THE TOOHEY LEGACY: RIGHTS AND FREEDOMS, COMPASSION AND HONOUR

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I INTRODUCTION

John Toohey is a person whom I have admired as a model of how to behave as a lawyer, since my first years in practice. A fundamental theme of John Toohey's approach to life and the law, which shines through, is that he remained keenly aware of the fact that there are groups and individuals within our society who are vulnerable to the exercise of power and that the law has a role in ensuring that they are not disadvantaged by its exercise.

A group who clearly fit within that category, and upon whom a lot of John's work focussed, were Aboriginal and Torres Strait Islander peoples. In 1987, in a speech to the Student Law Reform Society of Western Australia Toohey said:

> Complex though it may be, the relation between Aborigines and the law is an important issue and one that will remain with us;[1]

and in *Western Australia v Commonwealth (Native Title Act Case)*[2] he reaffirmed what was said in the Tasmanian Dam Case,[3] that '[t]he relationship between the Aboriginal people and the lands which they occupy lies at the heart of traditional Aboriginal culture and traditional Aboriginal life'.

A University of Western Australia

John Toohey had a long-standing relationship with the University of Western Australia, having graduated in 1950 in Law and in 1956 in Arts and winning the F E Parsons (outstanding graduate) and HCF Keall (best fourth year student) prizes. He was a Senior Lecturer at the Law School from 1957 to 1958, and a Visiting Lecturer from 1958 to 1965.

After a short period of practice at Lavan and Walsh, he founded Ilbery & Toohey.

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1 Quoted in James Edelman, 'A Short Biography of John Leslie Toohey AC' (1998) 8 *Journal of Judicial Administration* 109.

2 (1995) 183 CLR 373, 459, in a joint judgment with Mason CJ, Brennan, Deane, Gaudron and McHugh JJ.

3 (1983) 158 CLR 1, 274-5.

John Toohey commenced practise at the Independent Bar in 1965, and was appointed Queens Counsel in 1968, at the age of 38. He was a leader in the Western Australian legal profession, having been President of the WA Bar Association in 1970 and President of the Law Society of Western Australia in 1972-73.

B Aboriginal Legal Service

In 1973 John Toohey moved with Loma and his young family to Port Hedland, to take up the position as the inaugural Solicitor for the Aboriginal Legal Service of Western Australia, covering the whole of the Pilbara and Kimberley single handed.

I recall being somewhat in awe of him and the pioneering task he was performing when, as an Articled Clerk to the Crown Solicitor, I met him, in the course of the Supreme Court circuit in Port Hedland in 1974. What he was doing was of particular interest to me because I had been the Blackstone Society representative on the New Era Aboriginal Fellowship Justice Committee in 1973-74 when it first received funding from the Whitlam Government to establish the Aboriginal Legal Service of Western Australia (Inc).

The inauguration of the Aboriginal Legal Service also has a particular relationship to the University of Western Australia. In 1972 a small group of law students, organised by Henry Schapper (an Agricultural Science lecturer) and Andrew Brinsden (then a 3rd year law student) travelled to various South West towns to conduct a survey of the living conditions of Aboriginal people. I recall travelling with the then Law Librarian, Bill Ford[4], to Brookton and interviewing the local Police Sergeant and Shire President. We returned to the Law School and participated in a workshop which compiled the results of our survey and resolved that we would participate in a voluntary Aboriginal legal advice service which was being conducted one night a week by a handful of legal practitioners at the Aboriginal Advancement Council.

The NEAF Justice Committee in 1972 was chaired by George Winterton[5] (who had recently graduated from the University of Western Australia and was tutoring in Property Law). The inaugural Blackstone Society representative was Simon French. In 1974 it was chaired by Robert French, who had been admitted to practice in 1972. The Committee included Fred Chaney who had been admitted to practice some 9 years previously and the then Solicitor-General, Ron Wilson QC[6]. Associating with that group of lawyers inspired me to the career I undertook:

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4 Now Emeritus Professor Bill Ford, a former Dean of the Law School of the University of WA.

5 The late Professor George Winterton, Formerly of Sydney University and the University of New South Wales; Robert French, 'Vale George Winterton: Friend and Critic', *The Australian*, 21 November 2008, 27, 29.

6 The late Sir Ronald Wilson AC KBE CMG QC, former High Court Judge and former President of the Human Rights and Equal Opportunity Commission.

my first year of practice in 1976 being in the Kalgoorlie office of the ALS, newly created following the Laverton ('Skull Creek') Royal Commission, in which John Toohey QC represented the 30 Aboriginal people from Warburton and Docker River who, on 4 January 1975, were arrested while on their way to a rain-making ceremony at Wiluna, as the Royal Commission found, 'without cause', assaulted by police and held in an overcrowded police lock-up at Laverton.[7]

C Aboriginal Land Commissioner 1977-82

On 7 April 1977, John Toohey was appointed, upon the recommendation of the then Minister for Aboriginal Affairs, Ian Viner, as the inaugural Aboriginal Land Commissioner under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). He broke new ground as Aboriginal Land Commissioner responsible for the first Aboriginal land rights legislation in the country. He described the object of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) as 'to give standing, within the Anglo-Australian legal system, of traditional ownership that has so far failed to gain recognition by the courts.'[8]

John Toohey heard 15 claims extending the length and breadth of the Northern Territory. The claims were strongly contested by the Territory government and the subject of a number of appeals which went directly to the Full Court of the High Court.[9]

In *R v Toohey; Ex parte Attorney-General (NT)*[10] Justices Stephen, Mason, Murphy and Aikin, in a joint judgment, with Justice Wilson agreeing and Chief Justice Barwick dissenting, held that Justice Toohey's finding that the Utopia Station pastoral lease, purchased by the Aboriginal Land Fund Commission for the purpose of granting it to an Aboriginal corporation or land trust, was held 'on behalf of' persons who are members of the Aboriginal race of Australia, within the terms of section 50(1)(a) of the *Aboriginal Land Rights Act*, and was within the jurisdiction of the Aboriginal Land Commissioner 'involved no straining of language'.

Two of the cases involved the vexed issue of the extension of boundary of the townsite of Darwin, which the High Court found in *R v Toohey; Ex parte Northern Land Council* was for the improper purpose of excluding the land from the jurisdiction of the Commissioner.

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7 F Skyring, *Justice A history of the Aboriginal Legal Service of Western Australia* (UWA Publishing, 2011) 115-35.

8 *Report on Yingawunarri (old Top Springs) Mudbura Land Claim, Report No. 5* (Australian Government Printing Service, 1980) [70].

9 *R v Toohey; Ex parte A-G (NT)* [1980] HCA 2; (1980) 145 CLR 374; *R v Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170; *R v Toohey; Ex parte Stanton* (1982) 44 ALR 94; *R v Toohey; Ex parte Meneling Station* (1982) 158 CLR 327.

10 [1980] HCA 2; (1980) 145 CLR 374.

Robert French notes[11] that –

> There were no less than 14 reported decisions of the High Court touching matters connected with the administration of the Act [4 of them during Commissioner Toohey's time] before the Court's decision in *Mabo v Queensland (No 2)*[12]... [I]t was a statute in which the concept of traditional land ownership was firmly embedded. … It would be drawing a long bow to propose a direct causative relationship between the High Court's recognition of native title at common law in 1992 and its exposure to a decade of land rights litigation out of the Northern Territory. But the values underpinning the Act could not be lost upon the Court. There was a strong normative element in the *Mabo (No 2)* judgment. It is not unreasonable to suppose that some of it may have been informed by the experience of the contentious land rights statute.

At the end of Justice Toohey's term as Commissioner, Ian Barker described him, during the Alligator Rivers claim, as 'leading us like Moses who led the 12 tribes of Israel through the wilderness with a cheerful fortitude which did not ever leave him for the whole fortnight.'[13]

Ross Howie wrote, at the same time, of his 'sensitivity to historical injustice', his 'genuine interest' and 'great patience' and that 'it was hard not to be impressed by the Judge negotiating cheerfully with an old man to share the trunk of the only tree as a back rest.'[14]

II HIGH COURT

On 6 February 1987 Toohey was sworn in as a Justice of the High Court.

A golden thread which ran through the cases he decided in the High Court was a concern for justice, morality and equality. His judgments[15] supported a fair trial in *Dietrich v The Queen*[16], the constitutional guarantee of a jury trial, in *Cheatle*

11 Robert French, *Legal Change – The Role of Advocates* (2017) 44(7) *Brief* 28, and see Robert French, 'The Role of the High Court in the Recognition of Native Title' (2002) 30 *Western Australian Law Review* 129, 138.

12 (1992) 175 CLR 1. For a list of the cases see Robert French, 'The Role of the High Court in the Recognition of Native Title' (2002) 30 *Western Australian Law Review* 129, 136.

13 Transcript of hearings, Land Claim, 2 April 1982, 25; quoted in James Edelman and Natalie Gray, 'A Short Biography of John Leslie Toohey AC' (1998) 8 *Journal of Judicial Administration* 109.

14 R Howie, 'Mr Justice Toohey Ends Term as Aboriginal Land Commissioner' (1982) 4 *Aboriginal Law Bulletin* 14; quoted in James Edelman and Natalie Gray, 'A Short Biography of John Leslie Toohey AC' (1998) 8 *Journal of Judicial Administration* 109.

15 Noted by James Edelman and Natalie Gray, 'Toohey, John Leslie' in M Coper, T Blackshield and G Williams (eds), *The Oxford Companion to the High Court* (Oxford University Press, 2001).

16 *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292 .

v The Queen[17], the exclusion of evidence for 'unfairness', in *R v Swaffield*[18] and the right to an exculpatory document prevailing over legal professional privilege, dissenting, in *Carter v Managing Partner Northmore Hale Davy & Leake*[19].

He joined with other members of the Court in *Cunliffe v Commonwealth*[20] when considering provisions in the *Migration Act 1958* (Cth) for the registration of migration agents and giving of migration advice, in reaffirming the implied freedom of communication and the requirement for incursions upon that freedom to be 'reasonably proportional' or 'reasonably and appropriately adapted' to achieve the end of the constitutional power being exercised.

In *Goryl v Greyhound Australia Pty Ltd*[21] he joined with Justice Dawson in concluding that the section 117 Constitutional prohibition against subjecting in any other State a resident of any State to a disability or discrimination which would not be applicable to a resident in the other State applied to a non-resident of Queensland only being entitled to a lesser rate of damages than a Queensland resident under a State statutory insurance scheme.

A Constitutional Freedom of Political Communication

In *Lange v Australian Broadcasting Corporation*[22] Justice Toohey, with Chief Justice Brennan and Justices Dawson, Gaudron, McHugh, Gummow and Kirby, said

> Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be 'directly chosen by the people' of the Commonwealth and the States, respectively…
>
> [T]he freedom … cannot be confined to the election period. Most of the matters necessary to enable 'the people' to make an informed choice will occur during the period between the holding of one, and the calling of the next, election…
>
> [E]ach member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the

17 *Cheatle v R* [1993] HCA 44; (1993) 177 CLR 541.
18 *R v Swaffield* [1998] HCA 1; 192 CLR 159; 151 ALR 98; 72 ALJR 339 (20 January 1998).
19 *Carter v Managing Partner Northmore Hale Davy & Leake* [1995] HCA 33; (1995) 129 ALR 593; (1995) 69 ALJR 572; (1995) 17 ACSR 1; (1995) 183 CLR 121 (14 June 1995).
20 [1994] HCA 44; (1994) 182 CLR 272; (1994) 124 ALR 120.
21 (1994) 179 CLR 463 (delivered on 31 July 1997).
22 (1997) 189 CLR 520, 559, 561, 571.

> correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion - the giving and receiving of information - about government and political matters.

Justice Toohey wrote a joint judgment with Justice Gummow in the *Levy v Victoria ('Duck Shooting Case')*.[23] It was a case concerning the validity of regulations prohibiting entry into a 'permitted hunting area' during the open season for duck hunting without a game licence, where a protestor against the law was prosecuted for entering the area without a game licence. They said:

> It may be conceded that television coverage of actual events occurring within the permitted hunting areas during the periods specified in reg 5(1) would attract public attention to those protesting the duck shooting issues, even if it would portray or stimulate appeals to emotion rather than to reason. The appeal to reason cannot be said to be, or ever to have been, an essential ingredient of political communication or discussion. It must also be accepted that the constitutional freedom is not confined to verbal activity. We recognise that it may extend to conduct where that conduct is a means of communicating a message within the scope of the freedom.

B Freedom and Equality

In the case of *Kruger v Commonwealth (the Stolen Generations Case)*[24], a decision delivered on 31 July 1997, not long before his retirement from the High Court in February 1998, Justice Toohey, in the context of a submission that the 'stolen generations' might raise issues of an implied constitutional right to freedom of movement and association, freedom of religion and right of equality, articulated a broad-ranging view as to the place of freedoms and equality in the law.

He noted that to give content to the words 'intercourse' and 'absolutely free' in s 92 of the *Constitution*, there must be a guarantee of personal freedom 'to pass to and fro among the States without burden, hindrance or restriction'.[25]

He referred to Justice Murphy J in *Buck v Bavone,*[26] speaking of the right of persons to move freely across or within State borders as 'a fundamental right arising from the union of the people in an indissoluble Commonwealth', as a 'matter requiring further consideration'.

Citing what had been said in the series of implied freedom of speech cases

23 (1997) 189 CLR 579, 613.
24 (1997) 190 CLR 1.
25 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360, 393. A quotation from *Gratwick v Johnson* [1945] HCA 7; (1945) 70 CLR 1, 17.
26 [1976] HCA 24; (1976) 135 CLR 110, 137.

of the High Court, in which he had participated, he referred to the doctrine of representative government, representatives being responsible to the people and deriving their power from the governed[27] prescribed in the Constitution,[28] giving rise to freedom of communication and discussion of political matters[29] between all persons, groups and other bodies in the community[30] on the whole range of issues which an intelligent citizen should think about[31] and the right of access to the institutions, and of due participation in the activities of the nation,[32] carrying with it the implication of freedom of movement and association.

C Legal Equality

He noted that, implicit in the free agreement of the people to 'unite in one indissoluble Federal Commonwealth',[33] is 'the notion of the inherent equality of the people as the parties to the compact.'[34]

In the context which he was considering in *Kruger*, of Aboriginal people in the Northern Territory, he made the point that the freedom to participate in the activities of the nation 'does not ebb and flow' with eligibility to cast a vote.[35] He did, however, acknowledge a 'tension between the implied freedom of political communication and the express grant of power' to the government,[36] saying 'the relevant provisions of the Ordinance must not be disproportionate to what was reasonably necessary for the protection and preservation of the Aboriginal people of the Northern Territory', and ' it is relevant to consider the standards and perceptions prevailing at the time of the Ordinance. That is not to say that those

27 *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1, 69-70.

28 *McGinty v Western Australia* [1996] HCA 48; (1996) 186 CLR 140, 198; Brennan J in *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1, 48.

29 *Nationwide News Pty Ltd v Wills*[1992] HCA 46; (1992) 177 CLR 1, *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46; (1994) 182 CLR 104, *Stephens v West Australian Newspapers Ltd* [1994] HCA 45; (1994) 182 CLR 211 and *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520; (1997) 145 ALR 96; (1997) 71 ALJR 818.

30 Mason CJ commented in *Australian Capital Television Pty Ltd v The Commonwealth* [1992] HCA 45; (1992) 177 CLR 106, 139, see also 168-9, 174 per Deane and Toohey JJ, 212 per Gaudron J, and *Re Public Service Employee Relations Act* [1987] 1 SCR 313, 391.

31 Mason CJ, Toohey and Gaudron JJ in *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46; (1994) 182 CLR 104, 124, adopting the observation of Barendt, *Freedom of Speech* (1985) 152.

32 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 109-10, per Barton J and Miller J in *Crandall v State of Nevada* [1867] USSC 15; 73 US 35 .

33 See *Capital Duplicators Pty Ltd v Australian Capital Territory* [1992] HCA 51; (1992) 177 CLR 248, 274 per Brennan, Deane and Toohey JJ.

34 Deane and Toohey JJ in *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455, 485-90; and Toohey J in *Street v Queensland Bar Association* [1989] HCA 53; (1989) 168 CLR 461, 554.

35 Citing McTiernan and Jacobs JJ in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* [1975] HCA 53; (1975) 135 CLR 1, 35.

36 See *Leask v Commonwealth* [1996] HCA 29; (1996) 70 ALJR 995, 1011-13; [1996] HCA 29; 140 ALR 1, 24-6.

standards and perceptions necessarily conclude the matter; the infringement of a relevant freedom may be so fundamental that justification cannot be found in the views of the time'.[37]

In *Leeth v Commonwealth,*[38] joining in a judgment with Justice Deane, he said:

> The doctrine of legal equality is not infringed by a law which discriminates between people on grounds which are reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment. In one sense, almost all laws discriminate against some people since almost all laws operate to punish, penalize or advantage some, but not all, persons by reference to whether their commands are breached or observed. While such laws discriminate against those whom they punish or penalize or do not advantage, they do not infringe the doctrine of the equality of all persons under the law and before the courts. To the contrary, they assume that underlying legal equality in that they discriminate by reference to relevant differences. Again, laws which distinguish between the different needs or responsibilities of different people or different localities may necessarily be directed to some, but not all, of the people of the Commonwealth.' (footnote omitted)

In *Kruger*, he cited with approval Justice Gaudron in *Leeth*, who spoke in terms of judicial power, saying:[39]

> It is an essential feature of judicial power that it should be exercised in accordance with the judicial process...
>
> All are equal before the law. And the concept of equal justice - a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such - is fundamental to the judicial process.'

He added that:

> There is nothing that excludes Aboriginals from the principle of equality save the qualification that the principle is not infringed by a law which discriminates between people on grounds which are reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment. Indeed, in *Leeth*[40] Deane J and I spoke of the fact that a legislative power to make special laws with respect to a particular class of persons, such as aliens (Constitution, s 51(xix)) or persons of a particular race (s 51(xxvi)), necessarily authorizes

37 He referenced for that proposition *Cheatle v The Queen* [202] and *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* [203].
38 [1992] HCA 29; (1992) 174 CLR 455 at 488-9.
39 [1992] HCA 29; (1992) 174 CLR 455, 502.
40 [1992] HCA 29; (1992) 174 CLR 455, 489.

> discriminatory treatment of members of that class to the extent which is reasonably capable of being seen as appropriate and adapted to the circumstance of that membership.
>
> …It may be noted … that the 'discriminatory treatment' referred to in *Leeth* does not stand in necessary contradistinction to laws which are beneficial to a particular class of persons; it may include such laws.

D Natural Justice

An often-repeated theme in judgments of Justice Toohey was the entitlement of citizens to natural justice or procedural fairness. In *Aboriginal Sacred Sites Protection Authority v Maurice*[41], describing the role of an Aboriginal Land Commissioner, and balancing natural justice with cultural sensitivity, Justice Toohey said:

> The powers of the Commissioner are cast in the widest terms; s 51 provides that he 'may do all things necessary or convenient to be done for or in connexion with the performance of his functions'. Clearly the Commissioner may not act in an arbitrary manner and, generally speaking, he must act according to the principles of natural justice as they exist in regard to administrative inquiries. ….
>
> As a general rule the dictates of natural justice require that material be made available to all participating. But there may be situations, in particular where evidence concerns matters of a secret sacred nature to Aboriginals, in which the Commissioner is justified in placing constraints upon the circulation of that evidence.'

In 1995, in *Minister for Immigration and Ethnic Affairs v Teoh,*[42] Justice Toohey,[43] with Chief Justice Mason and Justice Deane,[44] found that ratification of a treaty amounted to acceptance of international obligations which those affected by administrative decisions could reasonably legitimately expect would be adhered to, giving content to the procedural fairness which the decision-maker was obliged to provide.[45] The Commonwealth proposed various Bills in 1995, 1997 and 1999[46] to reverse the effect of *Teoh* in relation to international treaties and issued statements negating legitimate expectations arising from treaties.[47]

41 (1986) 10 FCR 104, 119.
42 (1995) 183 CLR 273.
43 Ibid 301, 302-3.
44 Ibid 291-2; McHugh J dissenting, at 314.
45 Aronson Groves, *Judicial Review of Administrative Action* (Lawbook Company, 5th ed, 2013) 420.
46 *Administrative Decisions (Effect of International Instruments) Bill 1999* (Cth).
47 JOINT Statement by the Minister of Foreign Affairs and the Attorney-General, 10 May 1995 and 25 February 1997; I Katz, 'A Teoh FAQ' (1998) 16 *AIAL Forum* 1, 6.

Concerns were raised about the efficacy of the concept of 'legitimate expectation'. In 2003, in *Re Minister for Immigration; Ex parte Lam,*[48] Justices McHugh and Gummow suggested that it had served a useful role in the evolution and expansion of the of the duty to observe the requirements of natural justice but now had 'limited utility'.[49] Ultimately, in 2015, Justices Kiefel, Bell and Keane said in *Minister for Immigration v WZARH:*[50]

> The use of the concept of 'legitimate expectation' as the criterion of an entitlement to procedural fairness in administrative law has been described in this Court as 'apt to mislead', 'unsatisfactory' and 'superfluous and confusing'. In *Lam*, Hayne J observed that the concept 'poses more questions than it answers', such as '[w]hat is meant by 'legitimate'?' and '[i]s 'expectation' a reference to some subjective state of mind or to a legally required standard of behaviour?' and 'whose state of mind is relevant?' and '[h]ow is it established?'. Hayne J concluded that 'reference to expectations, legitimate or not, is unhelpful'.
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> More recently, in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*, Gummow, Hayne, Crennan and Bell JJ referred to the discussion of the concept by four members of the Court in *Lam*, and said that:
>
> > the phrase 'legitimate expectation' when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded.

What appeared to have been a good idea in 1995 seems now to be 'dead, buried and cremated'.[51]

E Public Interest Activities

His Honour on more than one occasion heard cases in which it was appropriate to express a view on the role of those engaged in public interest activities and their relationship to democracy.

In *Swan Television and Radio Broadcasters v Australian Broadcasting Tribunal,*[52] commenting on the public interest nature of private television broadcasting,

48 (2003) 214 CLR 1.
49 Ibid 16.
50 (2015) 256 CLR 326.
51 To use a phrase used by Tony Abbott in 2010 to refer to the fate of Work Choices: <http://www.news.com.au/national/breaking-news/abbott-pm-bid-dead-buried-cremated/news-story/c62b03505c15063688f59214674299b5> and in 2015 to refer to the GP co-payment <http://www.abc.net.au/news/2015-03-03/tony-abbott-declares-gp-co-payment-dead,-buried-and-cremated/6275912>.
52 (1985) 8 FCR 291, 320.

Justice Toohey, with Justices Sweeney and Wilcox, said:

> The fact that commercial broadcasting and television are intended to be conducted in the interests of the public does not mean that there is no room properly to maintain a claim for the confidentiality of commercial information. Unregulated disclosure of such information may result in serious consequences to a licensee and, therefore possibly, to the public interest. But the fact that there is in the control of television a direct public interest element, different in and from the public interest in the maintenance of other businesses, and that the source of the income of a licensee is a licence granted to it by the Australian Government and in the public interest serves to distinguish the claim for confidentiality by a television licensee from that which might be made by a person engaged in some other type of business. The public interest element in relation to television regulation may require a greater degree of disclosure of commercial information than would otherwise be appropriate.

In *Australian Broadcasting Tribunal v Bond*[53] Justice Toohey J, with Justice Gaudron, stated: 'Commercial broadcasting plays a significant role in the dissemination of information and ideas. That dissemination is vital to a free and democratic society… A commercial broadcasting licence thus carries with it an obligation to the community. It also carries with it the potential for powerful influence. The community is entitled to confidently expect that a licensee will discharge its obligation and, in particular, that the potential for influence will not be abused.'

III ABORIGINAL PEOPLE AND THE LAND

A Native Title Rights / Arbitrary Deprivation or Extinguishment of Property

In *Mabo v Queensland (No 1)*[54] Justice Toohey, with Justices Brennan and Gaudron held that section 10 of the *Racial Discrimination Act 1975* (Cth) operates to enhance the enjoyment of the human right to own property and not be arbitrarily deprived of it, if is the subject of inequality in enjoyment by discrimination in municipal law or its administration. That proposition was reaffirmed by Justice Toohey, in a joint judgment with Chief Justice Mason CJ and Justices Brennan, Gaudron and McHugh in *Western Australia v Commonwealth (Native Title Act Case)*.[55]

53 (1990) 170 CLR 321, 382.
54 (1988) 166 CLR 186, 217.
55 (1993) 183 CLR 373, 437.

1 Mabo v Queensland (No 2) (1992) 175 CLR 1

Possessory title

An area which the Toohey judgment alone addressed in *Mabo (No 2)* was possession as the root of title.

Possessory title was one of the alternative bases upon which the Plaintiffs had posited their claim, relying upon the work of Professor Kent McNeil of Osgoode Hall Law School, York University, Toronto[56] and *Perry v Clissold*[57] in which the Privy Council had held that a person in possession of land as its owner and exercising peaceably the ordinary rights of ownership (an adverse possessor) has a perfectly good title against all the world but the rightful owner.

The significance of his consideration of possessory title is that a possessory title is presumptively equivalent to a fee simple interest.[58] That is a conceptual starting point for the understanding of native title which provides a stronger bulwark against the extinguishment of native title than the 'bundle of rights' characterisation of native title, which became the popular description in later cases in Australian Courts[59] and which lends itself to native title being described as 'fragile',[60] and so readily susceptible to extinguishment or the only rights capable of recognition being those rights identified by specific historical use.

In *Wik Peoples v Queensland*[61] Justice Toohey referred to the possibility that native title may 'approach the rights flowing from full ownership at common law'.

As Justice Kirby said in *Ward*[62]-

> The object of the NTA is the recognition of *'native title'*, rather than the provision of a list of activities permitted on, or in relation to, areas of land or waters.

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56 McNeil, *Common Law Aboriginal Title* (1989) 196-204.

57 (1907) AC 73.

58 See Toohey J at 178, 206, 209-10, 211; see Simon Young, *The Trouble with Tradition Native Title and Cultural Change*. (Federation Press, 2008) 251.

59 *Fejo v Northern Territory* (1998) 195 CLR 96, 151 (Kirby J); *Western Australia v Ward* (2002) 213 CLR 1, [76], [95], [615], [638], [715].

60 *Fejo v Northern Territory* (1998) 195 CLR 96, 152 (Kirby J); *Yanner v Eaton* (1999) per Callinan J at 408; *Commonwealth v Yarmirr* (2001) per Kirby J at 183-4; *Western Australia v Ward* (2002) 213 CLR 1, [91], [665], [969]; *Yorta Yorta v Victoria* (2002) 214 CLR 422, [185].

61 (1996) 187 CLR 1, 126-7; see also Gummow J at 169 and in *Yanner v Eaton* (1999) 201 CLR 351, 382-4.

62 *Western Australia v Ward* (2002) 213 CLR 1, [569]-[575].

That is more generally consistent with the approach of the Courts in Canada.[63] There has been a recent trend in the Australian case law to revert to something approaching the Canadian position.

Firstly, there has been a recognition, confirmed in the Torres Strait Sea Case,[64] that native title may include an unrestricted right to take resources, including the right to trade in those resources, regardless of a lack of exclusivity of the title and any cultural restraints which may exist.

Secondly, the High Court in 2014, in *Western Australia v Brown*[65] rejected the proposition that extinguishment of native title may be effected by the exercise of rights,[66] thereby rejecting the idea that a doctrine of 'operational inconsistency' applies in Australia, and concluding that, where there is a competition between the *exercise* of two rights, it must be resolved in favour of the rights granted by statute. But when the statutory rights cease to be exercised or come to an end the native title rights and interests remain unaffected.[67]

This was taken a step further in 2015, in *Queensland v Congoo*[68]. In that case a 1939 National Security Regulation authorised the Executive to take exclusive possession of land. By the combination of a majority decision of the Full Federal Court[69] and a 3:3 split decision of the High Court[70] the conclusion was that because the exclusive possession of the Commonwealth 'was for a limited purpose, for a limited time and on the premise, apparent from the legislative scheme, that all underlying rights and interests should continue',[71] it did not extinguish native title. All members of the High Court found that the approach of the Full Court of the Federal Court was erroneous in focussing upon the duration of the interest and not on the 'criterion of inconsistency'. French CJ, with Keane J[72] said that –

> The clear and plain intention standard for extinguishment formulated in

63 *Hamlet of Baker lake v Minister for Indian Affairs and Northern Development* (1979) 107 DLR (3D) 513 and *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193.

64 *Akiba v Commonwealth* [2013] HCA 33; see also *Rrumburriya Claim Group v Northern Territory* [2016] FCA 776; *Western Australia v Pilki People* [2015] FCAFC 186.

65 [2014] HCA 8.

66 A proposition which had gained some currency from dicta of Gummow J in *Wik* (1996) 187 CLR 1, 202-3, *Western Australia v Ward* (2002) 213 CLR 1, [296] and *De Rose v State of South Australia* (2005 145 FCR 290.

67 *Western Australia v Brown* [2014] HCA 8, [59].

68 [2015] HCA 17.

69 North and Jagot JJ (Logan J dissenting).

70 French CJ, with Keane J, and Gageler J found that native title was not extinguished and Hayne, Keifel and Bell JJ found that it had been extinguished.

71 French CJ and Keane J in *Queensland v Congoo* at [27], summarising what North and Jagot JJ said in the Full Court of the Federal Court.

72 At [34] and Gageler J at [159] made a similar point. Hayne J rejected a 'clear and plain intention' standard as expressing an 'adverse dominion' test (rejected by the High Court in Ward at [78] to [82]), in favour of the test of 'inconsistency of rights'. See also Keifel J at [112]-[116] and Bell J.

> *Mabo [No 2]* is an important normative principle informing the selection of the criterion for determining whether a legislative or executive act should be taken by the common law to extinguished native title.

French CJ with Keane J[73] and Gageler J[74] focussed upon the purpose of the possession, while Hayne J[75] focussed on the rights conferred and Keifel J and Bell J regarded the limited duration of war-time powers as irrelevant to the 'inconsistency of incidents' test.

An approach to legislative construction which has regard to the objective legislative purpose, ascertained by reference to statutory context and framework which the provision in question appears, is unremarkable and in accordance with settled authority.[76] The proposition that such an approach should be eschewed when one comes to a consideration of legislation affecting native title, as opposed to any other proprietary interests is at odds with the common law of native title, as developed in other common law countries and imported into Australia, premised, as it is, on concepts of equality before the law.[77] And it is inconsistent with the ethos of equality before the law articulated in the judgments of Toohey J.

Fiduciary duty

In *Mabo (No 2)* Justice Toohey was the only justice who considered the argument put on behalf of the Plaintiffs that the Crown in right of Queensland 'is under a fiduciary duty, or alternatively bound as a trustee, to the Meriam people …, to recognise and protect their rights and interests in the Murray Islands'.[78] Toohey J held that, precisely because the Crown has such absolute power over the holders of native title, it is under a fiduciary duty in respect of that power. He concluded that the 'fiduciary obligation on the Crown does not limit the legislative power of the Queensland Parliament, but legislation will be in breach of that obligation if its effect is adverse to the interests of the titleholders, or if the process it establishes does not take account of those interests'.[79]

The notion of a fiduciary duty of the Crown towards Indigenous peoples had its genesis in the 1831 United States Supreme Court case of *Cherokee Nation v Georgia*[80] in which Chief Justice Marshall referred to 'those tribes which reside within the acknowledged boundaries of the United States' as 'denominated domestic dependent nations' and as being 'in a state of pupillage. Their relationship

73 At [38].
74 At [168].
75 At [75].
76 French CJ and Keane J at [36], citing, among other cases, *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, 194 CLR 355; 153 ALR 490; 72 ALJR 841.
77 A concept relied upon by Brennan J in *Mabo (No 2)* at [29].
78 At p199.
79 At p 205.
80 30 US (5 Pet) 1 (1831) 16-17, see DM Johnston 'A Theory of Crown Trust Towards Aboriginal Peoples' (1986) 18 *Ottawa Law Review* 307, 320.

to the United States resembles that of a ward to his guardian'. The United States Supreme Court has held that the power of the Government to dispose of Aboriginal lands without compensation, as if they were public lands, was restrained by its guardianship responsibility from engaging in an 'act of confiscation' of that kind.[81] In the 1983 United States Supreme Court case of *United States v Mitchell*[82] it was confirmed that the government has a fiduciary relationship in relation to the lands of its indigenous peoples where it controls the property belonging to them, and the power to manage the resources and land which comprises that indigenous property.

Justice Toohey relied upon the leading Canadian case on the government's fiduciary obligations to Indigenous peoples, *Guerin v The Queen*,[83] in which the Canadian Supreme Court, in 1984, found that the Crown's fiduciary obligation in relation to Indigenous interests in land arose out of the fact that the interests were inalienable, except to the Crown. He said:[84]

> Underlying such a relationship is the scope for one party to exercise a discretion which is capable of affecting the legal position of the other. One party has a special opportunity to abuse the interest of the other. The discretion will be an incident of the first party's office or position.[85] The undertaking to act on behalf of, and the power detrimentally to affect, another may arise by way of an agreement between the parties, for example in the form of a contract, or from an outside source, for example a statute or a trust instrument. The powers and duties may be gratuitous and 'may be officiously assumed without request'.[86]

In relation to the case before him he said:[87]

> …if the Crown in right of Queensland has the power to alienate land the subject of the Meriam people's traditional rights and interests and the result of that alienation is the loss of traditional title, and if the Meriam people's power to deal with their title is restricted in so far as it

81 *United States v Creek Nation* US 103 (1935) 109-10. See also *Lane v Pueblo of Santa Rosa* 249 IS 110 (1981); *Cramer v United States* 261 US 219 (1923) and the discussion by R.P. Chambers 'Judicial Enforcement of the Federal Trust Responsibility to Indians' (1975) 27 *Stanford Law School Review* 1213, 1246; D.M. Johnston 'A Theory of Crown Trust Toward Aboriginal Peoples' (1986) 18 *Ottawa Law Review* 307; R.H. Bartlett 'The Fiduciary Obligation of the Crown to the Indians' (1989) 53 *Saskatchewan Law Review* 301, 309-10 n 52; C. Hughes 'The Fiduciary Obligations of the Crown to Aborigines; Lessons from the United States and Canada' (1993) 16(1) *UNSWLJ* 70, 78-9.

82 103 S Ct 2961 (1983); see also D Tan 'The Fiduciary as an Accordian Term: Can the Crown Play a Different Tune?' (1995) 69 *ALJ* 440, 443.

83 (1984) 13 DLR (4th) 321.

84 Ibid 200.

85 Wenrib, 'The Fiduciary Obligation' (1975) 25 *U Toronto LJ* 1, 4-8; Guerin [1984] 2 SCR 384.

86 P Finn, *Fiduciary Obligations* (1977) 201; *Guerin* [1984] 2 SCR 384.

87 At 203.

> is inalienable, except to the Crown, then this power and corresponding vulnerability give rise to a fiduciary obligation on the part of the Crown. The power to destroy or impair a people's interests in this way is extraordinary and is sufficient to attract regulation by Equity to ensure that the position is not abused. The fiduciary relationship arises, therefore, out of the *power* of the Crown to extinguish traditional title by alienating the land or otherwise; it does not depend on an exercise of that power.
>
> > Moreover if, contrary to the view I have expressed, the relationship between the Crown and the Meriam people with respect to traditional title alone were insufficient to give rise to a fiduciary obligation, both the course of dealings by the Queensland Government with respect to the Islands since annexation - for example the creation of reserves in 1882 and 1912 and the appointment of trustees in 1939 - and the exercise of control over or regulation of the Islanders themselves by welfare legislation - such as the *Native Labourers' Protection Act 1884* (Q.), the *Torres Strait Islanders Act 1939* (Q.) under which an Island Court was established and a form of 'local government' instituted, and the *Community Services (Aborigines) Act 1984* (Q.) - would certainly create such an obligation.'

Justice Brennan in *Wik*[88] said that he was 'unable to accept a fiduciary duty can be owed by the Crown to the holders of native title in the exercise of the statutory power to alienate land whereby their native title in or over the land is liable to be extinguished without their consent and contrary to their interests,' and that 'it is impossible to suppose that a repository of the power shall so act that the beneficiary might expect that the power will be exercised in his or her interests'. His view was that the imposition of the duty would preclude the exercise of the power.

There is no necessary inconsistency between the existence of a power, particularly a discretionary power, and a duty arising from another source which limits the way in which the power might be exercised. As Justice Merkel suggested in *Nulyarimma v Thompson*[89] that the Crown and its agencies, when exercising public power affecting Aboriginal rights may be obliged to act fairly as between indigenous and non-indigenous communities. Justice Merkel referred to the work of then Professor Paul Finn[90] as drawing an analogy between the exercise of public power affecting classes of the community possessing different rights and a fiduciary obliged to act fairly between different classes of beneficiary.

88 *Wik Peoples v Queensland* (1996) 187 CLR 1, 95-6.

89 [1999] FCA 1192, [225], [227], referring to *Te Runanganui o Te Ika Wheuna Inc Socy v AG* [1994] 2 NZLR 20.

90 PD Finn, 'A Sovereign People, A Public Trust' in PD Finn, *Essays on Law and Government* (vol 1, 1995) 18-19; and PD Finn, 'The Forgotten 'Trust': The People and the State' in M Cope, *Equity Issues and Trends* (Federation Press, 1995) 138.

The Canadian Supreme Court, in 1990, elaborated on the finding in *Guerin* in *R v Sparrow,*[91] saying –

> The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown, constituted the source of the fiduciary obligation …the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary aboriginal rights must be defined in light of this historical relationship… The honour of the Crown is at stake in dealing with aboriginal peoples… The special trust relationship and responsibility of the government vis-a-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

The Court said that –

> [the Crown's] power must be reconciled with the Crown's duty, and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.[92]

The Court held in *Sparrow* 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 and it was necessary to address 'whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the aboriginal group in question had been consulted.[93]

In *Delgamuukw v British Columbia*[94] Chief Justice Lamer confirmed that the infringement of Aboriginal rights must satisfy the 'test of justification'. The infringement must be in furtherance of a legislative objective that is compelling and substantial. He said there was a fiduciary relationship between the Crown and Aboriginal peoples which reflected the prior Aboriginal interest and included the duty of consultation in good faith with the intention of substantially addressing the concerns of aboriginal peoples.

Justice Cooke, President of the Court of Appeal of New Zealand in *Te Runanga o Wharekauri v A-G*[95] said that the continuance of unextinguished aboriginal title

91 (1990) 70 DLR (4th) 395, 408, 413; see commentary by G Nettheim '*Sparrow v The Queen'* (1991) 2 *Aboriginal Law Bulletin* 12.
92 (1990) 70 DLR (4th) 395, 408.
93 *R v Sparrow* (1990) 70 DLR (4th) 395, 416-17.
94 (1997) 153 DLR (4th) 193.
95 [1993] 2 NZLR 301, 306.

gives rise to a fiduciary duty and constructive trust on the part of the Crown, citing *Sparrow* and Toohey J in *Mabo (No 2)*. In *Te Runanganui o Te Ika Whenua Inc v A-G*[96] the President said that 'extinguishment by less than fair terms, would be likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power'. In the 2015 Supreme Court of New Zealand case of *Paki v A-G (NZ)*[97] Elias CJ remarked that the Crown's obligations to Maori may have a basis in common law aside from its undertakings in the *Treaty of Waitangi* and may be broader than the understandings of fiduciary duty in private law.

There is no reason why Australian Courts could not adopt the form of sui generis fiduciary duty which has been articulated in Canada and New Zealand and which balances the duty of the Crown with the competing duties to be taken into account when exercising powers which impact upon indigenous rights.

In *Western Australia v Ward (Mirriuwung- Gajerrong Case),*[98] Gleeson CJ, Gaudron, Gummow and Hayne JJ said '[T]he statement in *Mabo (No 2)* that native title 'may be protected by such legal and equitable remedies as may be appropriate to the particular rights and interests established by the evidence'[99] is yet to be developed by decisions indicating what is involved in the notion of 'appropriate' remedies'. Kirby J in *Thorpe v Commonwealth [No 3]*[100] said that whether the Crown owes a fiduciary duty to Indigenous peoples 'remains an open question'.

Grover[101] suggests that much of the need for a fully developed fiduciary conception of the Crown-Maori relationship has been obviated in New Zealand by the commencement of the *Treaty of Waitangi* settlements process.

With the renewed call for treaty negotiations, overseen by a Makarrata[102] Commission, coming out of the Uluru Statement, made by the Indigenous people gathered at the 2017 National Constitutional Convention, the need to pursue in Australia the development of the legal concept of the Government's fiduciary relationship with First Nations peoples may also evaporate. However, like the pursuit of the Mabo case, in the absence of any political interest of the national government to promote national indigenous land rights legislation, if there is a continuing disinterest of Australian governments in negotiating treaties at national or other levels, then the pursuit of a suitable test case to determine the issue of the Crown's fiduciary duty to Indigenous people may be called for in Australia.

96 [1994] 2 NZLR 20, 24.
97 [2015] 1 NZLR 67.
98 (2002) 213 CLR 1, [67].
99 (1992) 175 CLR 1, 61.
100 (1997) 144 ALR 677.
101 K Grover, 'The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38 *Sydney Law Review* 339, 359.
102 A Yolngu term meaning 'coming together after a struggle'.

A particular factual case could be made out for recognition of the fiduciary duty or 'honour of the Crown' in Western Australia.[103]

Western Australia historically has assumed a duty to protect Aboriginal people. Upon the establishment of the Swan River colony it was proclaimed by Lieutenant Governor Stirling on 18 June 1829 that the protection of the law applied to aboriginal inhabitants. Premier John Forrest, debating the *Aborigines Native Offenders Bill 1883*, told the Legislative Council that Aboriginal people were 'to a great extent like children', and that rather than increasing penalties under the Act, it would be 'kinder' and 'more efficacious' to 'chastise them … like one would whip a bad child'.[104] The *Aborigines Protection Act 1886* was 'An Act to provide for the better protection and management of the Aboriginal Natives of Western Australia'. That approach continued in the *Aborigines Act 1897*, and in the *Aborigines Act 1905*, which included section 33, empowering the Chief Protector of Aborigines to undertake the general care, protection and the management of the property of any Aboriginal person, provided that the powers so conferred were not to be exercised without the consent of the Aboriginal person, except as may be necessary to provide for the due preservation of the property.

Paul Hasluck said of the *Aborigines Act Amendment Act 1936* that it confined Western Australian Aboriginal people within a 'legal status that was more in common with that of a born idiot than any other class of British subject'.[105] The notion of the 'honour of the Crown' becoming a recognised feature of the relationship between the Crown and Australia's indigenous peoples, as it is in Canada, would sit well with the ethos of John Toohey, reflected in what he had to say in *Mabo (No 2)*.

IV DEMOCRACY, THE RULE OF LAW AND THE ROLE OF JUDGES

In *Sykes and Cleary*[106] Justice Toohey pointed out the importance to democracy of maintaining the distinction between the independence of a public servant and free and independent judgement of a Parliamentarian.

He pointed out in a speech in Darwin on 4-6 October 1992[107] that the High Court, as a court 'established as a guardian of a written constitution within the context of a liberal-democratic society' might need to act vigorously 'to protect core liberal-democratic values' and the rule of law, in an age when 'parliaments are

103 Two unsuccessful attempt have been made to argue for a fiduciary duty in the Crown in Right of the State of Western Australia: *Bodney v Western Australian Airports Corporation Pty Ltd* (2000) 180 ALR 91 and *Collard v Western Australia [No 4]* [2013] WASC 455.

104 A Haebich, *For Their Own Good* (UWA, 1988) 54 n 11.

105 P Hasluck, *Black Australians; a Survey of Native Policy in Western Australia, 1829-1897* (MUP, 1942) 160-1, quoted in P Biskup, *Not Slaves Nor Citizens* (UQP, 1973).

106 (1992) 176 CLR 77, in a joint judgment with Mason CJ and McHugh J, at 96.

107 Published in 1993.

increasingly seen to be the defacto agents or facilitators of executive power, rather than bulwarks against it'. In the same speech he also spoke of 'a revival of natural law jurisprudence – that for law to be law it must conform with fundamental principles of justice'.

When asked in 1989 if judges reflect the social values of the class they come from his Honour, then newly appointed to the High Court, responded that he was not sure what class he could be described as coming from and that 'you've got to accept the fact that judges can't be entirely representative of the community. You can at least hope that they're sufficiently open minded to be able to appreciate views other than their own'.[108]

> [T]he biggest challenge facing us is the need to communicate with people, to explain just what we are doing, why laws are made, why they are administered in the way that they are and the way the courts apply them in the way that they do. I think it is incumbent on all arms of the law, including the courts, to make clearer to the community just what they are doing.[109]

When confronted, shortly before his retirement, with the suggestion that he was an 'activist', he stated that judges must 'create law' and that law is created every time a judge changes or develops the law. He said 'references to activism use the word 'change'… as a pejorative term'. His view was that a decision *not* to change or *not* to develop the law is just as activist as a decision to change the law and can have consequences just as dramatic.[110]

V JOHN TOOHEY CHAMBERS

Upon his retirement from the High Court in 1998, I wrote to John on 7 September seeking his consent to adopting his name for a set of Barristers' Chambers, with locations in Perth and in Darwin. Those expressing initial interest in being part of the Chambers included several who practised in the area of native title and land rights. He gave his consent on 16 September 1998, expressing the desirability of the chambers being available to counsel representing a variety of interests.

The Chambers were officially launched in Darwin on 25 September 1999 in Darwin, and has grown into two healthy collegiate sets of chambers. The Chambers at Level 3, Council House, 27-29 St Georges Terrace, Perth were officially opened by John on 30 April 2003.

As a condition of membership of the chambers each member undertakes to

108 (1987) 14 *Brief* 21.

109 Interview for *Brief* quoted by Kirby J in the 2002 John Toohey Oration at UWA.

110 James Edelman and Natalie Gray, 'Toohey, John Leslie' in M Coper, T Blackshield and G Williams (eds), *The Oxford Companion to the High Court* (Oxford University Press, 2001).

observe a standard of conduct worthy of the Honourable John Toohey.

In 2010 John wrote to me that –

> [H]uman rights, especially among indigenous people…can be a hard slog and is not always recognised.
>
> Human rights is and will always be an ongoing process and its value is not always appreciated.

VI CONCLUSION

We all honour and respect the empathetic, steadfast and unassuming way in which the Honourable John Toohey, throughout his life, pursued the cause of respect for human rights, particularly for indigenous peoples, and we seek to continue the legacy he has left us.