Legal Change and Social Change

2016 National Indigenous Legal Conference

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Thank you for inviting me to address this Conference. Its important theme is 'Indigenous Recognition: Many laws, the many facets of law reform'. I want to say something about legal change and social change from an historical perspective.

As we all know, Australia is a land of many histories. There is the first history of its occupation by its Indigenous people which stretches back 40,000 to 60,000 years. That occupation is reflected in the art, the songs, the stories and ceremonies, the laws and traditions and the language of the people themselves which created and conveyed, from generation to generation, knowledge about the country and the way in which members of Indigenous societies should deal with each other.

The second history is that of the British colonisers dating back to the late 18th century and their successors who brought with them the common law of England and the concept of the Rule of Law, developed the legal systems of the colonies and, ultimately, the Commonwealth Constitution and the legal institutions which are part of our contemporary societal infrastructure today.

The third of our histories is that of the migrants who have come to Australia over the past 50 years or so creating a multi-ethnic society composed of people from 180 different countries. Something like 46% of all Australians today were either born overseas or have at least one parent born overseas.[1]

The history of Australia's first people looms over the other two. As I said when I was sworn in in 2008, it dwarfs in its temporal sweep the history which has given rise to the

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[1] Australian Bureau of Statistics, *Cultural Diversity in Australia* (21 June 2012). <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013

Commonwealth Constitution, the Constitutions of the States, the laws made under them and, indeed, the Court on which I sit.

To recognise the Indigenous people of Australia in the Constitution as the first people of the continent is to do no more than to recognise in a fuller way our own identity as Australians, for our history is part of that identity. Constitutional recognition is not about singling out one race over others for special mention. It is about acknowledging that Australia's beginnings stretch back over millennia before 1 January 1901 when the Constitution of the Commonwealth was proclaimed.

Constitutional change and legal reform in relation to Australia's Indigenous people do not come easily. Problems of social, economic and legal disadvantage seem to be intractable. Sometimes, however, pausing to look back over the last century or so reminds us that there has been movement. It tells us that law reform alone does not achieve change without changes in social and cultural attitudes and that they interact in a way that gives rise to the question — Which came first, the chicken or the egg?

In the drafting of the Constitution and the coming into existence of the Federation, there was very little if any focus on Australia's Indigenous peoples. There was virtually no reference to them in the discussion of the race power which became s 51(xxvi) of the Constitution. It was an adjunct to the Commonwealth power over immigration which was framed from the perspective of those who supported a white Australia policy.[2]

The power to legislate with respect to the 'Aboriginal race' was one of the very few powers expressly reserved to the States. In a book entitled *Indifferent Inclusion,* Russell McGregor in 2011 observed that the prevailing attitude at the time of Federation was one of resigned indifference. The Aboriginal people were deemed incapable of exercising rights of citizenship or appreciating its responsibilities. Some commentators anticipated that they would die out. There is little evidence that they were seen as having any part in the future of Australia. When the *Commonwealth Franchise Act 1902* (Cth) was proposed in the Parliament, Members and Senators took different views about whether the franchise should be extended to Indigenous people. The mover of the Bill, Richard O'Connor, later to become

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[2] Robert French, 'The Race Power: A Constitutional Chimera' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 181–85.

one of the first Justices of the High Court, accepted the exclusion of Indigenous people so that the Bill would be passed.[3] So it was that s 4 of the Act stated:

> No aboriginal native of Australia Asia Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on an Electoral Roll unless so entitled under section forty-one of the Constitution.

Interestingly, O'Connor noted that Indigenous people already possessed the State franchise on the same basis as white people in New South Wales, Victoria, Tasmania and South Australia. However, only the very small proportion of Aboriginal people who had managed to get on to a State electoral roll before 1902 had their federal voting rights protected under s 41 of the Constitution.[4] It was not until 1962 that Indigenous people gained an unqualified right to vote in federal elections under the *Commonwealth Electoral Act 1918* (Cth).[5] The last jurisdiction to grant Indigenous people the right to vote in State elections was Queensland in 1965.[6]

The conception of Aboriginal people as a doomed race informed State Government policies in the first part of the 20th century. The view was that 'full blood' Aboriginals would become extinct but that the increasing birth rate of mixed race Aboriginal people required a coercive policy of absorption to resocialise Aboriginal children as white, and to prevent further mixing between the races. This policy was pursued with most vigour in Western Australia under the supervision of the officer known as the Protector of Aborigines, Mr AO Neville. By 1948, all the States of Australia permitted Aboriginal people to be removed to reserves. There were in some jurisdictions extraordinary restrictions on what we would now regard as basic rights and fundamental freedoms.[7]

In Western Australia, by 1936 the Commissioner of Native Affairs was the legal guardian of every Aboriginal child, notwithstanding that the child had a parent or other

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3 Russell McGregor, *Indifferent Inclusion* (Aboriginal Studies Press, 2011) xx–xxv.

4 Due to the dominant view that the protection of an adult person's right to vote in federal elections was limited to an adult person who had or acquired a relevant right to vote at a State level before the framing of the federal franchise in 1902: see John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 487.

5 *Commonwealth Electoral Act 1962* (Cth).

6 *Elections Act Amendment Act 1965* (Qld).

7 See generally John Chesterman and Brian Galligan, *Citizens without Rights* (Cambridge University Press, 1997) 152.

relative living, until the child reached the age of 21.[8] It was an offence to remove any Aboriginal person from one district to another, or to any place beyond the State, without the permission of the Commissioner.[9] Aboriginal people could be removed to reserves, districts, institutions or hospitals and it was an offence for them to refuse to be so removed or so kept. The burden of proof was reversed in prosecutions for such offences, so that the Aboriginal person had to prove that the Minister did not direct his removal.[10] The Commissioner could authorise a person to 'examine any natives with a view to ascertaining if they are afflicted with disease'. The examiner could use such means as necessary to compel examination. It was an offence for an Aboriginal person to resist such compulsory examination and treatment.[11] Aboriginal people could only be employed with a permit or under a permit and agreement.[12] The Commissioner could take over the general management of an Aboriginal person's property, including selling or disposing of it without their consent.[13] Aboriginals in camps near municipal areas could be moved on.[14] Aboriginal people could not marry without the permission of the Commissioner.[15] No warrant was needed for the arrest of an Aboriginal person who offended against any provision of the Act.[16] There were special courts of native affairs established to try offences committed by one Aboriginal person against another. There was no right of appeal from these judgments.[17] These laws were a mark of their times and the culture that supported them. It is, however, only a rather negative mark of progress to be able to say that they no longer exist.

In the 1950s the policy of absorption had been replaced by one of assimilation. Russell McGregor wrote that both policies presumed the rightness of State intervention in Aboriginal lives and both were concerned with building national cohesion.[18]

The assimilation policy marked the entry of the Commonwealth into Indigenous affairs. Under Paul Hasluck, who became the Commonwealth Minister for the Territories in 1951, Aboriginal 'citizenship', meaning the enjoyment of equal rights and responsibilities

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8 *Native Administration Act 1936* (WA), s 8.
9 Ibid, s 9.
10 Ibid, s 12.
11 Ibid, s 16.
12 Ibid, s 18.
13 Ibid, s 34.
14 Ibid, s 40.
15 Ibid, s 45.
16 Ibid, s 54.
17 Ibid, s 63.
18 McGregor, above n 3, 17.

with other Australians, was seen as a new priority. Legislative changes during this period removed some of the worst provisions from the previous 'absorption era' legislation. But they were replaced with broad executive discretions which allowed State and Territory governments to continue with the same practices if they so wished.[19]

Although the concept of assimilation reflected a commitment to formal equality for Indigenous people, it did not necessarily result in substantive improvements in their lot. The Commonwealth had no power to legislate with respect to them under the Constitution before 1967. Although Indigenous people had received citizenship on the same terms as other Australians following the enactment of the *Nationality and Citizenship Act 1948* (Cth), it did not affect the restriction of their civil and political rights under State law. The Attorney-General, Garfield Barwick, in a letter written in 1959 to Gordon Bryant, the member for Wills, said:

> You are quite right to think that aborigines born in Australia are Australian citizens by virtue of the Nationality and Citizenship Act 1948–55. This citizenship is the only national status which people have in relation to Australia though by dint of our relationship to the Queen and to the British Commonwealth of Nations Australian citizens are also British subjects.

He added:

> Perhaps the best way I can express this for you is to say that the status of the aborigine in relation to nationality and citizenship is determined by the Federal Statute. Being born in Australia, and not being within any of the groups which the Act excepts, the aborigine is an Australian citizen. But to ascertain what rights Australian citizens, including aborigines, have and to what disabilities they are subject, it is necessary to look to the general law.

On 7 March 1966, the Commonwealth Conciliation and Arbitration Commission decided the *Equal Wages Case* which provided formal wage equality for Aboriginal pastoral

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[19] Chesterman and Galligan, above n 7, 167.

workers in the Northern Territory.[20] The Commission foresaw some of the impacts of its decision, and said:

> Although what we do in the exercise of our powers may result in social changes, and may result in aborigines moving from one kind of life to another, we are not social engineers nor can we deal with the whole spectrum of aboriginal life. We can do no more than to attempt to achieve a just result in an industrial situation. We will not ignore the consequences of our acts, including what may happen to aborigines employed on stations, but we cannot attempt to mould a policy of social welfare for these people in the way a Government can.[21]

The Commission acknowledged the pastoralists' submission that there were many Aboriginal people on cattle stations who, for a variety of reasons, were unable to perform work in a way normally required in an economic society. The Commission agreed that the problem of assimilating or integrating those Aboriginal people into wider society was a difficult one with many facets. In the end however, it retreated to the limited nature of its function. It observed that if any problems of Aboriginal welfare, whether of employees or dependents arose as a result of the decision, the Commonwealth Government had made clear its intention to deal with them. It recognised that its decision would cause dislocation, social and economic, to Aboriginal people and so it actually suspended the operation of its variation to the relevant Award until 1 December 1968.[22] Bill Bunbury has described the almost immediate result as large scale unemployment and in many cases dispossession. Town authorities and State and Territory governments were not well prepared for the influx of formerly self-sufficient Indigenous people into the towns following that decision.

The next major legal change was the referendum of 1967, which removed the carve-out of the 'aboriginal race' from the race power. The effect was to grant power to the Commonwealth to legislate with respect to Aboriginal people. There was, however, no immediate change in terms of policy or social outcomes. Prime Minister Harold Holt

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20 *Variation - Cattle Station Industry (Northern Territory) Award* (1966) 113 CAR 651.
21 Ibid, 656.
22 Ibid, 670.

announced in parliament that it was his intention essentially to maintain the status quo and that remained Commonwealth policy until the election of the Whitlam Government.[23]

Bain Attwood and Andrew Markus tried to reconcile the Indigenous perception that they obtained rights in 1967 with the failure of the referendum to give rise to any lasting changes immediately after its passage. Nevertheless, there seems to have been a significant psychological impact as a result of the referendum. There were stories of a new found Aboriginal public confidence.[24] However much more was to come.

In 1975 the *Racial Discrimination Act 1975* (Cth) was enacted. And shortly after that, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The latter Act was the result of recommendations of the Woodward Royal Commission, which had been established following the failure of a claim for recognition of indigenous customary law in the Northern Territory in the *Gove Land Rights Case*.[25]

There has been debate about whether the *Racial Discrimination Act* itself has assisted in achieving positive social outcomes for Indigenous people. Statistical inequality of Indigenous people is apparent on any number of indicia including employment, income, housing, education, health and imprisonment. Outcomes in those fields have not generally improved since the enactment of the *Racial Discrimination Act*. Nevertheless, the Act was of importance when the High Court recognised native title because it prevented State Governments from dealing with native title rights differently from the way in which they would have dealt with equivalent non-indigenous property rights.[26]

The recognition of native title and the enactment of the *Native Title Act 1993* (Cth) itself has had a very significant impact, albeit over a protracted period since 1993. There are ongoing debates about the extent to which it has had a positive impact in improving the economic and social conditions under which Indigenous people who are able to claim native title rights and interests live. Undoubtedly, through the claims process, it led to a great remembering of Indigenous histories right around Australia by Indigenous communities themselves and through examination of colonial historical records relevant to the occupation

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23 Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2nd ed, 2007) 60–3.

24 Ibid, 57, 69.

25 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

26 See *Western Australia v Ward* (2002) 213 CLR 1.

of particular areas of land. The depth and richness of Australian Aboriginal history and culture and the existence of their laws and traditions was brought to the attention of the non-indigenous community in a way that it had never occurred before.

The cultural impact of grants of native title has been the subject of considerable research. However there is a lot less literature on its social impact on Aboriginal communities. In 2004, Ciaran O'Faircheallaigh[27] noted that there had been no systematic study of the effects, negative or positive, of agreement making processes, with mining and other interests, on native title groups or Indigenous communities. Where he and his fellow researchers had been able to gain access to those agreements, he found a great variability in outcomes. Some gave Indigenous groups 'substantial economic benefits and innovative provisions to minimise the impact of commercial activities on their traditional lands.'[28] Some seemed to have worsened the position of Indigenous parties. There was little available data on how effectively the agreements had been implemented and of their final impact on the economic, social and cultural wellbeing of recipients and on social relations in Indigenous communities.[29]

Marcia Langton and Odette Mazel analysed outcomes for indigenous communities located near mineral deposits through the framework of what they called the 'resources curse' and the 'paradox of plenty'. They drew an analogy with the failure of developing countries to make policy that would ensure an equitable distribution of resource derived wealth to upgrade levels of service delivery and basic infrastructure in resource rich areas. They said:

> It is clear ... that while the right to negotiate under the Act underlies significant opportunities for indigenous people in remote areas, such as the Pilbara, low levels of educational attainment, work readiness and economic participation in remote and rural areas pose difficult challenges for companies seeking to engage indigenous populations in economic participation to ensure measurable improvements in indigenous well-being.[30]

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27 Ciaran O'Faircheallaigh, 'Native Title and Agreement Making in the Mining Industry: Focusing on *Outcomes for Indigenous Peoples' (2004) 2 Land, Rights, Laws: Issue of Native Title 1*

28 Ibid 6.

29 Ibid 10.

30 Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom' (2008) 26 *Journal of Energy and Natural Resources Law* 31, 57.

There have also been problems with corporate governance with prescribed bodies corporate which hold on trust native title rights recognised under the Act. This is an ongoing issue.

In my time as President of the National Native Title Tribunal, which covered the period from 1994 to the end of 1998, I saw many aspects of Indigenous societies throughout Australia and got a sense of the working of the law in those early days. There was no doubt that it worked a very significant change in the psychology of relationships between Indigenous and non-indigenous interests. Whereas under the system of statutory land rights grants there was a sort of grace and favour character to them, native title claimants brought asserted rights to the bargaining table. My impression was that notwithstanding the chronic social and economic disadvantage, including the appalling incarceration rates of Aboriginal people in our society, there were good news stories and positive change emerging out of the native title process.

It is at the level of social and economic change that Indigenous Australia and the rest of Australia now face their greatest challenges. New approaches must involve consultation and integrated responses in which Indigenous communities take primary responsibility. We have been looking for solutions to the problems of Indigenous disadvantage for a very long time. The law is part of the answer but only part of the answer. It can only play a positive role to the extent that it either drives or is supported by social, economic and cultural change.