National Aboriginal and Islander Day of Celebration ("NAIDOC")

Self Determination:
Our Community, Our Future, Our Responsibility

Opening address by

The Hon David K Malcolm AC
Chief Justice of Western Australia

Forrest Chase, Murray Street Mall
Perth City

5 July 2004

The Hon John Kobelke MLA, Minister for Indigenous Affairs
ATSIC Chairperson, Gordon Cole and ATSIC Commissioner Farley Garlett both of the Perth Nyoongar Regional Council
Commissioner Karl O'Callaghan, Commissioner of Police

I acknowledge the Nyoongar people as the Traditional Owners of the land on which we now stand and I particularly thank Ms Marlene Jackamarra, for her invitation to speak at this historic event – the official opening and flag raising ceremony to launch NAIDOC Week 2004. I also particularly wish to welcome and thank Reverend Sealan Garlett and Aunty Doolan Leisha Eatts for their Welcome to Country, Richard Walley and the Wadumbah Dance Group, Mort Hansen, for his outstanding didgeridoo performance, as well as all of our indigenous brothers and sisters. As some of you may know, it has been my privilege and pleasure to be the Patron of the Sorry Day Committee, which was formerly the Bringing Them Home Committee. I am also the Patron of the Survival Concerts in the Supreme Court Gardens and have hosted functions at the Supreme Court for National Reconciliation Week. It is an honour to be here today at the National Aboriginal and Islander Day of Celebration at the beginning of NAIDOC week, with this year's theme being the recognition of Self-Determination within the Community.

It was 55 years ago that I first spoke to an Aboriginal person during a period in the Children's Hospital. I was aged 10. My bed was on a verandah facing East. In the bed next to me was an Aboriginal girl from

the North West. It was from her that I first heard about the Dreamtime and what it meant.

In 1957 when I was living in St George's College at UWA, the first Aboriginal student to enter UWA arrived. He was Irwin Lewis, father of the famous footballer. He was himself a great footballer. I saw first hand many of the difficulties which he had to overcome to succeed as he has done.

At the time of European colonisation in 1788, the Aboriginal population was estimated to be approximately 300,000 persons spread among more than 500 tribes living on the Australian continent. In the Northern Territory case of *Milirrpurru* in 1971, the first major native title claim, Blackburn J said that the claimant people had a system of law at the time of colonisation which was:

> " … a subtle and elaborate system adapted to the country in which the people lived their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws' and not of men, it is that shown in the evidence before me."

Within 100 years after colonisation, many tribes had been destroyed after conflict with European settlers. The traditional way of life had mostly disappeared, except for a few isolated groups and the population had been reduced to approximately 60,000 by a combination of killing by settlers and the effects of introduced diseases, poverty and

neglect. At the beginning of the Twentieth Century, most Aboriginal people still lived in the bush or in rural areas.

Until 1967 Aboriginal and Torres Strait Islander and people were not recognised as full citizens of Australia under the law. In general, they had no right to vote and no right to consume alcohol. Generations of Aboriginal children were removed from their parents in infancy and raised in orphanages or similar institutions. Aboriginals were not entitled to receive the same wage as non-Aboriginal persons. The position of the Aboriginal people under the law has dramatically improved since the 1960s, but there is still much to be done.

Non-indigenous Australians may not realise that the majority of us are in charge of our own lives in ways that many Indigenous Australians are not.[1] Life expectancy and health are a good example. Important factors in the improvement of the life expectancy of the Maori people of New Zealand include Maori control of health services, health service provision in a wide context of language and development education designed to close the training gap between Maoris and non-Maoris.[2] This is what "self-determination" should be seen as meaning to Indigenous people – being able to take charge of their own lives. Self-government does not have to mean the establishment of a separate sovereignty and dividing the country. For example, it can apply to running schools and local community health centres.

Since 1993, the judiciary in Western Australia have participated in a series of cross-cultural awareness programmes and have reached out to

[1] supra note 2
[2] Ibid.

Aboriginal communities throughout the State. Hopes for reconciliation were raised in 1991 with the establishment of the Council for Aboriginal Reconciliation. The Council made a series of major recommendations in relation to social justice in that time. The Aboriginal and Torres Straight Islander Commission ("ATSIC") has also made a substantial contribution. Its abolition raises significant questions regarding the future of reconciliation.

Despite the implementation of a number of reforms in dealing with offenders, at the end of 2002, an Aboriginal person in Western Australia remained over 10 times more likely to be arrested than a non-Aboriginal person[3]. Expressed differently, more than 13% of Aboriginal persons in Western Australia had been arrested during 2002. This is compared to just 1.3% of the non-Aboriginal population. An Aboriginal person is also 28 times more likely to be imprisoned than a non-Aboriginal person. Western Australia also exceeds all other States, as well as the Northern Territory, in terms of imprisonment rates for Aboriginal people. The causes of these dramatic differences in arrest and imprisonment rates for Aboriginal people and non-Aboriginal people are numerous. This is a topic on which much work has been done but more research is needed. How Aboriginal and Torres Strait Islander people are dealt with by the criminal justice system is a significant topic. Misunderstandings or misconceptions which may arise in the course of criminal proceedings in which an Aboriginal person is a witness or a defendant can have drastic consequences. It is imperative that the justice system is able to identify, understand and address those issues, in order to ensure equality before the law and access to justice for Aboriginal people.

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[3] Ferrante A, N. Loh & Fernandez J., (2003) *Crime and Justice Statistics for Western Australia: 2002*, at p.42

The aspirations of the Aboriginal peoples need to be recognised. In the eyes of the law, one of the strongest indicators of the indigenous communities' united front is the formal recognition of their unique connection to the land, and specifically, native title. The Aboriginal and Torres Strait Islander people themselves likewise need to recognise the current position and aspirations of others, including pastoralists and miners. There is a role for governments here to reconcile the aspirations and interests of all parties. The process for recognition of native title provides a larger scale precedent for the process of reconciliation within the community. In his first Ministerial Statement to the Northern Territory Parliament, Minister John Ah Kit MLA said:

> *"Aboriginal people in the territory must escape from the cargo cult mentality of the government doing everything for them; of relying on the empty rhetoric of playing the victim. Aboriginal organisations must bite the bullet and develop new, innovative strategies to overcome the cancerous ideologies of despair.*
>
> *The other side of that coin is that the government – in partnership with the Aboriginal people – must allow the development of forms of governance that allow Aboriginal people the power to control their lives and communities."*[4]

The opportunity for reconciliation will be lost by the adoption of hard-line adversarial positions by any of the parties with a vested interest in the outcome. We should learn from the experience in Canada, New Zealand and the United States where successful accommodations have been reached. The processes adopted there can be adapted for adoption here. Experience has shown that a process of consultation, mediation and

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[4] Ah Kit J, *Ministerial Statement*, Northern Territory Parliament, 7 March 2002, http://www.nt.gov.au/ocm/speeches/20020305_ahkit_aboriginal.shtml, 8 March 2002

reconciliation of land claims based upon mutual respect is essential. The process itself is as important as the ultimate outcome.

It is often argued that making special provision for indigenous people, as by providing an Aboriginal Legal Service or funding such a service, infringes the principle of equality before the law and is discriminatory. Experience in the United States and Canada suggests that the principle of equality before the law is consistent with special treatment of indigenous peoples, for whom there is a specific constitutional responsibility. The Canadian Parliament, in the exercise of its power with respect to Indians can validly enact special laws based upon a "legitimate legislative purpose in the light ... of long and uninterrupted history" or on "Indian customs and values" provided that they do not exclude Indians from the enjoyment of basic rights and freedoms.[5] In the United States, federal legislation dealing specifically with Indians is consistent with the guarantee of equal protection before the law if there is a rational basis "for the legislative classification in the light of its legitimate purpose". As in Canada, the United States courts have been strongly influenced by the special federal responsibility for Indians under the Constitution.[6]

The development and preservation of a multi-cultural society requires tolerance. In Australia, instead of having a society bound together by shared or common beliefs and values, our society has tended to become more dependant for its survival on co-operation between people who do not necessarily share common beliefs and their willingness to tolerate one another. Racial, religious and behavioural tolerance is not enough. There must also be co-operation, interaction and

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[5] *Attorney-General of Canada v Canard* (1975) 52 DLR 3d548 at 575
Slattery B, Understanding *Aboriginal Rights* (1987) 66 Can BR 727
[6] *Morton v Mancari* 417 US 535 at 555 (1974).

mutual respect between Indigenous and non-Indigenous members of our society. Through our shared bonds of humanity and spirituality, we must engage the entire community in the process of reconciliation in order for our Indigenous brothers and sisters to promote effective self-determination.

Today, there are many social issues affecting the stability Aboriginal community. Drugs, alcohol and crime all affect the vital unity that is provided by the family structure. Aboriginal youths of today are only one generation removed from a time when government policy forcibly took these children away from their parents, which had a marked impact upon the fundamental core of Aboriginal community – that being, the strength in unity found in family. It is without question, that the concept of a united family acting conscientiously towards bettering society at large, will prove to be the way forward in advancing the cause of the Indigenous community.

We have a long way still to travel to address the social and economic disadvantages of indigenous people. The idea of a treaty or agreement on reconciliation needs to be vigorously pursued at national, State, Territory and local levels. This involves the development of partnerships and projects which will advance the cause of reconciliation.

We look forward to the day when we can be united in the celebration of our diversity, acknowledging and respecting our differences, but making sure that we have cause to celebrate the best in all of us through equalising opportunity.

It is with great pleasure and a strong sense of privilege that I launch NAIDOC Week 2004.