

source of law in Australia, the Australian Constitution is a critical component of Australia's governance framework. Since its inception, the Constitution has contained overt references to race that have had a negative impact for Aboriginal and Torres Strait Islander peoples. Despite the amendments during the 1967 referendum, the Constitution fails to adequately represent and recognise Aboriginal and Torres Strait Islander peoples.¹⁷

The most obvious example of deliberate disempowerment, for reasons of control and racism, is the Northern Territory Emergency Response. However, systemic racism is also evidenced in the results of a number of coronial inquiries over the years. In his presentation on coronial reform, Professor Ray Watterson referred to excerpts of coronial reports and highlighted the repeated usage of phrases such as 'communication breakdown' 'system failure' and 'avoidable and unfortunate deaths'.¹⁸

In the context of these critical issues and others I found myself thinking about the broader context of those Aboriginal and Torres Strait Islander peoples who are fighting for recognition of native title or who are trying to make sense of what their native title means. Given the context of lack of control and systemic discrimination, native title is perhaps all the more important because it has the potential to be empowering and restorative. Despite this potential, at times, the current native title system seems to have the opposite effect. Although Justice Mansfield, in his presentation about the current state of native title was very optimistic,¹⁹ a more realist assessment was made by Kevin Smith, Chief Executive Officer of Queensland South Native Title Services. In Kevin Smith's view, the recent amendments present a lost opportunity. This lost opportunity is all the more

¹⁷ At the 1967 referendum both sections 51(xxvi) and 127 were amended to remove overt references to Aboriginal people. However, section 25 implicitly recognises that a State can disqualify people of a particular race from voting. For more see, G Williams, '[After the Apology: Recognising Indigenous Peoples and their Rights in the Australian Constitution](#)', presentation at the National Indigenous Legal Conference 2009, Adelaide, 24 September 2009.

¹⁸ R Watterson, '[Coroners and Indigenous death](#)' presentation at the National Indigenous Legal Conference 2009, Adelaide, 24 September 2009. See also Australian Coronial Reform Working Group, '[Australian Coronial Reform – The Way Forward](#)', Australian Coronial Reform Working Group, 2009.

¹⁹ The Hon. Justice Mansfield, '[Native Title – Where are we now?](#)', presentation at the National Indigenous Legal Conference 2009, Adelaide, 24 September 2009.

concerning given the broader context of Indigenous affairs in Australia.

There is still a long way to go before self-determination, sovereignty and non-discrimination for Aboriginal and Torres Strait Islander peoples. However, the presentations at the 2009 National Indigenous Legal Conference highlighted that these issues are still very much on the national agenda.

Observations from the National Indigenous Legal Conference - Water and Native Title

By Ingrid Hammer, Research Assistant NTRU

One of the concurrent sessions held at the 2009 National Indigenous Legal Conference was on the topic of Indigenous rights in water. Associate Professor Poh-Ling Tan from Griffith Law School and Solicitor, Ms Virginia Falk spoke of the complexity of water rights under the National Water Initiative (NWI), State and Territory regimes and how native title rights and interest are accounted for.

Incontestably, water is the buzz word flying around the government and private enterprise at a rate of knots. Climate change, water rights, irrigation, licences and natural flows are all catchphrases that dominate the headlines but the rights and interest of Indigenous people receive comparatively little exposure.

Poh-Ling Tan began the session by outlining the NWI and the situation of Indigenous rights under the scheme. What greatly surprised many participants was the lack of prominence that Indigenous participation and rights to water resources are afforded under the NWI. Most concerning is the largely discretionary language that is utilised in referring to Indigenous interests. Terminology such as 'wherever possible'²⁰ in referring to Indigenous

²⁰ Intergovernmental Agreement of a National Water Initiative Between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the

participation in water planning and 'wherever they can be developed'²¹ in relation to incorporating Indigenous social, spiritual and customary objectives and strategies to achieve the objectives of the NWI, begs the question, just how much prominence will water planners afford to Indigenous rights and interests?

Another concerning feature of the NWI is the lack of guidance given to water planners about how to consult with affected Indigenous people, including the most effective ways to engage, who to approach, when and how to best approach them. These questions are left unanswered under the NWI.

Virginia Falk provided the second presentation, focussing on the research that she undertook for her PhD. Virginia spoke of the need to reconsider water as a sacred resource and an asset for Indigenous people. Contemporary thinking about water issues should extend beyond a classic physical science understanding to incorporate Indigenous science. Virginia raises a somewhat overlooked point in advocating for the knowledge and science of natural resources as understood by Indigenous people. The knowledge that abounds from an Indigenous perspective might assist in water planning and directly benefit native title holders in access to water based rights and interests.

Virginia Falk and Poh-Ling Tan raise important points in relation to native title and water. The National Water Initiative, while recognising that Indigenous interests are important, lacks any compelling mechanism to ensure Indigenous engagement in water planning is effectively carried out. It must be remembered that without access to decent supplies of good quality water and planning that accounts for access to these supplies, the rights and interests of Indigenous people recognised through native title will be compromised.

Both presentations are available online from the NILC website: <http://www.nilcsa2009.com/>.

Australian Capital Territory and the Northern Territory, (signed 25 June 2004 at COAG meeting) CI 52(i).

²¹ Ibid CI 52(ii).

Summer Course in Native Title in January 2010 @ UNSW

The UNSW Law School will be offering an intensive course in Native Title Law, Policy and Practice in Sydney in the week commencing Monday 11 January 2010.

Over four days, the course examines the essential elements of native title law in Australia. Because that law can only be properly understood in context, the course also covers the broader policy and political debates that have influenced the evolution of Australian native title law in the last 15 years. The course also looks at the practical impacts of native title at ground level.

In past years, the class has included a mix of NTRB personnel, government and private sector lawyers, postgraduate coursework students and some final-year undergraduates. Since the course started in 2006, participants have come from NSW, WA, NT, Qld, SA, Victoria and the ACT.

For those not seeking academic credit, the course can be taken on a Continuing Legal Education (CLE) basis.

For those seeking academic credit, the course can be undertaken (with assessment and at a higher cost) on three other bases:

- through UNSW's postgraduate coursework programs
- cross-institutionally, for students enrolled elsewhere
- on a non-award voluntary basis (ie one-off, for interest or professional development).

For CLE enrolments, contact the CLE Centre at UNSW on 02 9385 2267 or cle@unsw.edu.au. For cross-institutional and non-award voluntary enrolments, go to www.unsw.edu.au/futureStudents/nonAward/sad/fsnacr_ossinst.html. Existing UNSW postgraduate students can enrol online.

Places are limited, so early enrolment is advisable to avoid missing out.