

Yoorrook Justice Commission Ceremonial Wurrek Tyerrang Opening Remarks

Senior Counsel Assisting Tony McAvoy SC

Opening Remarks

Chair Bourke, Deputy Chair Commissioner Hunter, Dhamangalnya, Commissioner Bell. My name is Tony McAvoy, I appear as Co-Senior Counsel Assisting the Yoorrook Justice Commission, together with Ms Fiona McLeod AO SC, and Ms Sarala Fitzgerald and Mr Tim Goodwin of Junior Counsel. We are instructed by Mr Ben Kiely and Ms Emily Heffernan of King and Wood Mallesons, who are the solicitors assisting the Commission.

Chair Bourke and Commissioners, we acknowledge that we are on the lands of the Wurundjeri people. We acknowledge the Bunurong and the whole of the broader Kulin Nation. We hope their spirits and their old people are with us today and whenever we conduct hearings on their lands. We acknowledge and pay our deep respect to the First Nations throughout this place called Victoria and across the nation. We extend our deepest respect and gratitude to the elders and first peoples present in the gallery for this opening.

Commissioners, in the quiet moments when the river, Birrarung, runs through the suburbs of this place it is possible to hear the whispers of the old people, the ones who have been in this place for many thousands of years, the ones who saw the seas recede during the last ice age and watched it rise again as the earth warmed. The ones who, no doubt, wept as the Wurundjeri, the Bunurong, were decimated, and their ceremony grounds and sacred places destroyed.

If we turn our heads and bend our ears, those whispers can still be heard. Those old people have not gone. They, like their descendants today, have nowhere else to go. But like the eternal truths told by the spirits of these lands and waters, the from the day the new world arrived here it failed to listen and only heard its own tongue and revelled in its own clamour. But the whispers remain, for there is a murmur that will always be here.

The purpose of this inquiry is to give voice to the old people and their descendants and to tell all those that now live here, and the rest of the continent, that which may have been told many times before but to date has been ignored.

Chair Bourke and Commissioners, this inquiry, the Yoorrook Justice Commission has come into being at the request of the First People's Assembly of Victoria. In response to that request Letters Patent were issued by the Governor of Victoria on 12 May 2021. Those Letters Patent contain the terms of reference by which this commission of inquiry is bounded. Those terms are broad, and your remit involves the examination of evidence which may have been buried, or have become overgrown, or ignored. It requires an examination of history, the identification of injustices, the unravelling of systems, and the protection of information.

As Co-Chair of the First Peoples Assembly of Victoria, Geraldine Atkinson has said

“We commend the Victorian Government for agreeing to work with the Assembly on a truth and justice process which will help shape and create a more equitable society that brings pride to all Victorians.”

The Letters Patent are in themselves historic, for in asking the questions that are posed in the terms of reference they demonstrate an insight that has been absent, and a willingness to truly hear what is being said. This is an historic event. It is historic for the First Peoples of southeast Australia, but it will also set the benchmark for similar inquiries that, without doubt, will be held in each province, if not under a national banner. First Nations people throughout the continent will be viewing these proceedings with hope and cynicism. Hope that this time, in this telling, some of what they know and understand will filter through and cause the relationship, that is almost uniform across the continent, to evolve from that which now exists into one which has some understanding and respect. Cynicism, that like the many, many times the government and the newcomers have been told before, the message will be listened to, but not truly heard.

As counsel assisting the inquiry, it is our duty to ensure that the evidence that is collected and brought before the Yoorrook Justice Commission, in a manner that engages the community and breaks through the indifference. It cannot be the case that the First People of Victoria come forward and share their trauma in an effort to educate the communities which live on their lands, but by which they are vastly outnumbered, only for that trauma to fall on deaf ears. It is not enough that the Ministers of the Victorian Government hear and understand the fact and consequences of the actions of their forebears, and their own actions. The evidence and results of this Justice Commission, if justice is to be delivered, must be understood as an unmasking of our society, a time when its true self is revealed by its actions in response.

It would be hubristic for Counsel Assisting or, indeed the Commissioners, to think that the community that is present day Victoria need only hear these truths once and take on itself the vigilance necessary to avoid sliding back to a place that is more comfortable by reason of its ignorance. These messages will need to be refreshed. But the time for collective growth is here, a time for all to be generous in spirit, compassionate in their understanding and thoughtful in their reactions.

In this regard, there will be a record that is indelible. A record created by First Nations people, unfiltered and unsanitised.

The process in which we are about to engage is not one of listening and hearing alone. It is intended to be participatory. This inquiry has about it the qualities of a ritualised initiation ceremony. For millennia, young people have, throughout Australia engaged in ceremony that ushers them into adulthood. The young people then leave childhood, they leave their parents behind and take on responsibilities and obligations, and they access the freedoms of adulthood.

With this ceremonial aspect in mind, it is easy to appreciate that this Inquiry will test the courage and strength of this society, its mental resolve, and if it passes these tests, if it accepts the knowledge that will be given to it, it may pass into adulthood and take its place as a matured being. In recent years there has been discussion about the absence of ‘moral legitimacy’ in settler states where there has been no just and equitable accommodation of or reckoning with First Nations, such as in Australia. This notion of ‘moral legitimacy’ can be understood as reminding us that no matter what your view as to the formal legality of the acquisition of territory by the British, there can be no moral legitimacy in the invasion and dispossession of another people.

It is only through the acceptance of that moral illegitimacy, and the need to engage in rectification and restitution that the Victorian community will be able to complete the ceremony that lies before it. In order to perform the acts of rectification and restitution that are necessary it must understand and accept, with all the pain of the precise detail, what it has done, what has been done in its name and what it is still doing. This is the courage and the strength that is needed.

This very point was made with great eloquence and passion by the former Victorian Commissioner for Aboriginal Children and Young People, Yorta Yorta and Gunditjmara elder, Mr Andrew Jackomos, in evidence to the Royal Commission into the Protection and Detention of Young People in the Northern Territory, otherwise known as the Don Dale Royal Commission, in 2016. In that inquiry speaking of his observations of the child protection system in Victoria he said:

“It is key to improving practice, key to improving outcomes for our kids. No matter how good your policies are, no matter how good your legislation is, no matter how many dollars you allocate, if you have poor practice that arises from institutional racism, as it does, then we will never have a good service for Aboriginal children and other children. You just can’t achieve that unless you confront and own up that there’s institutional racism and bias within – within the child protection system. And the youth justice system.”

Mr Jackomos is presently the special adviser to the Victorian Government on Aboriginal Self Determination. While many people in Government and the broader community are in the process of learning and are accepting of many of the facts that are well known to First Nations People, it is still very much the case that there are vast numbers of people in this State and this country who deny what has occurred. There will be evidence brought before the commission going to the deep racism that exists within the government and the community. It is a level of racism that has become more overt in world and domestic politics, and notwithstanding good work within some parts of government, the rates of incarceration of First Nations children, women and men continues to rise at a rate far in excess of the mainstream population and children are being removed from their families at rates never before seen.

Commissioners, we witnessed the RCIADIC recommendations being handed down and the failure of those recommendations to bring about the change in practice in the police, corrective services and across the government services that is still needed. That failure to change the culture in government is largely due to the entrenched racism.

That racism must be confronted in this inquiry. The Parliament, the government and the community must not be permitted to turn its head away from the brutal ugliness that is visited open First Nations people every day.

If this society is to move forward then the truth of what has occurred here must be so embedded in the story of this nation that it is unacceptable to publicly deny, or in its more insidious form, to question, that history.

At present, we see the debate continuing about the extent to which massacres of First Nations people occurred in this country. Professor Lyndall Ryan and her team at the University of Newcastle has researched and recorded many of those events, and although the number may be much higher than some expected, it must be observed that the First Nations communities believe this is the tip of the iceberg, and that the full account will never be known. However, some public commentators continue to question whether murder and massacre of First Nations people were prevalent practices in the colonial history, and some media companies continue to amplify those voices.

The effect of those doubters' voices is to tell those who are fearful of the truth, and those who convinced of their own superiority, which are often one and the same, that it is okay to maintain your ignorance and even to be vocal about it.

In the cultural life of First Nations, initiation ceremonies were, and in many places still are, conducted in ceremonial places that are circular in shape. There are ancient spiritual reasons for this shape the detail of which is for another time. Suffice to say that in some languages these places are called 'bora', and five such rings are known to exist at *Koora Kooracup*, now known as Sunbury.

Commissioners, being cognisant of these cultural and ceremonial norms as you are, you have determined that the tables which form this hearing and future hearing rooms shall form a circle to reflect the ceremonial aspect of these proceedings. The depth of meaning from this arrangement is respected and applauded by Counsel Assisting and should not be lost on any witness, their representatives or the public.

Not since the 1837 British Parliamentary Select Committee on Aboriginal Tribes has there been an inquiry so clearly directed at the clash of people and cultures that occurred following British arrival and the injustices that have been wrought upon the owners of this place. It should be remembered that under the heading New Holland that inquiry found in the following terms:

"These people, unoffending as they were towards us, have, as might have been expected, suffered in an aggravated degree from the planting amongst them of our penal settlements. In the formation of these settlements, it does not appear that the territorial rights of the natives were considered, and very little care has since been taken to protect them from the violence or the contamination of the dregs of our countrymen."

The evidence that will be adduced during the hearings will show that the territorial rights of the natives were not considered but ignored. The report also found that '*many deeds of murder and violence*' have been committed by military parties, storekeepers, cedar cutters and other free-settlers. The Committee recommended that the protection of the natives in all colonies be devolved to the executive of the British Parliament, and the acquisition of lands should be declared illegal and void. The self-serving and economically advantageous manner in which colonists ultimately got around this recommendation will also be the subject of evidence.

The close scrutiny of the early decades of the colony is necessary to fulfil the terms of reference, but also be illustrative of the ways in which parliamentary will and good conscience can be subverted and undermined, and how bureaucracies resist change, and fail to implement policies with which they disagree.

Nevertheless, this inquiry does not take place in the vacuum of the Letters Patent, but in the knowledge that is intended to inform and enable the State of Victoria and the population that now calls this place home to understand what will be said to it in the movement towards treaties, to forge a true relationship built on care and respect, mutuality and obligation. This again, returns to the participatory aspect of the inquiry. For Counsel, and other observers of human nature, we know that people can listen, and if they are sufficiently trained in the language and the mannerisms of the presenter, they can truly hear the overt messages and the nuance.

We know that if those messages are delivered in a certain way or enough times, they will be remembered. But we also know that if the listener is actively involved in the process itself becomes experiential and is far less likely to be lost or purged with unwanted or unused memories. We know that the first peoples of this continent had memory tools that outperform the western methods. In 2016 Dr Lynne Kelly published her book, *The Memory Code*, detailing how stories and songs reinforced by connection to places in the landscape enabled people to remember vast quantities of detailed information, but even with such tools practice is still necessary.

Commissioners, you have been invited to conduct this commission in a manner that provides a 'safe, supportive and culturally appropriate manner'. Working with the officers of the commission and counsel and solicitors assisting the commission we will use innovative and creative means to bring the evidence and make recommendations to you about the conduct of the hearing.

My learned Co-Senior Counsel, Ms Fiona McLeod AO SC will address you about the evidence and other matters shortly, but it is ever-present in Counsel Assisting's deliberations that in finding the best methods to present the evidence, a balance must be struck between First Nations ways of knowing and being, and the rest of the society's understanding of the inquisitorial process. However, it is lost on nobody that the fact that this inquiry must be conducted in English is a cultural and human tragedy. It is made all the more tragic given that this year, 2022, is the first in the International Decade of Indigenous Languages.

The Yoorrook Justice Commission will hear evidence of atrocities, and heartbreaking sadness from First Nations witnesses. But it will also hear evidence of survival, of

strength, of kindness and generosity and it will give witness to the deep knowledge and wisdom that resides in the people of this land.

The Commission also will hear from institutional witnesses, from government agencies and the people of Victoria. It will hear from historical and other experts. It will be asked to make findings as to the manner in which these lands and waters were taken, and the way in which the colonial machine maintains its oppression of the First Nations and First Peoples. It is from the evidence adduced in this Commission that findings must emerge that draw not only the shape of the face Victorians see when they look in the mirror, but the scars and wrinkles, the findings must ring true in voice they hear listening to themselves speak and sing, the tears they feel on their cheek. It is hoped that the face we all at the close of this commission see is mostly the same image, an image that reflects a maturity and respect, the visible change that shows on the face when one has been through an ordeal that is life changing. We hope nevertheless it is a face which retains some familiarity.

In commencing this inquiry, Commissioners, you invite all Victorians to observe and participate in ceremony. Notwithstanding all that has passed before, this offer is as gracious as it is profound.

I now invite Ms Fiona McLeod SC to return to the lectern.