1. INTRODUCTION

Distinguished guests, ladies and gentlemen, I would like to thank the Law Society of the ACT for inviting me to deliver the 2005 Sir Richard Blackburn Lecture and for their recognition of the importance of the issues that I seek to address.

I am honoured to follow the Chief Justice of South Australia who delivered this Lecture last year. You may recall that he spoke about the need to properly fund and support a suitable program of professional development for the judiciary. He also emphasised the importance of education and support for the independence of the judiciary.

In my dealings with lawyers in the United States our discussions on the likelihood of success in a particular case has always been based on who appointed a particular judge.

Were he or she appointed by President Bush I would be told we had no hope; however, if the Judge were appointed by President Clinton then we did.

Unfortunately, with only two exceptions, I have noted a consistency between the legal decisions and the individual judges’ appointees’ political position. I appreciate that this does not apply to every American judge but it does seem to me that there is now a growing politicisation of the American judiciary. I would hate to see this happen in Australia.
2. **THE GENEVA CONVENTION**

Last month I came to Canberra and for the first time drove along the road running between the War Memorial and Parliament House. As I drove past the individual memorials to the various wars that Australians have fought in, I noticed that after the Vietnam War Memorial there were blank spots, obviously waiting for memorials to Australians who will be killed in future wars.

I do regret that we live in a society that has an expectation that we will send people to kill and be killed in wars. However, if that is the case, then we need to look at how we protect the people that we send to war and in particular how we protect those who are captured by the enemy.

I have always considered that the Hicks case is linked to how we would like Australian Service Men and Women to be treated when captured by an enemy force.

I commenced acting for David Hicks after offering my services to his family in January 2002. I had been on holiday reading the papers and I realised that the intention of the American Government was to take prisoners to Guantanamo Bay, for the specific purpose of keeping them in a place that was “beyond the law”. To me as a lawyer this was the thing that was most concerning about their actions.

I thought if we spoke out strongly against such actions that the Australian Government would pressure the American Government to declare David Hicks to be prisoner of war and to apply the Geneva Convention.

I did not anticipate the obsequiousness of the Australian Government or the determination of the American Government to set up a new system of dealing with Prisoners of War.

3. **THE CHANGED WORLD**

After September 11 2001 we heard President Bush saying “the world had changed”.
I thought that this rather overstated the facts. I did not wish to suggest that the murderous attack and death of 3,000 innocent people was not a horrific event. It clearly was. But compared to the recent deaths of over 800,000 innocent people in Rwanda and our lack of concern about it, the deaths of millions in Cambodia, Vietnam and Korea and in particular the World Wars, I did not consider that September 11 was the most horrific event in modern times.

What has been significant and what has changed the life of many people has been the reaction of many governments to that event and in particular, the new laws restricting traditional civil liberties in the name of “freedom”.

To me, the most significant world-changing event in the last 100 years was probably the Second World War, which saw the deaths of over fifty million people. The majority of those killed were civilians, but others were captured soldiers, who were horrifically treated.

It was significant that in 1949 those who had seen first hand the horrors of war and the brutality of the treatment of Prisoners of War thought it necessary to gather together and update the 1929 Geneva Convention on Prisoners of War.

In case you think that the Geneva Convention on the Treatment of Prisoners of War is of less importance today, let me remind you of the lessons of World War II.

During that war, 28,756 Australians were taken captive by our enemies. Of those captured, 8,013 died in captivity, mostly at the hand of the Japanese who were not signatories to the 1929 Convention. This is a significant number of deaths when you consider that the number of Australian battle deaths was 19,2351.

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US military members interned by the Japanese had a death rate of 40%. Those interned by Germany, a country that recognised and largely applied the 1929 Convention, was just over 1%.²

Russia also had not ratified the Geneva Conventions of 1929 and as a consequence the Germans treated Russians differently. Of the 5.7 million Red Army soldiers captured about 3.3 million died in German captivity – a mortality rate “of 57 %”³

4. DAVID HICKS

When I first started acting for David Hicks, I was informed by his family that they believed he was associated with the Taliban. We understood that he had been picked up in Afghanistan initially by Northern Alliance troops and later handed over to the Americans.

Given that information, I believed that he should have been held pursuant to the Third Geneva Convention Relative to the Treatment of Prisoners of War.

The Australian Government advised David’s family that he was being held according to the 13 November 2001 Military Order of President Bush relating to the “Detention, Treatment, and Trial of certain Non-Citizens in The War Against Terrorism”. Under that order it is President Bush personally who must determine in writing that an individual be subject to his order.

Incidentally, I was working with some American lawyers on a Writ of Habeas Corpus at the time. I made a bet with those American lawyers that President Bush would not have signed David up.

We discovered later that this was in fact the case. In response to our application for the Writ of Habeas Corpus on behalf of David (the case that eventually became Rasul v. Bush⁴), the US Government in their

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² American Prisoners of War in World War I, WWII, Korea, Vietnam, Persian Gulf, Somalia, Bosnia & Kosovo (2,000) Charles A Stenger.
defence stated that Hicks was being held pursuant to President Bush’s powers under “the Laws and Usage of War”. It was not until almost a year and a half later that he was actually brought under the President’s Military Order.

5. THE US POSITION CONCERNING THE GENEVA CONVENTION

We now know from documents released to the public in June 2004 after a Freedom of Information Application that, in January and February 2002, the United States Government was also grappling with the issue of the Geneva Convention.

On January 22 2002 in the document entitled “Department of Justice memo to White House and Defense Department Counsels regarding the application of The War Crimes Act and Geneva Conventions”, Assistant Attorney-General Jay S. Bybee argued that the President had the constitutional authority to suspend the US obligations under the Third Geneva Convention.5

Bybee also suggested that the US President, under his power pursuant to Article 2 of the US Constitution and his ability to “interpret treaties on behalf of the nation,” could determine that “all the Taliban forces did not fall within the legal definition of Prisoners of War” and so “eliminate the need for Article 5 Tribunals”.6

Interestingly enough, Bybee twice referred to the fact that the facilities at Guantanamo Bay may not fully comply with the third Geneva Convention requirements7. He argued that the US could modify its obligations under “Geneva III” to take into account the needs of the Military “to protect their individual members”8 or self defence9

5 At p.13. The memo argued as a precedent that the US in 1986 had suspended the ANZAS pact insofar as New Zealand was concerned.
6 At p. 31 ibid. Article 5 of the Geneva Convention requires that each prisoners claim to be a POW be assessed by an “independent Tribunal”.
7 At p. 28 ibid.
8 At p. 24 ibid.
9 At p. 24 ibid.
In a later memo\textsuperscript{10} Bybee argued that torture of suspected terrorists could be legally justified on the grounds of "self defence" because "the threat of an impending terrorist attack threatens the lives of hundreds if not thousands of American citizens".

Bybee also argued that applying the International Convention Against Torture in a manner that interfered with the President's ability to carry out detention and interrogation of any combatants was unconstitutional.

Bybee's definition of torture was that an abuser must inflict pain "of such a high level of intensity that the pain is difficult for the subject to endure".

The Commentary of the Third Geneva Convention by the International Committee of the Red Cross comments on torture as follows:

"the word 'torture' refers here especially to the infliction of suffering on a person in order to obtain from that person, or any other person, confessions or information".\textsuperscript{11}

Bybee advised the President that if he were to find that the Taliban prisoners did not qualify as Prisoners of War, then the Geneva Convention would no longer protect them. Thus their treatment would not give rise to a breach under Article 30 of the Geneva Convention\textsuperscript{12}; nor would it constitute a violation of the US War Crimes Act.

In the end, based on facts supplied by the Department of Defense, President Bush determined that "the Taliban detainees are unlawful combatants" and "therefore do not qualify as Prisoners of War under Article 4 of Geneva". He decided that "because Geneva does not apply

\textsuperscript{10} August 1, 2002 "The Department of Justice memo to the White House Counsel regarding the definition of torture".

\textsuperscript{11} (page 6-7 1994 reprint).

\textsuperscript{12} Article 30 states "Grave breaches of which the proceeding article relates shall be those involved in any of the following acts, if committed against persons or property protected by the Convention: Wilful killing, torture or inhuman treatment including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."
to our conflict with Al Qaeda, Al Qaeda detainees do not qualify as Prisoners of War". 

In that memo, President Bush stated:

"Of course, our values as a nation, values that we share with many nations in the world, call for us to treat detainees humanely, **including those who are not legally entitled to such treatment**. Our nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent approximate and consistent with military necessity, in a manner consistent with the principles of Geneva".

Allowing a military group to take prisoners "beyond the Law", providing them with justification for torture, telling them that some of the detainees were not "legally entitled" to be treated humanely, and that the Geneva Convention did not have to be applied, is a recipe for disaster. If you add to those messages the instruction to "render" individuals to countries such as Egypt, Syria and Uzbekistan for questioning, then it should be no surprise if the result is abuse of those prisoners.

It should also be no surprise that the abuse caused a reaction against the abusers, as we have seen in the last week with the protests arising from the disclosure of abuses involving the Koran.

6. **RIGHTS UNDER THE THIRD GENEVA CONVENTION**

If prisoners at Guantanamo Bay or elsewhere are deemed to be held pursuant to the Geneva Convention, they must be "humanely treated". If they are questioned, they are only required to give their name, rank and

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13 Memo from President Bush 7 February 2002 to the Vice President and others concerning "Humane treatment of Al Qaeda and Taliban detainees"

14 Bold for emphasis

15 Article 13
serial number.\textsuperscript{16} If there is any doubt about their status as a POW then an independent tribunal will assess their position\textsuperscript{17}.

Article 17 of the Convention states that:

"No physical or mental torture, nor any other form of coercion, may be inflicted on Prisoners of War to secure from them information of any kind. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."

As for detention, such prisoners should be held in conditions similar to those of the detaining forces.\textsuperscript{18} That is, they should not be held in close confinement,\textsuperscript{19} they should be allowed to visit the canteen\textsuperscript{20} and they should be allowed to obtain and read copies of the Geneva Convention\textsuperscript{21}. They would have an entitlement to things that the current United States Attorney-General Alberto Gonzales considers "quaint" such as being paid for work and having athletics uniforms and scientific instruments sent to them.\textsuperscript{22}

Imprisonment in premises without daylight and any form of torture or cruelty are expressly forbidden under the Convention\textsuperscript{23}

Under Article 99:

"No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused".

If a prisoner is to be tried, then he is to be tried before a military court with essential guarantees of "independence and impartiality". The court must

\textsuperscript{16} Article 17  
\textsuperscript{17} Article 5  
\textsuperscript{18} Article 20  
\textsuperscript{19} Article 21  
\textsuperscript{20} Article 28  
\textsuperscript{21} Article 41  
\textsuperscript{22} Memo for the President January 25, 2005 re “Decision re Application of the Geneva Convention on Prisoners of War to the conflict with Al Qaeda and the Taliban”.  
\textsuperscript{23} Paragraph 40
follow the same procedure as are followed in the case of members of armed forces of the detaining power.\textsuperscript{24}

The most important article is probably Article 118, which provides that:

"Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities".

6. RIGHTS UNDER PRESIDENT BUSH'S MILITARY ORDER

If detainees are to be tried at Guantanamo Bay, they must first be brought under President Bush's Military Order.

President Bush's order allows him to determine to bring detainees under the order, and to try them before a military commission that does not follow the same rules and regulations of the United States Uniformed Code of Military Justice. It allows evidence obtained by torture to be used if considered of "probative value". There is no right of appeal to any independent or impartial tribunal and the President of the United States personally will make the final decision on any trial.

Whilst President Bush has indicated that he would not change a finding of not guilty to guilty, there is nothing to stop him sending a matter back for a re-trial or alternatively making a finding of guilt on a lesser charge and imposing a penalty or alternatively simply continuing to detain a prisoner who has been found not guilty.

The independent legal observer for the Law Council of Australia, Lex Lasry QC, concluded in his first report that:

"A fair trial for David Hicks is virtually impossible on the following grounds:

(a) the commission is not independent;

(b) the commission is a process created and exclusively controlled by the Executive US Government;"

\textsuperscript{24} Article 102
(c) there is a strong relationship between the Presiding Officer and the Appointing Authority;

(d) that members of the Military Commission were not legally qualified;

(e) that the rules of evidence were all but absent;

(f) there is no viable appellant process; and

(g) the count of conspiracy against David Hicks was so broad that it would easily facilitate conviction."

The maximum penalty for all charges at Guantanamo Bay is death, except for Australian and British subjects.

7. TREATMENT OF DETAINEES AT GUANTANAMO BAY

As for the treatment of detainees at Guantanamo Bay and the manner of their incarceration, it is certainly different to anything prescribed by the Geneva Convention.

Their initial incarceration was in Camp X-ray, a hastily constructed concrete and wire mesh structure, pictures of which you have no doubt seen. What you have not seen is the fear, uncertainty and brutality that were inflicted upon those detained.

There have been numerous reports detailing the abuses of Guantanamo Bay, not just from released detainees but also from the FBI who became concerned about it and now former guards and translators.

I only wish to comment briefly on a number of incidents.

Firstly, there was the incident of Specialist Baker, a US Military member who played the role of a detainee for a trainee "ERFing", or "Emergency Reaction Force", squad. "ERFing" squads are used to control detainees. Unfortunately the trainee ERFing Squad were not told that Specialist Baker was a US Military member. They beat him so badly in a training exercise
that he suffered brain damage that later required his discharge from the US Army.

The British detainees who have been released have provided graphic details of their treatment. In particular, 3 young men from Tipton in England - Rasul, Iqbal and Ahmed - released a comprehensive statement of 115 pages on their detention in Afghanistan and Guantanamo Bay.25

In that statement, Rasul states:-

"During the whole time we were at Guantanamo, we were at a high level of fear. When we got there the level was sky high. At the beginning we were terrified we might be killed at any minute. Guards would say to us "we can kill you at any minute", they would say "the world doesn't know you are here, nobody knows you are here, all they know is you are missing and we can kill you and no one would know".

In Guantanamo Bay, discipline was strict, according to the British detainees. They were detained in cages, 2 metres x 2 metres, exposed to the sun half of the day. They weren't even allowed to lean on the wire fence or stand up and walk around. Iqbal says that in the beginning the camp was run by US Marines and "they were brutal".26

The British described the ERFing teams and in particular an assault on a mentally ill Bahrainian who apparently was mimicking a female soldier. The beating by an 8-person ERFing team saw the Bahrainian kicked and beaten with his face repeatedly smashed into the concrete floor. In the end, the Bahrainian was hospitalised and operated on while the Marines hosed the blood out of his cell. These ERFings were videoed and, although 500 hours of video were taken, the US Government is refusing to release them on "privacy grounds". The video of Specialist Baker was apparently unable to be found.

25 This statement is available on the website of the Center for Constitutional Rights in New York www.ccr-ny.org.
26 P.24 of the Statement.
After almost a year at Guantanamo Bay, a fellow detainee accused the Tipton Three of being in a video with Osama Bin Laden. This was when the full range of interrogation techniques was used against them. They were placed in solitary confinement, they were short shackled in the freezing air-conditioned rooms for hours on end, they were subjected to deafening loud music and they were denied exercise or any "comfort items".

After about 5 or 6 weeks of endless interrogation, short shackling and isolation, all three admitted that they were members of Al Qaida and that they were in the Osama Bin Laden video. They duly signed confessions.

Fortunately for them, MI5 arrived and, using records seized from their employers in England, were able to prove that on the day the video was shot in Afghanistan, all three were in Tipton. One of them attended Court in Tipton on that day and the others were at work.

With respect to David Hicks, after he and the other prisoners were moved out of Camp X-ray, he received a visit from ASIO and the Australian Federal Police who reported to his parents that David now had "a room of his own" and "regular exercise".

When I arrived to visit him in Guantanamo Bay, we discovered that this meant he was in solitary confinement and that he was receiving two 15 minute periods of exercise a week.

David was to spend almost a year in solitary confinement. In a letter to his father towards the end of the confinement, he confessed that he was at the end of his ability to cope. We understand now that he is being held in what is known as Camp Delta.

As a result of disclosures of abuse, there have been at least 3 investigations into the treatment of detainees at Guantanamo Bay. The most extensive military investigation (and they have only been military investigations), is the report of Naval Inspector General Vice Admiral Albert T Church III delivered on the 3rd of May 2004.27

27 An unclassified executive summary is available at www.defenselink.mil/
Vice Admiral Church’s report covered Guantanamo Bay, Iraq and Afghanistan. He noted 71 cases of detainee abuse including 6 deaths. Another 130 cases remain open with ongoing investigation. I understand that there are another 24 deaths in custody under investigation.

As for Guantanamo Bay, Vice Admiral Church noted 24,000 interrogation sessions had taken place, over 40 for each of the 600 detainees.

As for the manner of interrogations at Guantanamo Bay, Vice Admiral Church found:

“When conducted under controlled conditions, with specific guidance and rigorous command over sight, as at GitMO, this is an effective model that greatly enhances intelligence collection and does not lead to detainee abuse. In our view it is a model that should be considered for use in other interrogation operations in the global war of terror”.

As for blame regarding abuse, Vice Admiral Church had this to say:

“Additionally, the nature of the enemy and the tactics it used in Iraq (and to a lesser extent, in Afghanistan) may have played a role in this abuse. Our service members may have at times permitted the enemies treacherous tactics and disregard for the law of war – exemplified by improvised explosive devices and suicide bombings – to erode their own standard of conduct”.

8. AUSTRALIA AND THE GENEVA CONVENTION

Australian Government support for the United States activities in Guantanamo Bay and elsewhere, in violation of the Geneva Convention, should be a concern to all Australians and in particular, to those who serve in our Armed Forces.

If Australia does not call for the application of the Geneva Convention to its citizens now, then it is possible that countries involved in conflict with Australia in the future will disregard the Geneva Convention. History has
shown us that this will result in the unnecessary ill-treatment and deaths of Australian service men and women.

No Australian would stand for a member of our Armed Forces to be subjected to the torment that those at Guantanamo Bay have suffered. Further, we would not accept that the President of a country we were at war with should have the final say over the life or death of an Australian service member.

It has always been a mystery to me why General Cosgrove was not pounding on the Prime Minister’s door advising that Australia should insist that all those captured in Afghanistan be dealt with under the Geneva Convention to ensure the future protection of our own forces.

Fortunately for our Defence personnel, we are in a minority of countries that support the Guantanamo Bay Rules over the Geneva Convention. I understand it is now only the United States and Australia who are publicly committed to supporting the Military Commissions in Guantanamo Bay. The standard never was good enough for British or other European Citizens, who have all been returned home at the request of their governments.

9. THE FUTURE FOR DAVID HICKS

As for David Hicks, at the present time any hearing before the Military Commission for war crimes is being delayed pending an appeal in the matter of Hamdan, an alleged driver of Osama Bin Laden.

In a judgment of the 8th of November 2004, Judge Robertson of the United States District Court found that the Geneva Convention did apply to Mr Hamdan. He further found that President Bush did not constitute a Competent Tribunal as required by Article 5 of the Geneva Convention and that the Military Commission was not a Court as required by Article 102 nor are its procedures consistent with that Article.

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28 Hamdan v. Rumsfield US District Court, District of Columbia, Civil Action No. 04-1519.
The appeal has been heard before the US Federal Court of Appeals and is awaiting decision.

On the 15th of December 2004, Judge Green in a separate decision ordered that Hicks’ challenge to the Military Commission process be held in abeyance pending final resolution of “all appeals in Hamdan v. Rumsfeld”\(^\text{29}\).

Consequently, it may be some time before Hicks is tried before a Military Commission and many more years before various appeals in the Federal Courts are decided. In the meantime, Hicks will remain at Guantanamo Bay. If the Australian Government presses the American Government for an urgent hearing, this would be a mistake, given the unfairness of the current process. If the Military Commission finds Hicks guilty of any offence, such a finding will always be open to doubt.

If David Hicks had committed a War Crime, as the American Government alleges, then he could be tried in an Australia Court\(^\text{30}\).

If you are in any doubt about the Australian Government’s ability to prosecute war crimes in Australia, then you will need to look no further than the decisions of the High Court in the Polyukhovich case\(^\text{31}\).

Attorney-General Ruddock’s statements that to prosecute Hicks would require the introduction of retrospective legislation to create a new crime is correct. He no doubt knows, given the extensive AFP investigation, that no Australian Court would convict David Hicks of the charges he faces in Guantanamo Bay.

\(^{29}\) Hicks v. Bush US District Court for the District of Columbia, CivilD299 Action No. 02-CV-

\(^{30}\) The right to prosecute in Australia is argued extensively in a forthcoming paper of Devika Hovell, of the University of New South Wales Faculty of Law and Grant Neiman of the Flinders University Faculty of Law, to be published shortly.

HINDMARSH AND NATIVE TITLE

1. INTRODUCTION

Simple statistics show that we are failing our obligation to indigenous people of this country.

Indigenous life expectancy is years less than for the total population. The life expectancy is 56 years for indigenous males compared to 77 for all Australian males, and 63 years for indigenous females compared to 82 years for all Australian females.\(^\text{32}\)

Indigenous males have an unemployment rate of 22% compared to 8% for non-indigenous males, and indigenous females have an unemployment rate of 18% compared to 7% for non-indigenous females.\(^\text{33}\)

In my experience, these statistics are probably an underestimation of the real unemployment rate among Aboriginal People.

We also imprison them at a greater rate than any other group. At 30 June 2004, they represented 21% of the prisoner population in Australia, and were 11 times more likely than non-indigenous people to be imprisoned. Indigenous youth incarceration rates are even worse.\(^\text{34}\)

If you ever doubt that Aboriginal People are subject to racism, then simply ask any Aboriginal Person you know how they feel about walking into a shop in any city. They know they are treated with suspicion, they are followed around and they feel the shame of it. It is an ordinary, everyday activity that brings continual distress to them.

The Hindmarsh Island Bridge Royal Commission further entrenched this pattern of treatment.

\(^{32}\) ABS v. World & Welfare of Australia's Aboriginal & Torres Strait Islander People 2003.
\(^{33}\) ABS v. World & Welfare of Australia's Aboriginal & Torres Strait Islander People 2003.
\(^{34}\) Australian Bureau of Statistics 4517.0 dated 23.12.04
2. HINDMARSH ISLAND BRIDGE ROYAL COMMISSION

The Hindmarsh Island Bridge Royal Commission was held at a time of hostility towards Aboriginal People following the Mabo decision and the debate about Native Title. The Ngarrindjeri People, who I acted for, felt that it ridiculed their beliefs, held them up to contempt and ultimately held them to be liars.

The fact that the findings of the Royal Commission were proved to be wrong in a subsequent decision of Justice Von Doussa in Chapman v. Luminis & Ors., is of little comfort to them as few people are aware of this decision.

3. NATIVE TITLE

In my work in Native Title, I have noticed the impact the Royal Commission has had. It seems to me that it has encouraged those who oppose Native Title to be bolder and to demand higher standards of proof that often cannot be met by people with an oral tradition. I have also been aware of incidences where Aboriginal People have remained silent, rather than have their beliefs challenged. More than once, I have been told by Aboriginal People that they do not wish to end up like the “poor bloody Ngarrindjeri’s”.

Native Title itself is clearly a lottery for most Aboriginal groups. Some more traditional groups with a shorter history of contact with Europeans will fare better than others in advancing claims, but the real lottery is in the value of Native Title to individual groups. Some will be lucky in that they will be allowed access to their land, depending on the legal status of the land, or receive royalties from mining, depending on whether or not they have minerals in their country.

In South Australia, there are currently 28 Native Title Claim Groups representing thousands of Aboriginal People, mostly without funds. Only 2

35 Chapman v Luminis Pty Limited (No 5) [2001] FCA 1106
or 3 groups have any funds to run their own Association; the rest have none. For those who are incorporated, they are often in breach of their corporate obligations to hold meetings, file reports etc, because of the lack of funding. They are not in a position to advance their own Native Title Claims and they are not well-funded by the Native Title Representative Body in South Australia, an organisation itself constantly strapped for cash.

The first Native Title Claim run in South Australia, the De Rose Hill Claim, is still not finalised. The cost in all has been in excess of 10 million dollars, an amount that would have purchased the land in dispute many times over.

This scenario will be repeated over 28 times in South Australia alone unless agreements can be reached. Aboriginal representatives and the State Government are aware of the problems and for this reason have embarked on a program of negotiation, in an attempt to avoid the crippling costs, delays and uncertainty that Native Title creates.

These factors affect large and small businesses in South Australia as well as Aboriginal People.

For example, WMC Resources are planning a billion dollar expansion of their Olympic Dam Mine. It wants certainty about which of the two overlapping claim groups it needs to negotiate with.

On the other hand, a client of mine wishes to buy a small 5 acre parcel along the remote road that divides his properties. The land at best would have a value of $2,000.00, but the cost of negotiating an agreement under the Native Title Act and to have it certified, even without paying for the acquisition of Native Title, will be in the order of $30,000.00. Not surprisingly, the State Government does not even wish to embark on discussions.

What can be done about this? In my opinion, quite a lot. I believe that how we respond to the issues of Native Title are important to our relations with Aboriginal People.
We can start by recognising that Aboriginal People largely do not lie about their beliefs and traditions. We need to understand that their traditions and adherence to their own law were damaged by our ancestors’ behaviour and not hold this against them by alleging that they have lost their connection to the land.

Then we need to look at what Aboriginal People want, what they may get if they are lucky in the Native Title lottery and the cost of giving it to them.

My instructions from my many Aboriginal clients have been consistent from the start. Firstly, they want, for the first time, official recognition that they are the people from that land. They want the Government to recognise that they are the Dieri or Arabunna or Wangkangurru People and that a particular area is “their” land.

This is not a great ask and would cost us very little other than negotiating the boundaries with overlapping claim groups. The value to Aboriginal People would be immense.

Secondly, the people want a say in what happens on their land. They wish to be able to protect sites of significance to them. If there is to be some economic development in their land, some mining activity or such, they would like to share in the rewards.

Again, this is not an unreasonable expectation and is not one that would be detrimental to Australia’s economic development.

Aboriginal People are currently able to apply to protect sites of significance using existing State Indigenous Heritage Protection Acts or the Commonwealth Aboriginal and Torres Strait Heritage Protection Act.

As for mining companies, from my discussion with representatives of mining companies it appears that opposition to Native Title has largely evaporated. They are well accustomed to paying royalties to indigenous groups in many countries around the world and provided that they have some certainty in their operation, they can and do simply factor
indigenous royalties in as a cost of operation, just as they do Government royalties.

Thirdly, Aboriginal People want access to their land. On pastoral land in South Australia, this is already a right enshrined in legislation. Consequently, it is not a significant factor for South Australia but I appreciate that it is elsewhere.

My experience in Native Title has been that the overly legalistic nature of the Native Title Act means that it is unlikely to produce outcomes that are seen as reasonable by Aboriginal People. To many, Court outcomes will seem like a rerun of the Royal Commission with an over-emphasis on written proof.

My great concern is that if the current Native Title system fails to deliver just outcomes, it will leave an embittered group in our community who will become increasingly dissatisfied as their requests for recognition are denied.

4. CONCLUSION

The treatment of detainees at Guantanamo Bay and the treatment of Aboriginal People in this country are not so far apart. Both have been denied rights that are fundamental to all people.

Allowing the treatment of those at Guantanamo Bay to continue, and allowing our relations with Aboriginal People to go unreconciled, diminishes us as individuals and diminishes our claim to being civilised people.

The cost of rectification of these matters is not huge. The cost of not rectifying these matters and the effect that it will have on us in the future is the cost that I fear.

The challenge for us as lawyers is to ensure that the Rule of Law is applied to those captured in conflict, and to make the sure that the rights and interests of Aboriginal People are recognised and respected.
I regret that we do not have a Government that is willing to show leadership in both of these matters, for they are important to the welfare of all Australians.