

**Chequered Progress: Recognition of Indigenous Rights, Laws and
Authority in Australia**

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I thank the organisers for the invitation to speak here today and the opportunity to make my first visit to the beautiful state of Hawaii. Where you stand depends on where you sit, as the Dean said last night at the reception, so to be clear about what my seat looks like: I am a non-Indigenous lawyer from Australia and I am lucky enough to have spent a significant part of my professional life working for Aboriginal community organisations. More recently I have had the opportunity to work with Aboriginal and non-Aboriginal colleagues on a research project looking at the idea of a modern treaty-making between Indigenous peoples and Australian government. I teach and research in the areas of constitutional law and Indigenous legal issues at the UNSW in Sydney.

I called my talk ‘Chequered Progress: Recognition of Indigenous Rights, Laws and Authority in Australia’ and I’m going to look in turn at constitutional arrangements, land, political institutions and service delivery. My basic argument is that the absence of any constitutional recognition of Indigenous peoples in Australia leaves any hard-won gain they may have

made extremely vulnerable to changes in the political wind. It also means that the recognition of Indigenous rights, laws and authority to the extent it exists, is very piecemeal.

Constitutional arrangements

The Australian Constitution simply makes no reference to the Aboriginal peoples who have occupied the continent in diverse ways for more than 50,000 years.

Nor does it mention the other Indigenous people of Australia, the Torres Strait Islanders whose traditional lands dot the sea between the top of the State of Queensland in northeast Australia and the nation immediately to our north, Papua New Guinea.

There is no federal Bill of Rights in our constitution, or even at a statutory level. There is no constitutional guarantee of non-discrimination or equal protection. In fact there is a constitutional power for the federal government to make laws based on racial distinctions. And according to our High Court, that apparently includes laws that adversely discriminate against people on the basis of their race.

The capacity for government to discriminate against racial groups was seen as essential by the politicians of the day, when the original Constitution was being debated. The proposal to include an equal protection clause in the draft Constitution was explicitly rejected on the basis it would for example prevent discrimination against Asian people on the goldfields. Another overriding priority was the White Australia Policy, designed to exclude people of

colour seeking to enter Australia. It was one of the first pieces of legislation to pass through the new Commonwealth Parliament in the early 1900s.

Many Australians are proud of the stable democratic political system we have had in Australia for a long time. It is impossible to ignore, however, that racism was powerfully present during the constitutional design phase of the new nation.

In its original form, there were two references to Aboriginal people in the Constitution. One said that Aboriginal people would not be counted in the national census upon which electoral apportionment was based: a pretty powerful message of exclusion. The other mention was also exclusionary, though in a slightly more complicated way.

The races power that was allocated to the federal legislature, that I mentioned earlier, specifically excluded coverage of Aboriginal people. Now, given the patently discriminatory intent of that power, that might look like a positive for Aboriginal people. Of course it was no kind of de facto equality guarantee. Instead it was a concession to State politicians that *they* would retain control of their Aboriginal populations, without interference from the federal government.

That Constitution took effect on 1 January 1901 and brought together the existing colonies in a federated nation of States. But of course the British Crown had established these colonies up to a century before and more. At this constitutional moment in the 1890s Indigenous peoples were not

involved, but of course that continued a process of legal exclusion that had been going on since the inception of colonisation.

For Australia is unusual, almost anomalous, amongst the nations originally colonised by Britain in never having made a treaty or treaties with its Indigenous peoples.

Precisely why that is so is of course debated, especially given the propensity for Britain to make treaties with local peoples both before and after 1788. The acknowledgments in the Royal Proclamation of 1765 precede the establishment of British administration in Sydney by about 20 years. The Treaty of Waitangi with Maori post-dates it by about half a century.

One explanation put forward by historian Henry Reynolds that I think carries some weight is the role played by Joseph Banks. The respected scientist who travelled up the east coast of Australia with Captain Cook in 1770 gave evidence back in Britain to a parliamentary committee that apart from a few people on the coast this continent was essentially deserted. To politicians eager to solve the problem of overcrowded prisons by dumping convicts in a far flung colony through a straightforward land grab, this was convenient reassurance.

British authority was asserted over half the continent by the raising of a flag and the reading of a proclamation at a small gathering of recently landed troops, convicts and officials. Despite its obvious disregard for factual reality – the presence of functioning Aboriginal polities or societies across the country – that first symbolic act had a telling result. It has made the

effective assertion by Indigenous peoples of sovereignty, of nationhood (domestic dependent or otherwise) a legal anathema in the eyes of our courts and government ever since. We have no treaties between government and Indigenous people and we have no common law recognition of internal political autonomy akin to the Marshall trilogy.

I am going to round out this quick constitutional survey with a couple of observations about 20th Century developments. The Australian Constitution, as you may know, can only be changed by popular referendum, with a majority of voters in a majority of States. Only 8 of 44 proposals have succeeded.

The one which attained by far the highest level of public support was the so-called Aborigines referendum. In May 1967 90% of Australian voters endorsed two amendments for which Aboriginal people and their supporters had campaigned for more than a decade:

1. the repeal of the provision that said Aboriginal people would not be counted in the census.
2. the removal of exclusionary words in the races power. Putting it another way, Aboriginal people were brought within the scope of the Commonwealth Parliament's power to make special laws for the people of any race.

Given its racist origins, that may not seem much of a step forward, but the expectation (borne out over subsequent decades) was the Commonwealth

would step into Indigenous affairs at the national level and enact beneficial or rights-protecting legislation specific to Aboriginal people.

So here was a constitutional moment in Australian history where Indigenous activism paid off and the nation seemed to support Aboriginal aspiration. But the pay-off certainly has to be kept in proportion. The amendments did not produce constitutional protection for the inherent or treaty rights of Aboriginal peoples, as Canada's constitutional moment did at the start of the 1980s.

It simply converted the Constitution into a foundational law that makes no reference at all to the first peoples of the continent, despite their occupation for hundred of generations before Europeans arrived.

Suggestions for reform have been made, to address this big hole at the centre of our basic law. Notably we had a formal national process of reconciliation during the decade leading up to the Centenary of Federation in 2001. The recommendations at the end of that process were for a new preamble to the Constitution, the establishment of a domestic treaty- or other agreement-making process, a guarantee of non-discrimination and other changes. None of this occurred and constitutional change remains very much part of what is referred to in Australia as Unfinished Business.

Land

I now want to turn to land. Hand-in-hand with the unilateral assertion of Crown sovereignty in 1788 went the assumption that colonial authorities

could seize land and begin to grant it to free settlers and freed convicts as the colony pushed out from its very modest beginnings in Sydney Cove.

That assumption is now associated with the term *terra nullius* (land belonging to no one) drawn from international law. The mindset if not the explicit doctrine of *terra nullius* underpinned the building of a nation and its economy for 200 years. It was of course an appalling fiction, to legitimise a dispossession that was often violent and everywhere disruptive if not destructive to local Indigenous societies.

The population estimate for the Australian continent in 1788 is between 300,000 and 1 million people. The hundreds of land-owning groups, often language-related, across the country represented a rich diversity of polities with a deep cosmology, complex kinship networks, authority structures and the technical and economic know-how to survive in a frequently very harsh environment.

Under pressure from humanitarian sentiment in the Colonial Office in London, local authorities began creating reserves so that Aboriginal people at the frontier could have some respite from the depredations of colonial expansion and some land from which to draw subsistence.

But no legal rights attached to the reserves. They could be and typically were revoked unilaterally and over the objections of the local people.

The first time Australia recognised the inherent rights of Aboriginal people to land was by statute in the State of South Australia in the late 1960s.

The high water mark in the land rights struggle was the enactment of Commonwealth legislation under the revised races power in 1976.

The Northern Territory Land Rights Act, as its name implies, operates only in the internal largely self-governing territory in the central north of Australia. Here, about a quarter of the population is Aboriginal, about ten times the national average of around 2.5%. The amount of land returned to traditional ownership under that law is nearing 50%, though it must be said it is overwhelmingly in arid regions of little interest to anyone else except mining companies who find commercially viable deposits.

It is seen as the high water mark not only for the amount of land regained but also for three other factors:

1. successful claim or transfer results in a grant of inalienable communal freehold title.
2. owners gain strong-ish rights regarding access to and use of the land by others.
3. a well resourced infrastructure of Aboriginal land councils that oversee claims, land management and development proposals, and have developed significant political power in their own right.

In the constitutional politics of the Northern Territory and the nation, the leverage provided by law like that dealing with something as fundamental as land is very significant. Perhaps not surprisingly, given the political

orientation of the current government, we are in the thick of a debate over unilateral changes proposed by the government to the Land Rights Act.

The other States, with the notable exception of Western Australia (a huge State with massive mineral resources) all have their own statutory land rights regimes, though the details and scope varies.

The common law picture on land is a little different but also has a constitutional significance. After fighting for more than a decade through the courts, Eddie Mabo and other people from the island of Mer in the Torres Strait won a famous land rights victory in the High Court in 1992.

In fact Australia was just belatedly catching up with common law world in recognising that the acquisition of sovereignty did not automatically extinguish the traditional rights to land enjoyed by local Indigenous peoples.

In *Mabo v Qld (No 2)* the High Court confirmed by a 6:1 majority that the doctrine of native title applied in Australia. The possibility that *Mabo* might achieve significant land redress on a national basis has been severely curtailed by two things in the years since 1992:

1. major amendments to the federal Native Title Act in 1998, which the relevant UN monitoring body said were discriminatory and breached Australia's obligations under the Racial Discrimination Convention; and
2. extremely restrictive interpretations of native title law by a much more conservative High Court in 3 test cases decided in 2002.

Some groups have achieved substantial gains of quasi-freehold title especially in Western Australia; others have achieved recognition of some co-existing rights, usually of non-economic value. Many groups have been disappointed. Either the legal doctrines of 'traditional connection' and 'extinguishment' lock them out entirely from the native title system, or they are becalmed in the midst of a legalistic and highly expensive process.

In terms of land rights *Mabo* has created a very mixed legacy. But I wanted to mention its constitutional significance. At common law *Mabo* recognised a fresh source of Australian law: the systems of traditional law and custom through which connection is expressed and by which rights are allocated within the group.

In other words Australian judge-made law recognised and gives legal effect to the authority structure within Aboriginal societies. In 2002 the High Court did its best to suppress the political potential present in that aspect of *Mabo*. But I share the view that the logical implications of *Mabo* and its recognition of traditional authority have yet to work themselves out in our legal system.

The High Court for the moment has made clear, however, that the courts will not be a promising arena in which to develop these ideas in the foreseeable future.

Political institutions and service delivery

I turn then to political institutions. In particular I want to briefly discuss ATSIC - the Aboriginal and Torres Strait Islander Commission, its abolition

and the substantial changes to Commonwealth policy and administration in Indigenous affairs.

ATSIC was a very unusual beast. It was established in 1990 under federal legislation, with 2 arms: an elected body of Indigenous representatives at the regional and national level. And an administrative arm responsible for policy and some service delivery in Indigenous affairs. It was abolished by the Federal Government earlier this year. The story of its demise is too complex to go into here.

The important point is that it was an experiment in Indigenous people having an elected representative voice inside the institutions of government, a capacity for making policy and some limited resources to implement it.

ATSIC was widely criticised within Indigenous communities as an imposed structure, lacking sufficient legitimacy. It also had its many critics in the wider Australian community. These latter critics often ignored the government failures for which ATSIC with its limited mandate and budget was made a scapegoat.

Anyway with ATSIC now abolished, the institutional void for Aboriginal and Torres Strait Islander peoples has become very obvious very quickly. The National Indigenous Council – a body of 14 Indigenous people with advisory functions only and hand-picked by the Minister – is as far as the government is prepared to go at the national level.

The degree to which pressure has come off government is obvious. To take one example: The Attorney-General recently announced a major national review of the native title system. Neither the review team nor its Steering Committee includes a representative of the Aboriginal or Torres Strait Islander community. It is hard to imagine that kind of basic disrespect being possible while ATSIC was in existence.

On the service delivery side, since the abolition of ATSIC major administrative changes have been made to mainstream public service departments. There is a loud rhetorical commitment to ‘joined up government’, agreement-making and partnerships and the rejection of one-size-fits-all solutions.

Of course the rhetoric and restructuring has been viewed with deep scepticism by many – even as some recognise the potential good that might also come. The key ground for scepticism, apart from the Commonwealth Government’s track record in Indigenous affairs, is the institutional vacuum created by the abolition of ATSIC. By discarding any agenda for constitutional reform or even resourcing the organisation and consolidation of Indigenous priorities and participation through regional and national bodies, the Commonwealth puts a basic question mark over its reforms.

How can the so-called shared responsibility agreements which are the centrepiece of its new arrangements be negotiated in a situation of gross bargaining inequality?

For agreements to stick, for communities to carry out their share of responsibilities under these agreements, they need to be seen as fair and legitimate. There seems to be little confidence of achieving that at the moment amongst the Indigenous people I hear talk about SRAs. And the good structural reasons for that view I think are obvious.

Before and during ATSIC a lot of Indigenous political campaigning was carried forward by community organisations like Land Councils and Aboriginal Legal Services. The potential for these organisations to give powerful expression to political sentiment is being threatened. Professionalisation of legal and land claim services is of course important to the Indigenous people these organisations are set up to serve.

But that process has been driven by the government financier, through increasingly onerous performance agreements, statutory obligations and tendering out processes.

These originally community-based organisations are being significantly altered and over time one of the important institutional outlets for pent up political sentiment is being potentially choked off. That anyway is a forgivable and widely held interpretation of the intentions of at least some within the Commonwealth government.

As you may have gathered, there is a widespread sense of fear and pessimism amongst Indigenous people and their supporters about the turn Australia has taken on Indigenous issues over the last few years. Many

people I think feel they are flat out defending past gains against fairly constant pressure on many fronts simultaneously.

It may be that the renewed focus on governance and economic development, on tackling substance abuse and welfare dependency, on shared responsibility agreement-making with 'joined-up government' will create an all important platform for future gains. It may be that out of the institutional vacuum, more legitimate governing arrangements might spring from the ground up.

But the enormous constraints within which Indigenous political identity can be expressed and promoted is more obvious now than it has been for decades.

Which prompts many to return to the basic hole at the centre of our constitutional system and the absence of a treaty or some other fundamental recognition of Indigenous authority and the need for a principled co-existence.

Recently Patrick Dodson, a senior Aboriginal leader from the Kimberley in northwest Australia returned to the idea of a national compact, treaty or agreement. In a speech to the National Reconciliation Workshop in Canberra in May this year he said:

'Prior to 1788 we were a sovereign people. The British came with their legal lie of terra nullius and took possession of our lands without our agreement or

consent, although specifically instructed to the contrary by the Imperial government.

This did not stop the colonisers from dispossessing us and subjugating us to their rules and to their version of history. They set up regimes and institutions that would condemn us to disadvantage and dependency on their largess and cold charity. We were granted no recognition in the British statute passed in 1901. The Statute recognised the Federation and formed the basis of the

Constitution for this emerging Nation. But it is based upon a lie – the lie of “Terra Nullius” No people in this land and land that belonged to no one.

This historical injustice and denial of our Indigenous people has diminished us as a nation. This will continue, until as a nation we have the courage to acknowledge the injustice that has been wrought upon an Indigenous people with undeniable rights to prior sovereignty. We must engage in a just negotiation of the Unfinished

Business that exists between us in order to achieve a just Settlement followed by National Reconciliation.

It is not possible to sustain true reconciliation without justice – without recognising and righting the wrongs of the past. This Settlement of Justice and National Reconciliation must be built upon a constitutional pillar that will become the foundation stone of our future relationship. The stone of this pillar must be like a hard granite polished by negotiation and agreement that will withstand the ravages of time and change.

This pillar must be the point of reference for all the things that will transpire between our peoples into the future. There should be no part of our relationship excluded from its design. The points of dispute between us today that are considered too difficult to resolve and have divided us in the past must be transformed into the steel reinforcement in this foundation of our new relationship.

There must be negotiation between us that will establish a just outcome for Aboriginal people - that will allow us as Australians to stand before the world and announce that we have resolved and reconciled the differences of our past, although belatedly and that we as Australians have laid a new foundation that can hopefully be celebrated in a National Agreement or in the substance of our constitution.

One that is now based upon principles of justice, good governance and a vision for a shared national destiny.'