PRELIMINARY ADVICE TO THE NATIONAL NATIVE TITLE COUNCIL REGARDING

ANY AFFECT OF THE PROPOSED VOICE TO PARLIAMENT ON FIRST NATIONS SOVEREIGNTY

Introduction

1. On Wednesday 25 January 2023, I received a verbal request from Mr Jamie Lowe, CEO of the National Native Title Council, to prepare an advice on the relationship between First Nations sovereignty and the proposed amendment to the Australian Constitution ("the Constitution") to insert provisions creating a right or power for a body representative of Aboriginal and Torres Strait Islander people and/or First Nations to provide comment in relation to parliamentary bills and executive decisions affecting the rights or interests of those people ("the Voice").

2. I confirm that I agreed to provide the written advice on a pro bono basis by 28 February 2023. However, following public advocacy regarding this issue on 26 January 2023 at protest rallies in various Australian capital cities, and subsequent media comment, some preliminary advice has been requested.

3. This advice is provided on a preliminary basis, in the sense that it does not set out the full reasoning for my opinion. However, it is my strong view that the answer to the question is not in doubt. The referendum and any related actions cannot affect the sovereignty of the First Nations.

Sovereignty

4. A difficulty with the question is the variety of meanings attached to the notion of sovereignty. At international law, the term is used to signify ultimate law-making authority over particular terrestrial territories and adjacent seas.

5. In Australia, as in the United States of America amongst other countries, there is a plurality of sovereignty in that the colonies (now states) exercised a sovereign authority prior to federation and the terms of the federation include preservation of certain sovereign powers in those states whilst conferring other powers on the federal entity. One of the suite of powers conferred on the federation in Australia and the USA is the power to deal with external affairs, defence, territorial security etc. Some writers refer to these arrangements as external sovereignty and internal sovereignty. These concurrently exercised sovereign powers are known as dual sovereignty.

6. For the purpose of international arrangements it is the external sovereignty that qualifies Australia to be a member of the United Nations ("UN"). Article 2 of the United Nations Charter sets out at Article 2 the principles by which the UN shall achieve its purposes. Article 2.1 provides

   The Organization is based on the principle of the sovereign equality of all its Members.

7. However, the notion of sovereignty accommodates numerous variations including condominia or joint sovereignty, see for instance Gibraltar.

Liability limited by a scheme approved under Professional Standards Legislation

8. In Australia, the acquisition of sovereignty by the British has been dependent on the notion that Aboriginal people were not sufficiently 'developed' to have been sovereign of their territories. This proposition is fallacious and was acknowledged as such, by implication, in the decision in *Mabo v State of Queensland* (No 2) (1992) 175 CLR 1. However, as we know the High Court in Mabo No 2 did not directly consider the validity of the British assertion of sovereignty. This is notwithstanding that Brennan J cited the passage from the International Court of Justice Western Sahara Advisory Opinion (1975) in which the relationship of the Western Saharans with their lands and waters was recognised as having a deep spiritual foundation. This same passage is referenced in the Uluru Statement from the Heart.

9. It is my understanding that the sense in which the term 'sovereignty' is used in Australia by First Nations representatives is in the fullest international law terms, as a matter of principle. By this I mean that that statement 'Sovereignty Never Ceded', which is used as a catch-cry, asserts that sovereignty was possessed by the First Peoples over their respective territories, has never been ceded and continues to be possessed. The Western Sahara Advisory Opinion confirms that the original invalidity cannot be overcome without some express agreement.

10. However, in broad practical terms, it is my observation that First Nations are not asserting a desire for full independent nation status, but rather recognition of and respect for their continuing sovereign status, territories and decision-making authority. That is not to say that they cannot assert their entitlement to full independence, if they wish.

11. Recognition that sovereignty was never ceded by First Nations in Australia ought not to be politically fraught. It is a fact. In the Northern Territory the Barunga Agreement, entered into between the Northern Territory Government and the four (4) statutory Aboriginal land councils, provided in clear terms for the recognition that sovereignty had never been ceded.

12. It seems to me to be possible for the federal, state and territory governments to acknowledge that sovereignty has never been ceded by First Nations without affecting the lawfulness of their own asserted sovereignty in the way that the Northern Territory Government made that concession.

<u>The Voice</u>

13. The Voice has arisen as a proposition for constitutional reform to provide for recognition of First Nations in the constitution. Its formal origins are in the support given to it by the adoption of the Uluru Statement from the Heart at a convention as Yulara, NT in May 2017. The convention organisers did not attempt to secure representation from each First Nation. Although this limited the extent of the mandate, the gathering of some 250 invited delegates provided some degree of broad support by individual First People.

14. Therefore, notwithstanding the shortcomings in the way the convention was conducted, it is proper today that the reform proposal came from the Uluru convention. It was adopted by the Referendum Council and recommended to the Federal Government. The Referendum Council recommendations were promptly rejected by then Prime Minister Malcolm Turnbull.

15. Individuals and groups of people continued to advocate for constitutional reform to enable the creation of a body to give advice to the Government. Others advocated for the creation of

Liability limited by a scheme approved under Professional Standards Legislation

treaty and or truth telling commissions. However, there was no uniform representative platform seeking any of those outcomes.

16. There can be no doubt that the proposal for the Voice emanated from members of the First Nations' communities and that while those individuals comprised a broad cross-section they were not representative of their respective First Nations.

17. This history is relevant because the proposal has not been put to government by the entities which hold Indigenous sovereignty, the First Nations. The proposal for a Voice, the support of it by individual First People, and the exercise of a vote in favour of the Voice by individual First People does not comprise an act of cession by any First Nation. Even the public support of a "yes" vote by a First Nation does not comprise an act of cession by that First Nation. Because the First Nation is not a party to the decision.

18. However, once the proposal was taken up by the Federal Government, it became a government action to give effect to a broad unmandated request. This is so because only the government can call a referendum to amend the Constitution. And only the voting populace can approve a referendum question. This includes First Peoples exercising their right to vote as Australian citizens.

19. It is noted that the Constitutional Expert Group appointed by the Government has formed the opinion that no parties' interests are affected by the holding of the referendum. It is also noted that when questioned by Senator Thorpe (Vic) in budget estimates about any impact of First Nations sovereignty, Mr Murray Watt answered that there was no impact.

<u>Acquiescence</u>

20. It is also noted that in the press recently, Senator Thorpe and Mr Michael 'Ghillar' Anderson have raised concerns that the consent to or the failure to oppose the holding of the referendum or the inclusion in the Constitution of provision for a body to make comment may amount to an act of acquiescence that will be able to be relied upon by the Australian nation state to rebut claims of continuing and unceded sovereignty by First Nations. I am also aware that an article by Professor George Williams has been published in the press on the issue of potential impact on First Nations sovereignty in which he expresses the view that there will be no impact. Professor Williams did not specifically deal with the issue of acquiescence. For the record, I agree with his views in relation to the matters he commented upon.

21. In an article for publish in the Melbourne Journal of International Law in 2017, Etienne Henry made the following observations about the international law relating to acquiescence drawing from the case law[1]

    > According to the International Court of Justice ('ICJ'), 'acquiescence … irrespective of the status accorded to [it] by international law … follow[s] from the fundamental principles of

[1] Henry, Etienne, Melbourne Journal of International Law, 2017 Vol 18(2), Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law, p 4

Liability limited by a scheme approved under Professional Standards Legislation

good faith and equity'.[2] It is 'equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent'.[3]

22. Mr Henry goes on to set out three (3) factors are necessary to conclude that a passive state has acquiesced to a claim or situation resulting from actions attributable to another subject of international law. They are:

    a. The inaction should be a certain period of time;
    b. The state alleged to have acquiesced should have knowledge of the claim or facts, and therefore a possibility to react; and
    c. Silence should be interpreted as acquiescence only to the extent a response ought to reasonably have been expected.[4]

23. As regards time, noting that the origins of the notion of acquiescence are found in principles of good faith, the circumstances may not require an immediate response, but in the present case would require a response prior to the referendum.

24. As regards knowledge of the claim or facts, it is my view that there is no claim and are no facts that would give rise to requirement upon First Nations to engage in rebuttal. A government official has rejected the proposition that the Voice reform will affect First Nations sovereignty, the expert group advising the government has advised that there will be no affect on any rights. Moreover, the actions by the Australian state to create provisions allowing for the receipt of comment by representatives of First Nations is performed in the context of the assertion in the Uluru Statement to continuing First Nations sovereignty and a demand for the entry into treaties. Further, the Government has publicly committed to the whole of the Uluru Statement from the Heart and has a stated intention to established a treaty and truth telling commission.

25. In my view the holding of the referendum is not a claim or fact which could be interpreted as asserting either primacy of Australian sovereignty over First Nations sovereignty, nor a denial of First Nations sovereignty, nor confirmatory of cession by First Nations. In the context of the Uluru Statement from the Heart and the action of committing to the establishment of a treaty and truth commission it is more consistent with the recognition of an ongoing First Nations sovereignty.

26. As regards the third limb, namely, reasonable expectation of a response, for the reasons set out above, in my view it is not reasonable to expect First Nations to act in response to the actions of the Australian state because the referendum and the actions consequent upon a 'yes' vote are not a claim or fact affecting or impacting First Nations sovereignty.

27. Further, the notion of acquiescence can be applied as between nation states in the international law setting. However, in the case of colonial or settler states and First Nations, the actions of nation states are governed by the principles of free prior and informed consent (FPIC). In August

---

[2] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (Judgment) [1984] ICJ Rep 246, 305 [130] ('Gulf of Maine Case')
[3] Ibid
[4] Henry p5

Liability limited by a scheme approved under Professional Standards Legislation

2018, the Expert Mechanism of the Rights of Indigenous Peoples, a United Nations sub-committee, published a report on FPIC titled *Free Prior and Informed Consent: A human rights based approach*[5]. The report sets out clearly the approach that ought to be taken by States undertaking actions which affect the rights and interests of Indigenous peoples. In my view, it is through this set of principles the actions of the Australian state would be seen in any analysis of its conduct surrounding the amendment of the Constitution.

28. In the present case, not only has there been denial by a government official that First Nations sovereignty will be affected but the government has not sought the free prior and informed consent of the First Nations to any such affect. The failure to expressly seek that consent would be fatal to any claim by the Australian state that the holding of the referendum or amendment of the Constitution affected First Nations sovereignty or that a failure to respond to those actions by First Nations may be relied upon as acquiescence.

29. Although no words have been formally settled upon, if regard is had to the form of words put forward by the Prime Minister at the Garma Festival in August 2022, it can be observed in respect of those words for the proposed amendment to the Constitution to insert a right to comment for First Nations or First Peoples in relation to certain parliamentary bills and executive decisions:

    a. There are no express words or meanings that could be said to impact upon or affect the sovereignty or the assertion of sovereignty by First Nations; and
    b. There is no basis for inferring or implying any impact or affect upon the sovereignty or assertion of sovereignty by First Nations.

30. Further, it is fundamental to the international law relating to the acquisition of sovereignty over territories that sovereignty over occupied territories may only occur by conquest or cession.

31. There are no circumstances under which any of the decisions by the federal parliament necessary to bring about the referendum, the holding of the referendum and amendment of the constitution, or the passage of legislation following the referendum can be said to constitute cession, conquest or confirmation of a past conquest or conquests, either expressly or by implication. If that were so, such impact would have already occurred as a result of the 1967 referendum to amend section 51(xxvi) of the Constitution or the passage of the *Native Title Act 1993* (Cth).

32. Notwithstanding the above views, the absence of a proper legal foundation did not stop the British territorial acquisition of First Nations lands and waters, or the maintenance of a legal pretence for two centuries. Indeed, the absence of a proper legal foundation did not stop the then Prime Minister, the Hon Malcolm Turnbull, from asserting that an advisory body would operate as a third chamber of parliament. It is, therefore, not inconceivable that an Australian political party or politician might seek to assert the referendum alone or in concert with other events demonstrate the legitimacy or perfection of the acquisition of sovereignty and the absolute displacement of First Nations sovereignty. The likelihood of this outcome is low but cannot be said to be non-existent.

[5] G1824594.pdf (un.org)

Liability limited by a scheme approved under Professional Standards Legislation

33. Further, in my view, it is impossible to protect against that type of mischievous political conduct. The best that can be achieved in the short term is a public statement from a Minister of the Government to the effect that the referendum does not have any impact or affect upon First Nations sovereignty. Although, in my view, such a statement is not necessary for legal purposes but may have some limited political function. Further, as we know, the statements of a Minister are not binding on a subsequent Minister, governments can change their policies, and parliament can amend legislation.

34. In the medium to long term the position as regards recognition and protection of First Nations sovereignty can be secured in treaty arrangements.

35. As to the difficulty of obtaining some ministerial statement, I am not aware of any public statements by the Federal Government acknowledging that sovereignty has never been ceded. This may present a much greater problem for the federal government than it did for the NT Government and may take some working through to ensure that it is said in a manner that allows the government to deny the existence of any competing sovereignty. But as is said above at [12] it seems to be an outcome that is achievable.

36. A more detailed advice will follow in late February 2023. Please do not hesitate to contact me should you wish to discuss any aspect of this preliminary advice.

Tony McAvoy SC

Frederick Jordan Chambers
53 Martin Place
Sydney NSW 2000

16 February 2023

Liability limited by a scheme approved under Professional Standards Legislation