



**Co-existing Sovereignties?  
Reflections on the  
13<sup>th</sup> National Indigenous Legal Conference**

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Distinguished guests, conference organisers, speakers and delegates.

Thank you for the kind invitation to address you this evening to offer some reflections on this, the 13<sup>th</sup> National Indigenous Legal Conference. Thank you Richard Walley for your generous welcome to country, both today and yesterday. I pay my respects to your elders and all the elders of the Whadjuk people of the Noongar nation, past, present and emerging and acknowledge their continued stewardship of this land. May I also acknowledge the many Aboriginal people who are here tonight who have travelled from around Australia to lend their voices to the conversation over the last two days.

I especially thank the many speakers from whom I have had the opportunity to listen to, and learn from, over the course of the conference. While I was not able to attend all of the addresses, those which I was able to attend displayed a richness and diversity of thought that will provide much food for thought and reflection in the weeks and months to come.

For now, I want to offer some brief reflections, drawn from listening to the speakers at the conference, on the theme of sovereignty and, in particular, on the variety of ways in which that word has come to be used.

Let me start with a quotation from the *Uluru Statement from the Heart*, quoted by our first speaker, the Hon Robert French AC:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed

it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

*This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.*

Two things struck me about this quote.

The first was how sovereignty, as a spiritual notion, was tied to relationality and relationships – to one's ancestors and to the land itself. I will return to this idea later.

The second was something remarkable in the final sentence:

"[This sovereignty] has never been ceded or extinguished, and co-exists with the sovereignty of the Crown."

The statement goes on "How could it be otherwise?"

What struck me as remarkable in this sentence was not the statement that the spiritual sovereignty had not been ceded or extinguished. It was the statement that it "co-exists with the sovereignty of the Crown".

Those words may, in generations to come, be seen as something of a watershed. Namely, that a statement from Indigenous leaders, addressing what they regard as meaningful recognition of their people in the Australian *Constitution*, should contain within its terms, an express recognition of the sovereignty of the Crown, the legal symbol of the colonising authority, and an acknowledgement of co-existence with it. It is expressly **not** what Sir Anthony Mason in *Coe v The Commonwealth* (1993) 118 ALR 193 at 200, described as an assertion of sovereignty "adverse to the Crown" and, thus not one necessarily at odds with Australian law.

And indeed, a moment's reflection will tell us that, even within the confines of Australia's existing constitutional law, a wide variety of notions of sovereignty already operate - sometimes in harmony and sometimes in creative tension.

The sovereignty of the Crown, for example, is not the only notion of sovereignty we employ in Australian constitutional law. From the earliest days of Federation, for example, side by side with the sovereignty of the Crown, have sat notions of popular sovereignty. In 1901, Inglis Clark said, of the Australian *Constitution*,

"Every community of men [and women] is governed by present possessors of sovereignty and not by the commands of men [and women] who have ceased to exist. But so long as the present possessors of sovereignty convey their commands in the language of their predecessors, that language must be interpreted by the judiciary consistently with a proper use of it as an intelligible vehicle of the conceptions and intentions of the human mind, and consistently with the historical associations from which particular words and phrases derive the whole of their meaning in juxtaposition with their context.

If the present possessors of sovereignty discover that the result so produced is contrary in particular cases to their will in regard to future cases of a like character, they will amend the language which they previously retained as the expression of their will. "

Of course, it is according to this constitutional theory that the "present possessors of sovereignty" would be asked to vote on any referendum proposal in relation to Constitutional recognition of Aboriginal and Torres Strait Islander peoples.

Nine-five years later, McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140 at 230, said the following:

"Since the passing of the *Australia Act* (UK) in 1986, notwithstanding some considerable theoretical difficulties, the political and legal sovereignty of Australia now resides in the people of Australia."

And 15 years after that, six judges of the Court (including McHugh J), spoke of sovereignty in Australia being "shared" between the Commonwealth and the member States of the federation<sup>1</sup>. That Court also included Gleeson CJ, who of course went onto become a member of the Referendum Council.

And so we already have a variety of notions of sovereignty that serve different purposes in different contexts in the law and which can be said to be "shared" and to "co-exist". And as McHugh J said, this state of affairs exists and serves us well, notwithstanding that it may have "considerable theoretical difficulties".

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<sup>1</sup> *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [65].

How much different, we need to ask ourselves, constitutional lawyers and citizens alike, is the notion of a further co-existent spiritual sovereignty co-existing with the Sovereignty of the Crown?

Of course, not all Indigenous Australians do recognise the legitimacy of the sovereignty of the Crown, or the other expressions of legal or political sovereignty in the Australian *Constitution* that I have referred to.

Nevertheless, the *Statement from the Heart*, with its recognition of co-existence with Western notions of sovereignty, makes clear that what is called for in the statement is not division or separation but, rather, a "fuller expression of Australia's nationhood".

As the diversity of views reflected in this week's conference make clear, there will be ongoing dialogue, conversation and even debate about what this might mean, and what form it should take, if it should take any form at all. Those are not matters in relation to which a judge should pre-empt the views of the Australian people. But what should not be gainsaid, may I suggest, is the generosity of spirit that comes with that word "co-exist".

It is also a statement of historical fact, an act of truth-telling. In the course of discussion at the conference Professor Dennis Egginton remarked that, while things might have been different had the world been flat and Captain Cook not made it to Australia, "we've moved on". We are here now, and the task is to

advance our humanity in the here and now. What I took from Professor Eggington's remark was this: that our history, both colonial and national history and their impact upon the much longer indigenous history of this land, are the reality that we have; as unavoidable as the fact that the world is round.

That reality is what it is; it must be acknowledged and its continuing legacy faced up to. But, as much as we might like the past to have been different, we are here now, with that reality.

It is what we do about it now that is most important.

And, as Professor Megan Davis reminded us in her keynote address, the future does involve a "what if?" question. It requires imagination and it requires us to act "as if" real change is possible.

And our imagination has to extend to us asking what we mean by sovereignty more broadly. Is it, as the dialogue between Tony McAvoy SC and Professor Irene Watson this morning demonstrated, about power or is it about authority? And if it is about authority, authority over who or what?

Reflecting on this, my mind turned to the song Joel Davis and Ed Leis sang for us yesterday, and Richard Walley's reminder of the importance of our stories. There is a sovereignty in our songs and our stories too. These, too, surely have an authority that must be respected.

And then, perhaps most challenging of all (at least for me), coming from Professor Watson, is the sovereignty of questions. Professor Watson's address in many ways took the form of a litany of questions, which go to the heart of the "considerable theoretical difficulties" surrounding our notions of power, authority, recognition and reconciliation.

Who has the most to gain from Aboriginal constitutional recognition?

Who will be recognised?

These questions and other questions, surely have an authority – a sovereignty - that must be respected.

The most difficult of which, for someone like me, is when, as Professor Watson put it, we "turn the gaze to the State" and ask for its source of authority. As a person who, through an act of the State, has been given certain power and authority, this is a considerable challenge. What is the bedrock of one's own authority?

And so I return to the first thing that struck me about the opening quote from the *Statement from the Heart*: how sovereignty, as a spiritual notion, was tied to relationality; in that case the relationship with the land and its people over time. All our authority, our different notions of sovereignty, ultimately come from somewhere else; from some relationship or other. Even the sovereignty of the Crown, in its purest form, was expressed to come from Divine right. It is only

the isolated so-called "sovereign citizen", with no legal or social ties to any other person, that is truly incoherent.

And relationships require mutuality. They require trust and generosity on both sides. They require the space to pose questions, sometimes very difficult questions, about how notions of sovereignty, in all its variety of forms can be worked out.

Who will be recognised?

Perhaps we all will.

Perhaps that quiet act of recognition in the *Statement from the Heart* is the extended hand towards *mutual* recognition.

Thank you for your time.