brennan J said in *Mabo*, "[t]heir dispossession underwrote the development of the nation".[4] Dispossession brought disempowerment and entrenched disadvantage. Disempowerment and entrenched disadvantage persist.

It is upon these truths that debate about recognition and voice must proceed, not spurious references to a third chamber of the Parliament, generalised references to equality, or dismissal of all forms of proposal as racially based. Again, let me explain what I mean by "generalised references to equality" and dismissing proposals "as racially based".

In his address about Recognition in Accordance with the Constitution, Murray Gleeson made two points about equality and race that I consider unanswerable. And they were unanswerable because they were based in the truths I have identified.

First, he said that:

> "It has been suggested that it is divisive to treat Indigenous people in a special way. The division between Indigenous people and others in this land was made in 1788. It was not made by the Indigenous people.
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> …
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> If it were fair to regard Indigenous people as merely one of the many minority groups that can be identified in the complex pattern of our social structure – and a very small group at that – then it would be reasonable to leave them to make their own way as contesting

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[4] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 69.

> participants in the ordinary democratic process. But that would take dispossession to its logical, and unattractive, conclusion."[5]

The second point he made (about race and racism) is closely related. It is that:

> "The history of the 20th century demonstrated the evil of racism, and race itself is a concept based on insecure conceptual foundations. It does not follow, however, that the term is unmentionable, or that any governmental action predicated upon race must be wrong. It has a firm footing in the Constitution."

That "firm footing" was the result of the 1967 referendum that amended s 51(xxvi) of the Constitution. And it was the Constitution that, in the language of its time, referred to the indigenous peoples as "the aboriginal race".

Dig further, and reference to "race" in this context is revealed to be no more than a rhetorical device of condemnation. It is an appeal to ignore our history. It is to say that our Constitution as it stands, and our future constitutional arrangements, must ignore the fact that the indigenous peoples of this nation had been here for tens of thousands of years before European settlers arrived. To ignore that fact is to return to the now long discredited and discarded fiction that Australia was terra nullius when European settlers arrived.

Notice, then, how the points made about equality and race are related to the truths I have mentioned. That is, notice that the argument made in support of an

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[5] Gleeson, n 3, 936.

Indigenous Voice to Parliament is based on premises that are stated and are premises which reveal the infirmity of contrary contentions. Contrast that kind of argument with one which consists only of repeating one or more slogans about race and equality. Recognise that the appeal to supposed racism is misleading.

There remains a further and critical issue to expose and consider. In November 2019, Lord Sales of the United Kingdom Supreme Court spoke about "Algorithms, Artificial Intelligence and the Law".[6] In that speech, Lord Sales spoke of the "tech world" placing democracy under pressure.[7] He identified what he called "a fracturing of the public space" by contrasting democracy of a kind with which we were familiar in the twentieth century" – where "Parliament worked in the context of a communal space for debating issues in the national press, television and radio, which generated broad consensus around fundamental values and what could be regarded as fact" – with today – where information technology allows people to retreat from that communal space into highly particularistic echo-chamber siloes of like-minded individuals, who reinforce each other's views and never have to engage or compromise with the conflicting views of others".[8]

Lord Sales was surely right to say that we need to find ways of reconstituting a common public space.[9] Only then can we hope to emerge from our separate echo chambers and obtain consensus about values and facts. I have no ready-made solution to offer to the problem. But there are some matters we need to consider.

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[6] The Sir Henry Brooke Lecture for BAILII; 12 November 2019. https://www.supremecourt.uk/docs/speech-191112.pdf

[7] *Algorithms, Artificial Intelligence and the Law*, 20.

[8] *Algorithms, Artificial Intelligence and the Law*, 20.

[9] *Algorithms, Artificial Intelligence and the Law*, 21.

It will be little use trying to turn back the clock by assuming that what were the mass media of newspapers, television and radio can be reconstituted as a common public space. Those days have gone and we must face the fact of social media. And that means facing the fact of targeted messaging. All political campaigning now depends upon sending different messages to different people, telling each recipient what is thought may persuade that recipient. Often, the message is little more than a slogan. But the very disaggregation of communication in this way creates the highly particularistic echo-chamber siloes of like-minded individuals of which Lord Sales spoke.

A platform like Twitter does allow a user to draw attention to all or any of the longer form material which that user thinks to be relevant to a particular issue. All who use Twitter know how those seeking to promote reasoned debate will link their message to one or more longer-form piece, whether a blog post, a periodical article or some other discussion of the issues. Very often, this will expose the reader to a much wider discussion of the subject than the reader would otherwise have found. To my mind, the best discussions about Brexit-related issues could be found through Twitter posts linking to blogs and other commentary. To my mind, some senior legal scholars use Twitter to lead their readers to material the reader would not otherwise find. Yet Twitter, like all social media platforms, allows, even encourages, what Lord Sales described as the creation of highly particularistic echo-chamber siloes of like-minded individuals, who reinforce each other's views and never have to engage or compromise with the conflicting views of others.

Perhaps our lost common public space will have to be built by using social media to aggregate commentary. But the challenges then will be, first, to do that in a way that allows the user to distinguish between argument about the issue and bare statements of disagreement or abuse, and second, to do it in a way that attracts the

attention of more than those who search only for reinforcement of some pre-determined view adopted as an article of faith.

Maybe the pandemic has given us a glimpse of two things: that we can engage in a common public space on the basis of shared values and facts and how we did that. Governments have had to explain why they have taken the steps they have. They have used every available means of communication. Health and economic considerations seem to pull in opposite directions. There are many uncertainties. The steps taken affect everyone. Many lose their jobs and income. The disease is highly contagious and very dangerous. All of us, but some more than others, think (or hope) that we are bullet proof and are reluctant to accept radical changes to the way we live and work. But governments have very quickly made radical changes in the ways we live and work. They have done that by telling society the facts as simply and clearly as they can. In telling those facts, governments have repeatedly acknowledged the limits of their knowledge – this is a new disease and science has much still to learn about its transmission, its effects and what can be done to reduce the harm that it brings. But society has responded to being trusted with the facts that are known and has recognised that difficult judgments have had to be made. And government has brought about great changes so that, together, we can pursue shared purposes.

No matter how we try to create a new common public space, we must continue to insist upon the framing of arguments about policy by reference to values and facts. We must continue to insist upon teaching those fundamental values and facts. And we must teach those values and those facts by relating them to the political issues that must be considered and exposing both whether and how those values and facts relate to proposals that are made.

Because what the political branches of government do is relevant and important, we must do whatever we can to have those who would lead us recognise that our democratic institutions are more valuable than those who at any moment may occupy some office in those institutions. We must do what we can to impress upon those who seek office that power is not the objective, that "having the numbers" in the branch, the faction, the party, the legislature, is not the end. What matters is what our democratic institutions do, and how they do it. And all our democratic institutions are based upon reasoned and informed debate.

Reasoned and informed debate, like leadership, depends upon truth. Leaders must lead and they must teach.

Zelman Cowen was a leader. As legal scholar and teacher, Law School Dean, University Vice-Chancellor, Zelman Cowen walked ahead of others and had others follow in his path. As Governor-General, he led the nation with that "Touch of Healing" that marked his term of office. And he never stopped teaching. Look at his speeches as Governor-General and you see the teacher at work, often enough by his holding a mirror to Australia and Australians so that we could see who and what we are and what we might become. It is right, therefore, that this Centre at Victoria University should bear his name and that this annual oration mark his signal achievements.

Zelman Cowen led because he taught. So should we all.