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Law Council
OF AUSTRALIA

National Indigenous Legal Conference

Speech delivered by Law Council of Australia President, Mr Greg McIntyre SC, at the 2024 National Indigenous Law Conference, Melbourne (Naarm).

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Good morning everyone.

Since UNESCO declared 2019 to be the year of Indigenous languages and followed that up by making this the decade of Indigenous languages it has been my practice to acknowledge the traditional custodians in the Noongar language, the language of my hometown *Boorloo*, which is of course Perth. These words were taught to me by Emeritus Professor Len Collard, A Whadjuk Noongar traditional owner:

Kaia

Nyuny Kaditj Ngulluck Nyinniny

Wurundjeri Woi-wurrung Bunurong Boon Wurrung Kulini Boodja

Nguny burruniny quop kaditj kanya

Nitja baarl birrdiya baarl boodjah

Koora yeye Borrrdahwan

Kaia

I thank Tarwirri for organising the 2024 National Indigenous Legal Conference and giving me the opportunity to be a part of this important event.

Introduction

Today I want to talk about how the law—and in particular Australia's foundational law, the *Constitution*—has impacted First Nations peoples. I will explore our legal history since colonisation and some of the major achievements in the fight for First Nations rights and recognition—which, while

including individually big wins, have in not brought an end to the struggle. I would also like to talk with you about the role that improved civics education can play in ensuring all Australians understand our history.

Many of you will know that the Law Council's Indigenous Legal Issues Committee is chaired by eminent First Nations barrister Tony McAvoy SC and comprises multiple leading First Nations thinkers amongst the legal profession, including Professor Megan Davis, who co-chaired with me the Law Council's Voice Referendum Working Group. One of the key takeaways relayed to us by this Committee about the Voice Referendum debate last year was there is a lack of understanding by Australians about our history and our *Constitution*. In particular, there has been a failure to understand the experience of Aboriginal and Torres Strait Islander peoples and a significant misunderstanding of the role that the *Constitution* has had in that experience.

Although commonly stated during the Voice debate, it is a complete misconception that the *Constitution* has treated all Australians equally or fairly.

I don't have to tell you that Aboriginal and Torres Strait Islander peoples have been subject to colonisation, dispossession, discrimination, marginalisation, and significant breaches of human rights across multiple areas, historically and in contemporary Australia, not least in the confronting truths of stolen generations and stolen wages, the lack of protection of cultural heritage and land rights and in the treatment of persons in contact with the criminal justice and child protection systems.

These policies and practices continue to have an impact today and the road to equality for Aboriginal and Torres Strait Islander people in Australia is proving to be a long one.

I recognise that the matters that I discuss in this speech will be all too familiar to the members of this particular audience. However, in remarking upon them, I am seeking to give some effect to the Indigenous Legal Issues Committee's guidance that it is nevertheless important that the Law Council of Australia does shed light on basic concepts and events which should form part of the broader truth-telling picture, using opportunities as they arise to do so. This must form part of our ongoing civics education.

A brief history of the *Constitution* and its impact

For more than a century, one of the greatest challenges and gaps has been recognition of Aboriginal and Torres Strait Islander Peoples in Australia's founding document—the *Constitution*. The Constitutional Conventions that were held between 1890 to 1898 to determine the text of the *Constitution*, did not include representatives of Aboriginal and Torres Strait Islander peoples. And for the most part, Aboriginal and Torres Strait Islander peoples were not able to vote on the delegates to represent their jurisdiction at the Conventions.

As a result, our founding law did not reflect the interests and aspirations of First Nations communities. Rather, the provisions of the *Constitution* were premised upon the exclusion of Aboriginal and Torres Strait Islander peoples and were inherently discriminatory.

As some examples.

Section 127 excluded “aboriginal natives” from being counted in Commonwealth or state censuses. This meant that Aboriginal and Torres Strait Islander people weren’t recognised as part of the Australian population.

Section 25 allowed the States to disqualify people from voting in the elections on account of their race. This was of course used by the States over many decades to exclude many Aboriginal and Torres Strait Islander people from voting.

This exclusion was exacerbated in 1902, when the Commonwealth Parliament passed the *Commonwealth Franchise Act 1902* (Cth) which excluded Aboriginal and Torres Strait Islander people from voting in federal elections unless they were permitted to vote in local elections.

It was not until 1962, sixty years later, that the *Commonwealth Electoral Act 1918* (Cth) was finally amended to extend universal adult suffrage to Aboriginal people. But it was even then only in 1983 when Aboriginal and Torres Strait Islander peoples were treated like other Australians, with voting made compulsory.

And then there was the so-called ‘races power’ in section 51(xxvi). This gave the Commonwealth Parliament the power to legislate with respect to, and I quote, “the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws”.

As noted by Professor George Williams, Aboriginal and Torres Strait Islander people were not excluded from this section “because they were to be

protected, but because it was thought that the Aboriginal issues were a matter for the States and not the federal government".[1]

As a result of this exclusion, Aboriginal and Torres Strait Islander people were subject to multiple policies and laws put in place by state governments that have left a legacy of trauma and loss.

The 'Protection acts'—as they are erroneously known—implemented across all of the states and the Northern Territory, gave governments broad powers of control over the lives of Aboriginal people. These acts were used to forcibly separate children from their families, control employment, wages, savings and property ownership, control the right to marry and force people to live in missions and on reserves.

These protection acts, and many other legislative instruments, resulted in significant human rights abuses, intrusive control, institutionalisation, and harm. This harm was significant and has lasted across generations.

I understand that Joshua Creamer will discuss the experience of Aboriginal and Torres Strait Islander Queenslanders under these laws in more depth with you tomorrow.

What should we know about the development of Australia's Constitutional history since 1901?

Despite the discriminatory design that was inherent in Australia's Constitutional law settings, and the disruption to Indigenous law, structures and cultures that

[1] George Williams, 'Race and the Australian Constitution' (2013) 28(1) *Australasian Parliamentary Review* 4, 6.

it presented, Aboriginal and Torres Strait Islander peoples across the entire country have persevered, advocated domestically and internationally, and showcased remarkable strength, resilience and tenacity when it comes to fighting for their rights and recognition in Australia's *Constitution* and broader legal reforms.

There is much more than can possibly be included in this presentation about how Australia's Constitutional history evolved from this starting point. However, at least some key events, amendments, challenges and decisions could be better understood.

In response to the Constitutional process underway, First Nations persons marshalled early, and often, to secure better outcomes for their communities. In 1900, for example, the Aborigines Protection Society suggested that Federation offered a chance for Australia to adopt a 'comprehensive and uniform native policy' to benefit Aboriginal people across the country. Although these appeals were ignored, the demand for change grew.

In the 1930s, William Cooper and his colleagues established the Australian Aborigines' League (the **AAL**) to lobby state and federal governments on behalf of Aboriginal people. Throughout these years, Cooper gathered nearly 2000 signatures from First Nations people for a petition to the King, calling for First Nations representation in the Australian Parliament. This was an extraordinary achievement.

On 26 January 1938, 150 years after colonisation, the AAL and the Aboriginal Progressive Association, declared a 'Day of Mourning' and held a landmark

conference to draw attention to the treatment of First Nations peoples and to request full citizenship status and rights.

In 1944, the Post-War Reconstruction and Democratic Rights referendum—otherwise known as the '14 powers referendum'—was held. One of the 14 powers sought to be gained by the Curtin Government was the power to legislate for "The People of the Aboriginal Race". The referendum failed.

In the intervening period ahead of the 1967 referendum, First Nations efforts nevertheless continued in the fight against injustice and fight for equality, including under the *Constitution*.

The Bringing them Home Report in 1997 summarised this period of history, as follows:

> *Since at least the 1930s Aboriginal and humanitarian groups had been urging the Commonwealth to display leadership on Aboriginal affairs. Although the Commonwealth did not have constitutional power until 1967 to legislate in respect of Aboriginal people it could have influenced State policies by making grants of aid conditional on policy change. However the Commonwealth had been consistently wary of upsetting State sensitivities as well as committing itself to extra funding.*
>
> *This position changed after 1967…*[2]

[2] Human Rights and Equal Opportunity Commission, *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Final Report, 1997) ('*Bringing them Home Report*').

There was no single moment that sparked the 1967 referendum, but rather a groundswell of activism throughout the 1950s and 60s. The Warburton Ranges controversy in 1957 about whether Aboriginal people in the Central Desert were living in a state of destitution, the Yirrkala Bark Petitions in 1963, the 1965 Freedom Ride and the Wave Hill walk-off that began in 1966, are just some of the events that drove these issues into the spotlight.[3]

Following years of campaigning, on 27 May 1967, a proposal was put to the Australian public to make two changes to the *Constitution*:

(i) To amend s 51(xxvi) to strike out the words 'other than the aboriginal race in any State', thereby allowing the Commonwealth to make laws with respect to Aboriginal and Torres Strait Islander peoples; and

(ii) To delete section 127 entirely to ensure that Aboriginal and Torres Strait Islander peoples would be counted as part of the population.

The proposal received monumental support in every State and nationally. The 'Yes' vote was supported by more than 90 per cent of Australians—to date the highest yes vote achieved in any Australian referendum.

Despite being a significant moment in history of First Nations peoples under the *Constitution*. It is important to recognise also, what this referendum did not do.

While one of the purposes of the referendum was to allow the Commonwealth to take on responsibility for First Nations peoples, amending s 51(xxvi) in the

[3] Australian Institute of Aboriginal and Torres Strait Islander Studies, *The 1967 Referendum* (Web Page, 12 July 2024) <https://aiatsis.gov.au/explore/1967-referendum>.

way it was, may have been an error by failing to explicitly provide that the power to make laws with respect to Aboriginal and Torres Strait Islander peoples could only be applied only for their benefit.

By not doing so, this amendment may have also laid the groundwork for the Commonwealth to pass laws that impose a disadvantage. I will return to this shortly in relation to decision in *Kartinyeri v Commonwealth of Australia* (also known as the Hindmarsh Island Bridge Case).[4]

But first I would like to turn to a 1982 case in which I was involved as a young solicitor in Cairns – *Koowarta v Bjelke-Petersen*.[5]

John Koowarta was a member of the Winychanam community at Aurukun and a traditional owner of the Archer River region on Cape York Peninsula in Queensland. He challenged the Queensland Government under the *Racial Discrimination Act 1975* (Cth) after its decision to prevent the Aboriginal Land Fund from acquiring a crown lease on a pastoral property for the Winychanam people. The decision by the Bjelke-Peterson Government was based on cabinet policy at the time, which opposed ownership of large tracts of land by Aboriginal peoples.

The Queensland Government challenged the validity of the *Racial Discrimination Act 1975* (Cth) in the High Court and was defeated.

Joh Bjelke-Petersen, then Premier of Queensland Government, argued that the *Racial Discrimination Act* was not valid as the Australian Government had no power to make it. Queensland's first argument was that the race power—

[4] (1998) 195 CLR 337.
[5] (1982) 153 CLR 168.

which now applied to laws about Aboriginal and Torres Strait Islander peoples following the referendum—did not support the Act because the Act addressed racial discrimination against all people, not just the people of one particular race. On this point Bjelke-Petersen was successful, six to one.

However, the High Court found that external affairs were not limited to matters geographically external to Australia and that the domestic implementation of international obligations, in this case the United Nations Convention on the Elimination of All Forms of Racial Discrimination, forms part of Australia's external affairs, and enacting legislation within the Commonwealth pursuant to those obligations is a valid exercise of the external affairs power under section 51(xxix).

Mabo (No 1) case and recognition of native title in *Mabo v Queensland (No.2)*[6] overturning the notion of 'terra nullius' (unoccupied land prior to colonisation) and recognising the past and continuing relationship Aboriginal and Torres Strait Islander people have to Australian land.

In 1981, I was invited to a conference on the topic of 'Land Rights and the Future of Race Relations in Australia' organised by the James Cook University Student Union and the Townsville Treaty Committee to speak on the topic 'A High Court Test Case? Eddie Koiki Mabo, alongside historian Noel Loos, was a co-chair of the Townsville Treaty Committee and, following some side discussions during the conference, I received instructions to commence a test case for land rights on Murray Island.

[6] (1992) 175 CLR 1.

Starting with five plaintiffs whose vision and courage I applaud: Eddie Koiki Mabo, hisaunt Celuia Mapo Salee, brother's Fr Dave Passi and Sam Passi and Council Chairman James Rice and a committed legal team, proceedings commenced on 20 May 1982 in the High Court and resulted in the decision handed down on 3 June 1992.

My naïve hope, in pursuing the quest for land rights through the mechanism of the Meriam People's claim in the High Court, was that it would secure for this group and other Indigenous Peoples a basis for recognition and self-determination within the Australian community. This would, I hoped, go some way in providing social and economic security.

The decision in *Mabo [No 2]* was obviously momentous in many ways. But it did not quite deliver all that we had hoped, and in the subsequent decades we have seen an array of judgements and legislation which seek to determine or limit land rights in this country.

After the Mabo decision, successive Australian governments, and the courts, grappled with its impact and implementation.

In *Wik Peoples v Queensland*, which commenced before the introduction of native title legislation, the High Court considered whether statutory pastoral leases granted by the Queensland Government could coexist with native title rights.[7]

The High Court found that a pastoral lease does not confer rights of exclusive possession and therefore could to some degree coexist with native title rights.

[7] (1996) 187 CLR 1.

However, as the High Court held, if there is any inconsistency between the rights of the native title holders and the rights of the pastoralist, the rights of the native title holders must yield.

The *Native Title Act 1993* (Cth) was introduced by the Keating Government. But after the decision in *Wik* was handed down in 1994, there was much confusion.

In 1996, the Howard Government then introduced the *Native Title Amendment Bill 1997* (Cth) (also known as the '10-point plan legislation'). The stated purpose of this legislation was to provide certainty following *Wik*. However, it has been argued that the amendments made to the Act significantly weakened Aboriginal and Torres Strait Islander peoples' native title rights, effectively diminishing the rights initially recognised through the *Mabo* decisions.

This was followed by *Kartinyeri v The Commonwealth* [1998] HCA 22 (known as the Hindmarsh Island case).[8] This was a significant dispute throughout the 1990s regarding the building of a bridge to Hindmarsh Island. The then-Australian Government passed the *Hindmarsh Island Bridge Act 1997* (Cth) to remove protections granted to prevent the building of the bridge.

The argument put for the Plaintiff to the High Court was that post the 1967 Referendum, the race power could only be used for the benefit of First Nations people. This was lost, and the Court found (6-1, Kirby dissenting) that it also allowed non-beneficial laws. A signal that the *Constitution* did not provide the protections that Aboriginal and Torres Strait Islander persons were seeking.

[8] *Kartinyeri v The Commonwealth* (1998) 195 CLR 337.

The precedents established in Mabo and other land rights decisions continue to arise in more recent court judgments, which have their own implications for legislation and policy affecting the rights of Aboriginal people in Australia.

In 2019, the High Court affirmed the approach to be adopted in valuing native title compensation in the case of *Northern Territory of Australia v Griffiths*, colloquially known as the "Timber Creek" case.[9] The High Court awarded over $2.5 million to the Ngaliwurru and Nungali peoples for the extinguishment of exclusive native title rights to parts of their traditional lands and waters. This figure consisted of compensation both for economic and cultural loss. The Timber Creek decision will have increasing significance as the focus of native title claimants turns from establishing the existence of native title rights, to matters relating to compensation for extinguishment of those rights.

In 2020 the High Court In *Love* and *Thoms*,[10] considered whether Aboriginal Australians could be "aliens" within the meaning of section 51(xix) of the *Constitution*. A 4:3 majority held that Aboriginal Australians are not within the reach of section 51(xix) relating to aliens and naturalisation. Although the majority judges reached this conclusion by different reasoning, all referred to the landmark Mabo decision, the three part test of Aboriginality applied in that case of (1) descent from an Aboriginal or Torres Strait Islander ancestor, (2) self-identification and (3) recognition by the local community and the common law recognition of Aboriginal people's unique connection with their traditional lands and waters as the basis for

[9] (2019) 269 CLR 1.
[10] *Love v Commonwealth of Australia* (2020) 270 CLR 152 ('*Love* and *Thoms*').

regarding Aboriginal people as “belonging” to Australia and therefore outside the meaning of “alien”.

If you are interested, I would encourage you to read my article *Indigenous Equality: The Long Road* in the Griffith Journal of Law and Human Dignity, where I unpack in more detail, the courts’ consideration of native title rights and interests since the 90s.[11]

In that article I also briefly make the case for judicial recognition of the Crown’s fiduciary duty in relation to Australia’s First Nations peoples, as has occurred in New Zealand and Canada.

For example, in *R v Sparrow*, the Canadian Supreme Court found that the exercise of indigenous rights could be regulated, but that the “honour of the Crown” required that there be a valid objective of such legislation beyond the extinguishment of Indigenous interests.[12]

It is beyond time, in my view, that this fiduciary duty should also be recognised in Australia.

The Voice referendum and related developments

As I have outlined, Constitutional change has not provided recognition, either formal or substantive.

In an attempt to rectify this, as you are all aware, powerful First Nations leadership and painstaking community consultation over more than a decade

[11] Greg McIntyre SC, ‘Indigenous Equality: The Long Road’ (2021) 8(2) *Griffith Journal of Law and Human Dignity* 1.
[12] [1990] 1 SCR 1075.

led to the development of the Uluru Statement from the Heart which sought constitutional reforms to empower First Nations Voice enshrined in the *Constitution* and a Makarrata Commission to supervise the process of agreement making between governments and First Nations and truth-telling about First Nations history. Again, I recognise so many of you here today for your leadership on these matters.

As you may know, the Law Council had a longstanding position in support of Constitutional recognition, as guided by its Indigenous Legal Issues Committee and backed by its Directors. Our view was that the Referendum proposal put forward to the Australian people in 2023 was both Constitutionally sound, and reflected fundamental principles of self-determination guiding Australia's approach to First Nations people.

We made it clear that on our assessment, the proposal was simple, straightforward, safe and modest.

However, as we all know, the Voice did not achieve the majority it required. We recognise the clear signal given that this time at least, a majority of Australian people were unconvinced of its merits.

So where are we now?

The question is what now can and should be done to right the wrongs that First Nations people have endured at every jurisdictional level — federal, state and territory.

Pathways currently being pursued include negotiating comprehensive settlement agreements and establishing platforms for negotiating treaties.

These processes have experienced significant challenges at times, noting what is currently happening in Queensland but have also seen notable successes in Victoria and South Australia.

As mentioned earlier, the Uluru Statement from the Heart also calls for a Makarrata Commission which would supervise the process of agreement making between governments and First Nations and truth-telling about First Nations history.

The Law Council will of course continue to seek guidance on the most appropriate and informed response to these calls from its Indigenous legal and broader experts. This is a process currently in motion, through a Makarratta Working Group, as we listen carefully to our experts, and I do not propose to comment further on it while it is on foot. We are also cognisant that much work is in train at the state and territory level and do not seek to detract from these important processes.

As a more immediate action, however, one thing that has been made abundantly clear to us by our Indigenous Legal issues Committee is that the United Nations Declaration on the Rights of Indigenous Peoples remains foundational to addressing the marginalisation of First Nations communities in Australia. This document, which elaborates on the articles of core human rights treaties – as voluntarily entered into by Australia – with respect to Indigenous persons should be another key feature of any Australian civics education program.

Without a legal and policy framework based in human rights, breaches of human rights in Australia, particularly of marginalised groups of people, are likely to

remain ‘disturbingly routine’. The UNDRIP is the authoritative international standard informing the way governments across the globe should engage with and protect the rights of indigenous peoples.

Australia formally announced its support for the UNDRIP on 3 April 2009, but, more than a decade on, Australian governments and parliaments are yet to recognise and implement its standards and protections domestically in a formal and comprehensive, as opposed to piecemeal, manner. Should the Commonwealth eventually adopt a Federal Human Rights Act, the Law Council supports UNDRIP rights being in the mix. We were pleased to see that the recent Parliamentary joint committee report on Australia’s future federal human rights framework similarly recognises their importance.

A further, immediate concern to the Law Council’s Indigenous Legal Issues Committee that Australia’s full history of dispossession and disadvantage, including under the *Constitution* itself, seemingly remains untold. As I have mentioned, the role of civics education is vital and we must consider whether it is, as designed and delivered, fit for purpose.

It may, or may not, surprise many to learn that the level of civics understanding in Australia is relatively low and has not been improving. According to the 2019 NAPLAN results, 53 per cent of Year 6, and 38 per cent of Year 10 students were at or above the proficient national standard for civics education;[13] and 28 per cent of Year 6, and 24 per cent of Year 10 students in fact believed that the government determined a referendum result.[14] This is worrying.

[13] Australian Curriculum Assessment and Reporting Authority, *NAP Civics and Citizenship 2019: National Report* (2019) 23-24.
[14] Parliament of Australia, ‘Civics education: is Australia making the grade?’ (14 June 2023).

We believe, and are advocating for, work to increase civics knowledge in Australia in respect of First Nations histories and cultures, particularly as they relate to concepts and systems of law.

In the meantime, the Law Council is committed to playing its part in ensuring that the history of First Nations persons and the law in Australia is better heard and understood. We recognise, of course, our own limitations in this regard. A speech such as this can merely skate over a few different elements of this history. It can never hope to relay the real, personal underlying struggles of the peoples and communities involved in shaping, and challenging, the law. Nor should it. These stories are for First Nations communities and leaders to tell. We all need to listen carefully, and often, to these stories, as critical forms of truth-telling.

But I nevertheless encourage all Australians to inquire deeply into these stories, and learn carefully from them, without waiting for formal civics programs to be established and regardless of their stage of life. There is much knowledge which is already at our fingertips, should we care to look. We must understand our past, in order to hope for a better future.

Thank you.

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