

## Challenging Race and Gender Injustice in Western Australia's Constitution: Don

### McLeod spots an opportunity

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#### Introduction

Don McLeod (1908-1999) was a prospector, miner and pastoral worker in the isolated north-west of the state of Western Australia. Yet in 1937 he noticed something surprising in the correspondence pertaining to the process whereby Britain granted self-government to the colony. It was relevant to the indigenous peoples, the Aborigines, and for him it provided an explanation for the racial injustice that they experienced. It showed that the Crown's philanthropic intent towards the indigenous peoples had been undermined by Western Australian politicians.

McLeod, although not an educated man, studied the correspondence and discovered the relevant section of the *Western Australia Constitution Act 1889 (Western Australia)*.<sup>2</sup> Section 70 set out how Aborigines were to receive education and welfare, funded not by Britain but by Western Australia. It would be through a set amount or one-percent of its gross annual revenue and the British government retained control of expenditure of these monies.<sup>3</sup> McLeod was shocked at his findings. Race had been made a fundamental issue in framing the state Constitution. It assigned the indigenous people to a separate group despite their status as British citizens and recognised that they would need assistance to survive the imposition of British culture. Later, gender had become

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<sup>1</sup> Jan Richardson recently completed a Ph.D. on Donald William McLeod, and this article draws on that research. See Jan Richardson, 'They Couldn't Break Me': Don McLeod, Champion for Aboriginal Justice in the Pilbara', (Monash University, 2016).

<sup>2</sup> R.J.T. Butler, 'The Significance of Section 70 of the 1889 Constitution Act for Western Australian Aborigines', in *UWA Social Science Project*, (University of Western Australia: unpublished, 1981); Don McLeod, *How the West Was Lost: The Native Question in the Development of Western Australia*, (Port Hedland D.W. McLeod, 1984), p. 2; Raymond J. T. Butler, 'Education, the State, and the Indigenous Minority: A Case Study from Western Australia', (Masters thesis, Murdoch University, 1985).

<sup>3</sup> *Constitution Act 1889*, An Act to confer a Constitution on Western Australia, and to grant a Civil list to Her Majesty. Schedule C related to section 70 which was deleted by No. 14 of 1905 s. 65.

a corollary when settler men used Aboriginal women as sexual substitutes for a wife. The woman's interests could be safeguarded, and the offending men required to provide on-going care for her and responsibility for the children they sired. Such care would need funding to employ protectors and Section 70 delivered a financial model for the Indigenous people's protection and cultural adaptation. In 1905, section 70 was repealed.<sup>4</sup>

The idea of protecting Indigenous people during colonisation arose from British humanitarian ideals of the 1830s. They had influenced settlement in the other colonies of Australia, an impulse that encouraged the colonial office to design the *Aborigines Protection Act* in 1897<sup>5</sup>. This Act established an Aborigines Protection Board for Western Australia, like that provided in all other Australian states except Tasmania. It retained British control of Aborigines to avoid the colonists' mistreatment of them that had been reported to the UK government<sup>6</sup>. Section 70, peculiar to Western Australia, provided the money.

Until he died in 1999, McLeod conducted a campaign to expose the process and ramifications of repealing section 70. He argued that politicians such as John Forrest, then Western Australia's Premier, 'attempted to fiddle the estate of the Beneficial Owners by trickery and deceit'.<sup>7</sup> His viewpoint was unusual for a white man in an era when white men were financially advantaged by

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<sup>4</sup> The *Aborigines Act 1905* confirmed the removal, see The Constitutional Centre of Western Australia, 'Section 70', (2018). Accessed 06/02/2018.

<sup>5</sup> The long title of this Act was "An Act to provide for the better protection and management of the Aboriginal Natives of Western Australia, and to amend the Law relating to certain Contracts with such Aboriginal Natives". The Aborigines Protection Board was to have members appointed by the Governor and accountable to him. It was repealed, and the new Aborigines Act 1897: 'An Act to further amend the Constitution Act of 1889, and for the better Protection of the Aboriginal Race of Western Australia', abolished the Aborigines Protection Board, which was then replaced by the Aborigines Department on 1 April 1898.

<sup>6</sup> Anne O'Brien, 'Humanitarianism and Reparation in Colonial Australia', *Journal of Colonialism and Colonial History*, 12 (2011); Malcolm McCusker, 'State of the Federation Address', ([www.constitutionalcentre.wa.gov.au](http://www.constitutionalcentre.wa.gov.au), 2015). Accessed 26/06/2018.

<sup>7</sup> McLeod, p. 2.

the constitutional section whose removal he exposed as unjust.<sup>8</sup>

McLeod noted that by removing section 70, allocation and control of funding for Aboriginal education and welfare was passed into the hands of Western Australia politicians, who had a vested interest in promoting economic prosperity for the state. He construed the poverty and powerlessness of the Pilbara Aboriginal pastoral workers in 1937 to be a consequence of this decision. In McLeod's assessment, the resolution to withdraw section 70 from the Constitution thereby rendered the Constitution invalid and immoral. He formulated the view in 1937 that had the colonial office directed and monitored the funding provided in section 70, the effects of colonisation would have been far less detrimental to the Aboriginal pastoral workers. Motivated by this analysis, he began lobbying in 1943 for restitution of the financial and political benefits specified in section 70.

As his work for Aboriginal justice increased in later years, McLeod campaigned to bring to public attention his interpretation of a constitutional injustice. In 1981 historian Mandle recorded that he had 'become obsessed with what he sees as the injustice done to the aboriginals by the repeal of section 70'.<sup>9</sup> He had some effect, and as recently as 2016 historians and lawyers were examining arguments about the Constitution and colonisation of Western Australia.<sup>10</sup> McLeod pursued the idea that the processes of repealing section 70 were illegal and immoral, and in 1977 he travelled to England to obtain legal advice about his analysis. John Macdonald, a London Queen's Counsel

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<sup>8</sup> The law preventing interaction between the races had created a culture in the north-west where, as Aboriginal pastoral worker and Lawman Clancy McKenna said, 'Everything was governed by the white man and the station life ... The station owners got all the benefits.' See Kingsley Palmer and Clancy McKenna, *Somewhere between Black and White: The Story of an Aboriginal Australian*, (South Melbourne: Macmillan, 1978), pp. 56-57. Clancy McKenna was one of the important leaders of the Strike 1946-1949.

<sup>9</sup> W.F. Mandle, *Going It Alone: Australia's National Identity in the 20th Century*, (Ringwood: Penguin Books Australia, 1977), p. 173.

<sup>10</sup> Anne Scrimgeour, 'The Deliberate Rape of a Splendid People: The 1 Per Cent Campaign in the 1950s', *Studies in Western Australian History*, 30 (2016); Ann Curthoys, 'The Impossibility of Section 70 Aboriginal Protection, Amelioration, and the Contradictions of Humanitarian Governance', *Studies in Western Australian History*, 30 (2016); Peter Johnston and Steven Churches, 'The Aboriginal 1 Per Cent Guarantee Litigating the Issues: Insights and Lessons', *Studies in Western Australian History*, 30 (2016).

at Lincoln's Inn and an 'expert on colonial legal matters',<sup>11</sup> expressed his opinion that there was no doubt Section 70 was lawfully repealed. He believed also that there had been breaches of duty by the British Government and the Government of Western Australia but that 'these breaches of duty are not ones which can be enforced by the Courts'.<sup>12</sup> McLeod was heartened by this legal opinion.

Collaboratively with the Pilbara Aboriginal people, McLeod campaigned to recover the justice he signified by the symbol '1%'.<sup>13</sup> In 1993 McLeod's Aboriginal colleagues, who had legal standing in the case, started proceedings against the State of Western Australia for an invalid *Aborigines Act 1897* and 1905 constitution.<sup>14</sup> They claimed that

section 70 had not been properly repealed. They claimed that they represented all aboriginal inhabitants of Western Australia, and that they were entitled to a declaration that the *Aborigines Act 1897* and the *Aborigines Act 1905* were invalid in so far as they attempted to repeal section 70 ...

and that

section 70 was not properly repealed because neither the *Aborigines Act 1895* nor the *Aborigines Act 1905* had been enacted in accordance with two procedural requirements.<sup>15</sup>

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<sup>11</sup> Nicholas Hasluck, pers. comm., 13 June 2016. Hasluck was a judge on the Supreme Court of Western Australia in 2000.

<sup>12</sup> See 'Re: the Nomads Group of Aborigines and section 70 of the Constitution Act 1889 (Western Australia)', John Macdonald, Lincoln's Inn, 15 July 1977. Kindly donated to me by Nicholas Hasluck.

<sup>13</sup> Nomads Group of Aborigines, 'Submission by the Nomads Group of Aborigines to the Federal Cabinet, Commonwealth of Australia', (1970).

<sup>14</sup> Steven Churches, 'Put Not Your Faith in Princes (or Courts) – Agreements Made from Asymmetrical Power Bases: The Story of a Promise Made to Western Australia's Aboriginal People', in *What Good Condition?: Reflections on an Australian Aboriginal Treaty 1986-2006*, (Canberra: ANU E Press, 2006), pp. 1-14.

<sup>15</sup> Joshua Thomson, 'The One Per Cent Case (Yougarla V Western Australia)', *Oxford University Commonwealth Law Journal*, 1:2 (2001), 271.

They were not successful in 1996<sup>16</sup> or a subsequent legal action against the State.<sup>17</sup> McLeod did, however, bring the subject to national and international attention. By taking a moral rather than simply a legal position, McLeod raised questions that are relevant to the contemporary debates about Aboriginal people's place in modern Australia that historian Mark McKenna raises.<sup>18</sup>

Don McLeod's story is illuminating, showing how a bushman saw something Western Australian politicians hoped nobody would notice, and then informed those excluded from the negotiations - the Aborigines of the north-west. By selecting historical events from 1826 to 1999, I demonstrate why McLeod's traits kept the constitutional process alive in the face of considerable opposition and led to the issue becoming ethically relevant to the position of Indigenous Australians today.



*Location of Pilbara region in Western Australia*



*Don McLeod speaking at an Aboriginal meeting, Pilbara, 1969.*

*Photo by Jan Richardson*

### **Donald William McLeod**

At the time he discovered section 70 and its repeal, McLeod was unaware of Western Australia's political history. He was a multi-skilled working man useful to the pastoral stations in the Pilbara. More than twenty of these stations were scattered across a vast region of 193,823 miles<sup>2</sup>, 754 miles from the capital city, Perth. His manual and outdoor work in the climatic and physical conditions of extreme hardship kept him too busy to be involved in politics. That was, until he encountered the Pilbara Aboriginal people in 1937. Their suffering compelled him to change his allegiance from pursuit of personal profit and success to changing his society and bringing conditions of greater

<sup>16</sup> *Judamia v Western Australia* CLR 344 (judgment of the Full Court). P40/1996 [1996] HCATrans 408.

<sup>17</sup> *Youngarla v Western Australia* [2001] HCA 47, (2001) 181 ALR 371 (HCA).

<sup>18</sup> Mark McKenna, *Moment of Truth: History and Australia's Future*, (Carlton: Black Inc., 2018).

fairness for them.

Don McLeod was born in 1908, the seventh child of hard-working parents, and his early life in a small coastal township in the mid-west region of Western Australia prepared him for adversities. His mother died in childbirth when he was four years old. With no-one at home to look after his children, their father sent them to boarding schools and placed Don in a convent for care and education. After leaving school at age 15, Don modelled himself on his father and acquired practical skills useful in the remote region, including prospecting and mining. For a man willing to work in the hot and rugged environment of the north-west, such employment was available even during the worldwide economic slump, the Great Depression 1929-1932. If prospecting and manual jobs such as fencing and sinking water wells were not available, a man willing to lump bales of wool from the storehouse to the ship could find work on the wharf. Outdoor labour-intensive work was particularly tough in summer temperatures that could reach 46.1<sup>0</sup>C in the shade; Don told a friend that even drinking 15 litres of water a day in addition to plenty of cups of tea could not keep him cool.<sup>19</sup> This challenging environment developed the mental and physical resilience upon which he drew when he was campaigning for Aboriginal justice in the Pilbara.

While travelling around the Pilbara, McLeod observed social and political relationships on the pastoral stations yet rarely encountered indigenous people living and working there. He saw that pastoralists in the north-west were positioned as a ruling class and their indigenous workers as a servant class. There was veracity in his perception, a situation arising from relationships between settlers and indigenous peoples formed during the early days of 19th century colonisation.<sup>20</sup> From the age of 29 he engaged with the indigenous pastoral workers and gradually became drawn into their worldview. He then construed the social, economic and political structures of colonial society

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<sup>19</sup> Richardson, p. 46.

<sup>20</sup> Penelope Hetherington, *Settler, Servants & Slaves: Aboriginal and European Children in Nineteenth-Century Western Australia*, (Crawley: University of Western Australia Press, 2002).

as imposing oppression on the Aboriginal people. For the rest of his life he worked with the oppressed to achieve their freedom from government control. This included the economic and social prosperity that they could have developed had they benefited from the provisions of section 70. His views were opposed by those in power in Western Australia: the bureaucrats, politicians and pastoralists. As lawyer Stephen Churches commented, ‘The combination of moneyed interests and State force were determined to take McLeod down.’<sup>21</sup> They failed.

McLeod assisted the Pilbara station workers to withdraw their labour from the pastoral stations until they were given decent wages and conditions. Their strike, lasting from 1946 to 1949, was, however, about more than a simple industrial issue. The strikers were re-claiming the dignity and autonomy they had known before colonisation. As academic Michael Hess described the strike, ‘Aborigines made one of the most successful attempts of any colonised people to throw off the yoke of their oppressors and assert their rights against those of their self-styled "protectors"’.<sup>22</sup>

Underpinning McLeod's actions was his anger that Western Australian politicians dishonoured the original intentions of the colonial government. Through section 70, money was to be expended on the education of Aboriginal children. Had that directive been followed, by 1946 the adults would have been literate in the English language and legal/political structures of Western society. Government funding for their education and welfare, as specified in section 70, could have empowered Aboriginal adults to interpret the world by themselves and then act in their own interests. McLeod reasoned that by depriving the indigenous people of education, politicians infantilised the adults, who had to depend on Europeans to translate written words and political decisions to them. He explained to me the centrality of section 70

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<sup>21</sup> Churches, p. 8.

<sup>22</sup> Michael Hess, 'The Pilbara Pastoral Workers' Uprising of 1946', *Papers in Labour History*, 3 (1989), 20.

to his argument for restitution of justice. In 1949, a policeman and a public servant accosted him, accusing him of wanting the Aboriginal people in the northern region of Western Australia to have all the privileges and no responsibilities. 'Nothing of the sort' he replied, 'I want one-percent of the gross revenue beyond the reach of Parliament, that's all I want'.<sup>23</sup>

Some researchers believe Indigenous people had been living in tribal groups for 30,000 years on the land now known as Western Australia.<sup>24</sup> Section 70 was an acknowledgement that this new colony had claimed land already populated. The settlers knew little about these tribal peoples whose land they were occupying, and whose numbers were reckoned, in 1829, to be about 55,000.<sup>25</sup> From McLeod's perspective, colonisation became immoral when Western Australian politicians requested colonial parliamentarians to remove section 70 from the constitution. As historian Ann Curthoys noted, they 'immediately obliged by passing a new Bill in November 1897 for the repeal of Section 70'.<sup>26</sup> McLeod believed that depriving the Aboriginal people of the one-percent was 'a completely conscienceless act'.<sup>27</sup> It allowed the self-interest of settler society to impose on the Aboriginal peoples who had lived on the land before the British Crown claimed it in January 1827.

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<sup>23</sup> DW McLeod to Richardson, 1968.

<sup>24</sup> Sue O'Connor, Australian National University Department of Archaeology and Natural History, and Australian National University Centre for Archaeological Research, *30,000 Years of Aboriginal Occupation: Kimberley, North West Australia*, . Centre for Archaeological Research 1999, edn (Canberra: ANH Publications: Centre for Archaeological Research, Australian National University Canberra, 1999).

<sup>25</sup> A.P. Elkin, 'Aboriginal-European Relations in Western Australia: An Historical Record', in *Aborigines of the West: Their Past and Present*, ed. by R.M. Berndt and C.H. Berndt (Nedlands: University of Western Australia Press, 1979), (p. 290).

<sup>26</sup> Ann Curthoys, 'Settler Self-Government Versus Aboriginal Rights, 1883-2001: The Shocking History of Section 70 of the Western Australian Constitution', (2001) pp. 3 <http://www.branchcollective.org/?ps-articles>, accessed 7 September 2015).

<sup>27</sup> McLeod D.W., 'March 2 Letteer to Aboriginal Land Rights Commission', ed. by Secretary (Melbourne: 32 Parkvierw 165 Derby rd, Shenton Park, 1973), p. 5 typed by a professional typist.; McLeod to Aboriginal Land Rights Commission, 2 March 1973, National Archives of Australia, *McLeod, Donald William - Series of letters; submission by The Nomads Group of Aborigines to the Federal Cabinet*, NAA: A4252, 49.



### Colonisation of Western Australia

In 1829, through the *Western Australia Act 1829* (UK), Captain James Stirling formally founded this land as a British colony. It was to be named Swan River Colony but three years later this name was changed to the Colony of Western Australia and the *Western Australia Constitution Act 1889* (*Western Australia*) granted it responsible government. This Act provided the only Constitutional recognition of Aboriginal people in Australia at that time.<sup>28</sup> By legislation introduced in the 1840s, the Imperial government implemented a policy to protect the indigenous peoples. Queen Victoria's representative, the Governor, decreed *An Aborigines Protection Act 1886*<sup>29</sup> by which Britain retained control until 1897 of the indigenous population, now named Aborigines.<sup>30</sup>

Experiences of governors and settlers in the Eastern states of Australia from 1788 had influenced the practices and attitudes of the new colony in the West.<sup>31</sup> Early Western Australian politicians making policies about the state's indigenous peoples were prejudiced by settlers' ideas, which were mostly negative. Respected explorer A.R. Richardson, for example, believed a settler 'feels himself (or should do so) both intellectually superior to the savage tribes....'.<sup>32</sup> Historian Paul Hasluck surveyed 'native' policy in Western Australia between 1829 and 1897, and listed several of the major differences between the colonisers and the colonised. 'The Australian aborigines differed from primitive races with whom Europeans came into contact elsewhere during the 19th century', he wrote. They were not one homogenous group but were nomadic food gatherers. They had no herds and did not cultivate crops. They did not build village settlement or permanent camps, and 'accumulation was limited to what could be carried on a woman's back on a long day's march'.<sup>33</sup>

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<sup>28</sup> Churches.

<sup>29</sup> "An Act to provide for the better protection and management of the Aboriginal Natives of Western Australia, and to amend the Law relating to certain Contracts with such Aboriginal Natives"

<sup>30</sup> In this respect Western Australia different from other Australian Colonies where, from 1855 they were responsible for their own native administration. In 1897 the Imperial government ceded control of Aborigines to the Western Australia government by *The Aborigines Act 1897*.

<sup>31</sup> Elkin, p. 288.

<sup>32</sup> John Wilson, 'Authority and Leadership in a 'New Style' Australian Aboriginal Community: Pindan, Western Australia', (M.A., University of Western Australia, 1961), p. 29.

<sup>33</sup> Paul Hasluck, *Black Australians: A Survey of Native Policy in Western Australia 1829-1897*, 2nd

Recent historical and sociological research demonstrates, however, that at the time of colonisation the Aboriginal people had a complex and sophisticated culture. Historian Richard Broome named it 'A Great Tradition',<sup>34</sup> but colonial policy-makers did not have access to this scholarship. Hasluck noted that differences between the white and black were so great the colonists could not place the indigenous lifestyle into their own social structures.<sup>35</sup> Enlightened insight only came later when language difficulties were overcome, and Aboriginal custodians of their culture, historians and linguists began educating mainstream society about Aboriginal traditions. The two groups remained alien to each other. Hasluck questioned why 'native administration became known as an outstanding 'problem' of colonial policy and as a criterion of successful colonisation'.<sup>36</sup>

The Colony gained representative government in 1890 but before Royal assent could be given to a constitution, there was a sticking point – the Aboriginal peoples. Even though the Aboriginals were to be British citizens, settlers saw them as a race apart and the question arose as to whether the British government or the Western Australian government would be responsible for them. Their culture derived from their hunter-gatherer lifestyle, and they spoke many languages and dialects. Each clan had their own identity and language name and its own elders who exercised authority over a small group. In the north-west some of the larger were Nyamal, Palyka, Kariyarra, Ngarla.<sup>37</sup> Only when settlers arrived were these distinct language groups morphed in the colonial imagination into one population type. As historian Bain Attwood pointed out, when Europeans occupied their land the settlers had the power to homogenise the language groups into one name such as 'Aborigines'.<sup>38</sup> Other designations were 'natives', and in contemporary Australia,

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edn (Carlton: Melbourne University Press, 1970 ), p. 17.

<sup>34</sup> Richard Broome, *Aboriginal Australians: A History since 1788*, 4th edn edn (Crows Nest NSW: Allen & Unwin, 2010), pp. 5-14.

<sup>35</sup> A/Commissioner of Native Affairs, 'Report to Minister for Native Affairs 9/4/47', (9/4/47, 1947), p. 6.

<sup>36</sup> Hasluck p 11. His own study rectified the early lack of interest in colonial enterprise in Australia, as opposed to that in Africa, the Pacific Islands and some colonies of France and Holland.

<sup>37</sup> David R. Horton, 'Aiatsis Map of Indigenous Australia', (Canberra: Aboriginal Studies Press and Auslig/Sinclair, Knight, Merz, 1996).

<sup>38</sup> Bain Attwood, *The Making of the Aborigines*, (Sydney: Allen & Unwin, 1989), p. x.

'Indigenous'; these descriptors prevented an appreciation of the diversity of the cultural and linguistic groups, but early British officials acknowledged that the Aboriginals needed legislative safeguards.

Secretary of State for the Colonies Sir Henry Holland asserted 'some special arrangement should be made when self-government is granted, to ensure the protection and good treatment of the northern native population'.<sup>39</sup> The British government therefore insisted on a clause in the Constitution that would retain British government responsibility for the education and welfare of the Aboriginal peoples through the insertion of section 70. Peter Johnston and Steven Churches, both lawyers examining this issue, explained this benevolent intent. It derived from 'a flourishing at Westminster of British evangelical philanthropy for Indigenous populations, over the protests of local politicians'.<sup>40</sup> Funding was to be £5000 per annum or one percent of the gross revenue of the state, not of Britain, and accountable to an Aborigines Protection Board administered by the Governor.<sup>41</sup> Control of the indigenous people was immediately a local issue, and by 1905 section 70 had been removed. According to historian, Chris Owen, Western Australian parliamentarians had insisted on its removal for two reasons: 'that it was a paternalistic, patronising interference in colonial affairs and that the British Government thought the parliament and people of Western Australia could not be trusted to deal fairly with Aboriginal people.'<sup>42</sup> <sup>43</sup>Owen commented that both were right.

Section 70 related specifically to the indigenous population and had two major components: the purpose and the funding.<sup>43</sup> It made Western Australia the only state in Australia that did not have

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<sup>39</sup> Peter Johnston, (1989), p. 322.

<sup>40</sup> Johnston and Churches, p. 106.

<sup>41</sup> The word 'Aboriginal' initially referred to the indigenous peoples and I will use it henceforth. The word 'native' is also used by some early writers and where quoting, I will use the language of those whom I quote. For the wording of section 70, see footnote 43.

<sup>42</sup> Chris Owen, 'An Excess of Humanity?' the Kimberley District and Section 70 of the Western Australian Constitution', *Studies in Western Australian History*, 30 (2016), 74.

<sup>43</sup> Western Australian Constitution Act 1889.

full sovereignty - an idea that settler society fiercely opposed. As historian Ann Curthoys noted, politicians 'immediately obliged by passing a new Bill in November 1897 for the repeal of Section 70.'<sup>44</sup> Indigenous people were not consulted and so had no input to the debate about the process negotiating Western Australia's sovereignty.<sup>45</sup> The outcome of discussions created the social structure that McLeod noticed.

The oppressor/oppressed relationship that McLeod discerned also originated from settlers influenced by Charles Darwin's theory regarding survival of the fittest in the animal world. Extending this theory to the human species allowed those from a developed society, such as the British colonists, to believe they were superior to those whose culture was less developed, such as the Australian Aborigines.<sup>46</sup> Historian Anna Haebich demonstrated that application of his theory placed Australia's Aboriginal tribes as 'the least evolved race in the world.'<sup>47</sup> 'All European attitudes towards the aborigines' were influenced by this theory, wrote historian Peter Biskup, and 'since they were doomed to eventual extinction' there was no point educating them.<sup>48</sup> They could, however, be 'civilised'.

The colonising process was, according to Hasluck, based on three principles: Aborigines would be

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Purpose:

THERE shall be payable to Her Majesty, in every year, out of the Consolidated Revenue Fund the sum of Five thousand pounds mentioned in Schedule C. to this Act to be appropriated to the welfare of the Aboriginal Natives, and expended in providing them with food and clothing when they would otherwise be destitute, in promoting the education of Aboriginal children (including half-castes), and in assisting generally to promote the preservation and well-being of the Aborigines. ....

Funding:

Provided always, that if and when the gross revenue of the Colony shall exceed Five hundred thousand pounds in any financial year, an amount equal to one per centum on such gross revenue shall, for the purposes of this section, be substituted for the said sum of Five thousand pounds in and for the financial year next ensuing.<sup>43</sup>

<sup>44</sup> Curthoys, pp. 3 <http://www.branchcollective.org/?ps-articles>, accessed 7 September 2015.

<sup>45</sup> Patrick Dodson, an Indigenous Commissioner on the *Royal Commission into Aboriginal Deaths in Custody*, 1987–1991. Retrieved from the Government of Western Australia's *Constitutional Centre of Western Australia* website, accessed 9 June 2015.

<sup>46</sup> I.M. Crawford, 'Aboriginal Cultures in Western Australia', in *A New History of Australia*, ed. by C.T. Stannage (Nedlands: University of Western Australia Press, 1987), pp. 3-34 (p. 10).

<sup>47</sup> Anna Haebich, *For Their Own Good: Aborigines and Government in the South West of Western Australia 1900-1940*, Second 1992 edn (Nedlands: University of Western Australia Press, 1988), p. 48.

<sup>48</sup> Peter Biskup, *Not Slaves Not Citizens: The Aboriginal Problem in Western Australia 1898 -1954*, (St Lucia: University of Queensland Press, Crane, Rusak & Co Inc, 1973), p. 15.

British subjects, civilised and protected.<sup>49</sup> The Imperial government had inserted Section 70 to protect the Aboriginal peoples from exploitation and violence by the settlers, a situation that had been reported to London by numbers of concerned persons such as Rev John Brown Gribble (1847-1893). Gribble was a powerful advocate for care of the Aboriginal people and protection from white men. He opened a mission in 1885 in the north-west township of Carnarvon and, outraged by what he observed, published a book in 1886 outlining settlers' exploitation of and brutality to the 'natives'.<sup>50</sup> He wrote to the Governor and the Colonial Secretary as well as local missions stating that he would reveal 'the wrongs and injustices, and the cruelty obtaining under the British flag in the colony of Western Australia'.<sup>51</sup> Activist Mary Bennett (1881-1961) publicised the same message throughout the 1930s to 1961. She corresponded with the London-based Anti-Slavery Society and Aborigines Protection Society, ensuring that that the evidence she collected was known internationally.<sup>52</sup> Her work was too late to influence debates about the constitution, but added to the need for the education and welfare that section 70 promised.

Inherent in the process of colonisation was the requirement that Aboriginal people would speak the lingua franca of Britain, English. Kenyan woman Ngũgĩ wa Thiong'o, also a subject of this obligation, discussed her experience of this stipulation. She asked the question 'what was the colonialist imposition of a foreign language doing to us children?' It was, she concluded, dominating, a carrier of culture, a means of alienation, of 'seeing oneself from outside oneself as

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<sup>49</sup> Hasluck, p. 13.

<sup>50</sup> Rev J.B. Gribble, *Dark Deeds in a Sunny Land or, Blacks and Whites in North-West Australia*, First published s.n. Perth?: 1886. edn (Nedlands: University of Western Australia, 1987); Cavan Brown, *The Blackfellow's Friend*, (Bassendean: Access Press, 1999); Su-Jane Hunt, 'The Gribble Affair: A Study in Colonial Politics', *Studies in Western Australian History*, (1984); Jane Lydon, 'Christian Heroes? John Gribble, Exeter Hall and Antislavery on Western Australia's Frontier', *Studies in Western Australian History*, 30 (2016).

<sup>51</sup> John Harris, *One Blood: 200 Years of Aboriginal Encounter with Christianity, a Story of Hope*, (Sutherland, NSW: Albatross Books 1990), p. 419. Citing Papers Respecting the Treatment of Aboriginal Natives in Western Australia, Colonial Secretary's Office, 1170/86.

<sup>52</sup> Sue Taffe, *A White Hot Flame: Mary Montgomerie Bennett, Author, Educator, Activist for Indigenous Justice*, (Clayton: Monash University Publishing, 2018). Sue Taffe: 'Mary Bennett', Collaborating for Indigenous Rights, National Museum of Australia, accessed 12 March 2015; Fiona Paisley, Race and remembrance: contesting Aboriginal child removal in the inter war years, *Humanities Review*, vol. 8, Nov-Jan., 1997.

if one was another self.<sup>53</sup> In the new colony of Western Australia, English was the lingua franca but was not taught to the indigenous tribal clans. In the Pilbara today, twenty-six indigenous languages are still extant,<sup>54</sup> therefore, being multi-lingual, they could learn another tongue. Their languages are oral, and linguist John Bradley commented on the significance of orality to Aboriginal language speakers. Yanyuwa elders taught Bradley their language, one of whom asked him in Yanyuwa, 'Can my country hear English?' Speaking Yanyuwa, Bradley responded, 'What do you think?' Dinah, one of the last full Yanyuwa speakers, replied 'I do not think it does, it can only hear Yanyuwa'. Bradley recognised 'a deeper understanding of an existential crisis for Dinah.' English words translated into Yanyuwa inadequately carried the full connection of language to the people's land and from the land, to their culture.<sup>55</sup> Indigenous people were further disadvantaged when legislation concerning them was written in a foreign language and not translated. McLeod later stated that the Pilbara people had been deliberately kept 'illiterate, isolated and destitute.'<sup>56</sup> Language, as Ngũgĩ declared, was a tool of domination.

### **The Pilbara**

In the Pilbara, the region that concerned Don McLeod in the 1930s, most Aboriginal people lived in family groups on pastoral stations to supply labour to the stations. McLeod mixed with the station owners but not their Aboriginal employees; distancing himself was not due to lack of concern, rather, it was government legislation. Section 36 of the *Aborigines Act, 1905* prohibited unauthorised persons coming within 110 yards of Aboriginal people.<sup>57</sup>

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<sup>53</sup> Ngũgĩ wa Thiong'o, *Decolonising the Mind the Politics of Language in African Literature*, (Nairobi : EAEP: London J. Currey, 1986).

<sup>54</sup> Wangka Maya Pilbara Language Centre, <http://www.wangkamaya.org.au>, accessed 21 February 2018

<sup>55</sup> John Bradley, 'Can My Country Hear English?', *PAN: Philosophy, Activism, Nature*, 13 (2017), 68.

<sup>56</sup> McLeod to Pauline Webb, World Council of Churches, 17 July 1981: 6. In *'The Native Question' West Australia*, a collection of materials compiled by McLeod and donated to me by the Nomads Charitable and Educational Foundation.

<sup>57</sup> Section 36 of the *Native Administration Act, 1936*: "It shall not be lawful for any person, other than a superintendent or protector, or a person acting under the direction of a superintendent, or under a written permit of a protector, without lawful excuse, to enter or remain or be within or upon any place where aborigines or female half-castes are camped. Any person who, without lawful excuse ... is found in or within five chains of any such camp shall be guilty of an offence against this Act.

McLeod began to see what others of his race were apparently not seeing: that an apartheid-like situation had developed in the north-west. This was legally sanctioned by the *Native Administration Act, 1936* and Aboriginal people were segregated by laws that governed every aspect of their lives. The laws had been in operation long enough to establish hegemony of the Western social, political and economic structures over those of the Aboriginal people. Legal punishments and illegal violence had taught them that resistance was futile, ensuring that the colonial government had full control over all aspects of Aboriginal people's lives. The *Aborigines Act 1905* had created an Aborigines Department under the Minister, and a Chief Protector of Aborigines who had power over every Aboriginal child until they were sixteen years old, and the places Aboriginal people could or could not go. In addition, although Aboriginal people were British subjects, they were not granted citizenship unless they applied and renounced their tribal ways of living. Anyone wanting to employ an Aboriginal had to apply for a Permit and punishments for Aborigines who did not comply with their work permit were specified.<sup>58</sup> A Permit to employ one man cost five shillings and for more than one man the applicant had to pay £5; penalties for those who breached this requirement were a fine of £500 or six months in jail or both. As McLeod discovered in the late 1930s, most of the Aboriginal workers could not read these contracts and did not understand that they had apparently signed them. Illiteracy compounded their helplessness.

### **McLeod discovers the 1%**

McLeod discovered the repeal of Section 70 in 1937, but it was not until 1942 that he was able to convey his findings to the north-west Aboriginal pastoral workers. By then he had encountered an old unnamed sick Aboriginal man and found a way to communicate across the racial barriers. It was a moment that presented him with a choice to obey or defy the rules and his compassion

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<sup>58</sup> Section 18 of the Native Administration Act, 1905-1936.

overruled his fear of being arrested. He broke the law and the tacit cultural taboos by putting this sick Aboriginal man in his truck and driving him over 100 miles to hospital. The man was having a heart attack; McLeod's actions and those of the hospital staff helped him to recover.

The old man was an elder in his clan, and his family credited McLeod with saving his life. Their appreciation gave McLeod an opening to converse with those on the other side of the racial line, although, in keeping with their gender-divided cultural practices, only with the men. The men made him aware of their grievances about their exploitation on the pastoral stations, their bewilderment about why the pastoralists could ask the police to return them to work if they tried to leave, their anger that men could take their wives for the night, and their helplessness because they had not been taught to read and write English. They asked him 'how it was they couldn't leave the squatters<sup>59</sup> they were working for even though they were paid little or no wages. If they tried to leave, they were brought back by the police.'<sup>60</sup> He could not answer their questions but vowed to investigate.

McLeod travelled the 2000 miles from his headquarters in Port Hedland to the capital city Perth to begin his study. It was there that he came across correspondence about framing the Constitution and discovered the insertion of section 70 and then its repeal. He also noted that negotiations had been conducted in English with no attempt to include the Aboriginal people of the isolated north. Despite translation difficulties, he felt there could have been a way had the intent existed. Therefore, from his world view, now influenced by that of the Aboriginal people, an injustice had occurred. Greater still was the wrong inherent in removing the annual one percent of the state's revenue that section 70 set aside to educate and care for the indigenous people. Despite language difficulties in conveying complex legal concepts, McLeod determined to report his findings to the

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<sup>59</sup> 'Squatter' was a colloquial term for pastoralists.

<sup>60</sup> McLeod, p. 37.



Aboriginal leaders. He was given an opportunity to do this; the ramifications of his actions disrupted the pastoral industry and transformed the lives of the Pilbara pastoral workers.

A culturally appropriate space was provided when the traditionally-oriented Aboriginal leaders from hundreds of miles around gathered for an important tribal ceremony in a secret place far from the towns and stations. The forum during which they could make decisions was a meeting of senior Aboriginal holders of their Law. They invited McLeod to attend their ceremonies and the meeting to discuss his answers to their question. That question was phrased differently at different times but essentially was simple and profound: why were they no longer free to travel in their own country, why were they virtual slaves to the pastoralists? Reference to the pastoralists came from those engaged on pastoral stations scattered across the vast Pilbara, the men working on the property and the women in the homestead. The pastoral economy had been built on a compliant workforce of the unpaid or low-paid labour of these men and women.

McLeod described the gathering as like a United Nations meeting, which Aboriginal lawmen representing all the state's tribal groups travelled vast distances to attend.<sup>61</sup> To manage the linguistic diversity of twenty-four languages, they appointed sixteen interpreters who ensured that all language groups could fully comprehend McLeod's report, delivered in English. In the traditions of a people with an oral culture, McLeod spoke, his word was translated, and the leaders discussed among themselves his contribution. They were most interested, McLeod later recorded in his history of the group, reporting that it was 'the first time they had been able to judge how their affairs had been dealt with'.<sup>62</sup> Those lawmen at the meeting comprehended how their condition of servitude had come about and the leaders declared their agency in the only way they could - by action. They would no longer tolerate the inferior position into which government

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<sup>61</sup> Donald William McLeod interview with Chris Jeffery, State Library of Western Australia 1978, OH331, 1978.

<sup>62</sup> McLeod, (1984) p.38.

legislation placed them. They would no longer abide by rules they did not understand. Now they would break the controls over them, assert their autonomy, reclaim their dignity.

The senior lawmen from the Pilbara conveyed these decisions to McLeod, asking his advice on what steps they could take. He reminded them of the European method of striking to gain workers' rights and this they decided to implement for their cause. Their greatest difficulty lay in its organisation. Their people were living in family groups on pastoral stations in the immense Pilbara region. Their leaders had no telephones, they could not write letters, they had few motor cars for transport. In addition, they knew the station managers, police and government officers would try to stop them and could use violent means to restrain them or jail them for making trouble. The pastoral industry relied on their cheap labour and in 1942 wool was a war commodity, thus giving extra powers to the authorities to crush any upheaval. Once again, they asked McLeod to guide them. He suggested spreading the message through their clan leaders and waiting until the war was over before pulling their people off the stations on a designated day. The lawmen adopted this strategy and instructed McLeod to 'work for the reinstatement of section 70, it being seen in the context of the overall economic, social and cultural injury visited on the Aboriginal community'.<sup>63</sup>

### **Recovering autonomy**

When World War Two ended, the Aboriginal leaders agreed on a date in 1946 to strike, symbolically, the first of May. Their decision was conveyed to their station employers in language that Western society could understand - a strike for better wages and conditions - but their undisclosed purpose went far beyond that. They wanted to reclaim their autonomy and dignity, and they wanted the education and welfare that the Imperial government had enshrined in section 70, funded by one-percent of the annual gross state revenue and untouchable by the Western

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<sup>63</sup> Johnston, (1989) p. 343.

Australian parliamentarians.

From 1946 to 1949, McLeod supported the Pilbara pastoral workers' extended strike on stations that were exploiting their labour in the field and in the homestead. The strike was partially successful in its demand for better wages and conditions, but most strikers did not return to the pastoral industry. Instead, with McLeod's assistance, they created an economic enterprise in which he was expert, alluvial mining. Although this brought only subsistence level prosperity, it was a major step towards achieving their unpublicised objective: to regain the independence they knew before colonisation. The strikers had confidence in McLeod as the first white man who had tried to help them, and they co-opted him into their struggle against the State. They invited him to join them in the community they formed among the 800 or so men, women and children who had gathered from the stations. He agreed to do this but initially was hindered by the law restricting European and Asian people mixing with Aboriginal people, for he had been arrested under this law. He and the leaders were arrested and jailed during the strike years when, at the height of government opposition and determination to break the strike, every means at the disposal of the government was used to break them.<sup>64</sup> One immediate consequence of the strike was favourable to McLeod. The Western Australian government changed the law prohibiting unauthorised persons going closer than 110 yards to a group of Aborigines.<sup>65</sup> He was free to associate with Aboriginal people without fear of being arrested, gave the strikers all his possessions and money and lived and worked for them until he died.<sup>66</sup>

The leaders appointed the white man their representative in matters to do with the Western political and economic sphere, which required language literacy. Much that is known in the English-speaking world about their early work for economic and political independence is

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<sup>64</sup> McLeod estimated that at one time in 1947, 66 of their men were in jail, see McLeod, p. 47.

<sup>65</sup> For the wording of the relevant Act, see footnote 52.

<sup>66</sup> Richardson.

consequently mediated through McLeod. He could campaign on their behalf until they acquired English literacy or were interviewed by those who could write their stories.<sup>67</sup>

McLeod learned from the people about their experiences, grievances and philosophy and from them formed the view that the racial ramification of the repeal of section 70 was equal to its gendered aspect. The women, he reported, told him that until the strike they did not know they were entitled to reject the European and Asian men who wanted to use them for sexual services. In his opinion,

Now the woman was the most unfortunate person of all, she not only had her husband to worry about but she also had any white man to worry about, any one of them could take her down, could knock her down at any tick of the clock and she didn't know that the law wouldn't allow it. She didn't know that she had the right to refuse until the strike happened in 1946, they weren't aware that they had the right to refuse white men. They thought the law was such that they had to give way whether they liked it or not so that every blackfellow's wife or daughter on the stations were raped, there is no other way to describe it. They were raped regularly by the squatters and their employees, it was a dreadful situation.<sup>68</sup>

This aspect of their liberation came more than 40 years after the funding stipulated in section 70 for 'the welfare of the Aboriginal Natives'<sup>69</sup> was removed. In the 1930s, activist Mary Bennett raised this subject of settler men's sexual exploitation of Aboriginal women when she addressed the Women's Service Guilds of Western Australia. From her experience, she said, 'it is so much the accepted thing in the North for white men to molest native women that it can be described as the custom of the country'.<sup>70</sup> One solution she offered was to 'affirm the right of aboriginal women

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<sup>67</sup> Palmer and McKenna; Jolly Read and Peter Coppin, *Kangkushot: The Life of Nyamal Lawman Peter Coppin*, (Canberra: Aboriginal Studies Press, 1999); Monty (Minyjun) Hale, 'Kurlumarniny: We Come from the Desert', ed. by Anne Scrimgeour (Canberra: Aboriginal Studies Press, 2012).

<sup>68</sup> McLeod to Wendy Lowenstein interview (1969), National Archives of Australia, NAA TRC 2915/39.

<sup>69</sup> See Section 70, *Constitution Act 1889* (WA)

<sup>70</sup> Taffe, p. 180.

to the sanctity of her person' and to insist that protectors were married.<sup>71</sup> She promoted her views to the British Commonwealth League conferences in 1929 and 1930, drawing on the 1928 research into the 'status and conditions of aboriginals' in Northern Australia by a Queensland Chief Protector of Aborigines, J.W. Bleakly. Bleakley noted the number of children born to Aboriginal women from white fathers. He recommended checking 'the abuse of these defenceless aboriginals' by ensuring that more white women went into the northern regions<sup>72</sup> and that Protectors in bush postings should be married men. Government policy of appointing policeman as protectors could also be seen as to protecting 'white interests'<sup>73</sup> and measures to save wages. Thus by 1946, protection for Aboriginal women had not been ensured. McLeod argued that the well-being of the women was not protected but that had funding provided by section 70 been allocated to their protection, an injustice could have been prevented.

In addition to his role as the group's prospector and business adviser, McLeod trained himself as a champion of the original Aboriginal rights to protection under the Constitution. He bought a portable typewriter and taught himself to use it so that he could write campaign letters; often his documents reveal the hardships under which he was conducting his correspondence. At times, the keys on his old typewriter jammed from a mixture of sweat and dirt getting into them, at others he had to put rocks on the paper to prevent the wind blowing it away. His words, sometimes misspelled but always fiery, consistently carried his message. As early as 1944, he began bringing his perspective into the public arena when he wrote to an Australian union official.<sup>74</sup> By 1956 he brought it to the international community when he began corresponding with the Anti-Slavery Society in London. On 16 September 1956, he sent the Society some material which was

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<sup>71</sup> Ibid., p. 180.

<sup>72</sup> J. W. (John William) Bleakley, 'The Aborigines and Half-Castes of Central Australia and North Australia : Report', (Melbourne: Government Printer, 1929), (p. 27).

<sup>73</sup> P. Biskup, 'White-Aboriginal Relations in Western Australia: An Overview', *Comparative Studies in Society and History*, 10 (1968), 449.

<sup>74</sup> McLeod to Ernie Thornton 14 July 1944. A typed copy of McLeod's handwritten letter is in Australian National University, Noel Butlin library, Federated Ironworkers Association, E170/9/75.

vital one to any one interested in the Question of Aboriginal Rights in West Australia for it includes all the official Despatches from the W Aust Governor to The Sec Of State for the Colonies how the 70 Section came to be in the W Aust Constitution and the shabby way it was removed all the parliamentary debates and so on.<sup>75</sup>

He was handicapped in his campaigning, living and working in the Pilbara under conditions of extreme heat and isolation. He did not have a secretary, an office, or even a house where he could store materials and write in peace. His clerical work had to be fitted in-between his primary job, responsibility for advising the strikers on economic enterprises. Financial independence was prioritised so that the people would not be forced back to work on the pastoral stations and he was the only person in the group well tutored in the Western economic system.

McLeod lived by himself within the Aboriginal community, unmarried and for many years the only white man, sharing the work and the suffering. In the early years, they depended on their alluvial mining, profits from which were unpredictable, and they learned to survive at a subsistence level. As the strikers' group had some successes in their mining enterprises, McLeod assisted them to form several proprietary limited companies through which they could manage their affairs.<sup>24</sup> He and the strikers often used one of the company names to designate their affiliation, such as Pindan, and Nomads. Their companies had an office in Perth staffed by ideologically committed people who assisted them to keep their records in order and produce campaign materials.

When McLeod began bringing the story of section 70 to the public, he used his shorthand designation of one percent.<sup>76</sup> He chronicled his judgement in correspondence and repeatedly in

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<sup>75</sup> DW McLeod to The Anti-Slavery Society, London, 16 September 1956. Battye Library, MN 1444, *Papers of Don McLeod*, ACC 1568A, doc 81.

<sup>76</sup> Submission by the Nomads Group of Aborigines to the Federal Cabinet Commonwealth of Australia, 1972.

later analyses of what became known as the 'Native Question'.<sup>77</sup> John Macdonald QC, from whom McLeod sought a legal opinion on the whether the 1905 repeal of section 70 was lawful, had concluded that it had been legal. However, he also said,

I think Mr McLeod is right in saying that if section 70 of the 1889 Act had not been repealed, much of the hardship and misery which the aboriginal people have suffered would have been avoided.<sup>78</sup>

McLeod conveyed this advice to the strikers' senior leaders for them to debate.<sup>79</sup> Later, others wrote about the idea.

### **Pursuing the 1%**

Ray Butler in 1981 was the first academic to put the history of section 70 to a conference.<sup>80</sup> McLeod then outlined it in his book, published in 1984, *How the West was Lost*, in which he raised the process as a moral problem.<sup>81</sup> For most others in the wider community, it was a legal problem. Peter Johnston wrote an article focussing on a matter from a submission to the Aboriginal Land Enquiry conducted by Paul Seaman QC in 1984 - the repealed section 70. He noted that even after eighty years the issue was raised by Aboriginal groups throughout Western Australia, and suggested that this could be for psychological, political and legal reasons. Knowledge of section 70 was, he speculated, promoted by a 'remarkable white-fella' Don McLeod.<sup>82</sup> The topic of section 70 began

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<sup>77</sup> McLeod interview with Chris Jeffery, State library of Western Australia, OH331 (1978).

<sup>78</sup> Johnston, 1989, pp. 344-5.

<sup>79</sup> Richardson, p. 209.

<sup>80</sup> Butler, (1981).

<sup>81</sup> McLeod, (1984).

<sup>82</sup> Peter Johnston, 'Litigating Human Rights in Western Australia: lessons from the past', *University of Notre Dame Australian Law Review*, 15 (2013), pp. 111-15, (p. 125).

to be analysed from different perspectives by Australian lawyers and historians.<sup>83</sup> Johnston had met McLeod and influenced him to consider ways of addressing the injustice.

One consequence of this new idea that the repeal of section 70 might be invalid was to test in court the belief McLeod had held for fifty-five years, namely, that the State owed to Western Australia's Aboriginal people one percent of State revenue to be used for their education and welfare. McLeod and the strikers' group began proceedings in 1993. Peter Johnston, acting as one of the group's legal counsels, recorded that 'the High Court, by majority, thoroughly rejected that proposition and remitted the matter to the Supreme Court for further determination'. The appellants in the 1996 Supreme Court case *Judamia v Western Australia* were old men from the strikers group: Snowy Judamia, Crow Yougarla, Paddy Yarbarla, Billy Thomas and Leslie Ankie.<sup>84</sup> Several of these men were born before 1905 and so had special standing.<sup>85</sup> Although their case lost, by appealing the decision McLeod and the leaders continued to pursue justice through the court. Their appeal was also dismissed, a decision that the High Court reversed in 1996.<sup>86</sup>

McLeod died in 1999 but testing his idea had a second chance. On appeal from the Supreme Court, the strikers took their case to the High Court of Australia. Snowy Judamia had died and their court

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<sup>83</sup> Johnston, Peter, 'Pape's Case: What Does It Say About Standing As An Attribute of 'Access To Justice?'', Article 2, *Bond Law Review*, issue 3, 22 (2010); Johnston, Peter, 'Waiting For The Other Shoe To Fall: The Unresolved Issues in Yougarla v Western Australia', *Australian Association of Constitutional Law*, conference paper, <http://www.gtcentre.unsw.edu.au/Conference-Papers-February-2002.asp>; Johnston, Peter, 'Manner and Form Provisions in the Western Australian Constitution: their judicial interpretation', (unpublished doctoral thesis, The University of Western Australia, Department of Law, 2005); Johnston, Peter, 'Pape's Case: What Does It Say About Standing As An Attribute of 'Access To Justice?'', *Bond Law Review*, issue 3, 22, (2010); Johnston, Peter, Steven Churches, 'The Aboriginal 1 Per Cent Guarantee Litigating the Issues: Insights and Lessons', *Studies in Western Australian History*, 30 (2016), 105-120; Murray, Sarah, 'Confusion in the Labyrinth: Section 70, the Constitution and Societal Change', *Studies in West Australian History*, 30 (2016), 121-130; Muecke, Stephen, *Ancient and Modern: time, culture and indigenous philosophy* (Sydney: University of New South Wales Press, 2004); Owen, Chris, "An Excess of Humanity?", The Kimberley District and Section 70 of the Western Australian Constitution', *Studies in Western Australian History*, 30 (2016), 73-89; Richardson, Jan, (2016); Scrimgeour, Anne, 'The Deliberate Rape of a Splendid People: the 1 per cent campaign in the 1950s', *Studies in Western Australian History*, 30 (2016), 91-103; Thomsen, Joshua, 'The one Per Cent Case (Yougarla v Western Australia)', *Oxford University Commonwealth Law Journal*, 1-2 (2001), 269-278.

<sup>84</sup> WA Supreme Court, Library No 950137, 23 January 1995.

<sup>85</sup> Johnston, (2010) p. 25.

<sup>86</sup> Full Supreme Court, Library No 960114, 1 March 1996; reversed on appeal by High Court, setting aside order of Owen J, 9 October 1996. See Peter Johnston, (2002), p. 1, footnote 2



case could not proceed under his name. Crow Yougarla was elected as the primary appellant in a High Court case known as *Yourgarla v Western Australia 2001*. SC Churches, PW Johnston and DF Jackson QC represented the strikers. The case was dismissed.<sup>87</sup>

### **The life of the 1%**

By the time he died, McLeod had for more than fifty years studied the constitutional process and campaigned to gain its original provision of justice for the Aboriginal people. Although his hope that fairness could be obtained through the highest Australian courts of law was not realised, those whom he believed had been excluded from the state polity were now politicised.<sup>88</sup> His finding that racial and gender injustice for Aboriginal peoples of the Pilbara had been entrenched when section 70 of Western Australia's 1905 Constitution was removed, was a unique interpretation of colonial history. It was particularly powerful because it arose from the Aboriginal people's response to negotiations fundamental to their wellbeing but from which, before McLeod, they had been excluded.

It was significant that McLeod realised the ramifications of Western Australian parliamentarians administering programs and monies for the education and welfare of Aboriginal peoples. Administration being kept 'beyond the reach of Parliament', originally intended by section 70, was a safeguard. As the history of the Pilbara exposed, those who had a vested interest in using Aboriginal labour and Aboriginal women for their own advantage, would be unlikely to formulate systems that favoured the Aboriginal people and disadvantaged the settlers. Controlling the settlers rather than the Aboriginal people would have produced a radically different outcome.

McLeod's symbol of the one percent had a life beyond his death when lawyers and historians examined the arguments and published their analyses in journal articles and book chapters.

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<sup>87</sup> *Yourgarla v Western Australia* (2001) HCA 47, 9 August 2001.

<sup>88</sup> McLeod to Pauline Webb, World Council of Churches, 17 July 1981, p. 6. In *'The Native Question' West Australia*, a collection of materials compiled by McLeod and donated by the Nomads Charitable and Educational Foundation.

Between 1981 and 2016 there were thirteen theses, conference papers or articles written about section 70.<sup>89</sup>

The place of Western Australian Aboriginal people in the 1905 Constitution and the 'fight over the existence of s.70' had entered mainstream methods of analysis.<sup>90</sup> Western Australian barrister Joshua Thomsen discussed 'Imperial control over colonial legislative processes' as revealed in the strikers' case.<sup>91</sup> Peter Johnston presented a paper in 2002 to the Australian Association of Constitutional Law conference in which he debated the case and concluded 'Although s.70 may now be taken to have been erased from the Western Australian Constitution, its ghost may continue to haunt later constitutional controversies.'<sup>92</sup> Churches outlined the history of the one percent measure, including that the documents were not tabled in the House of Commons as required by s.32 of the *Australian Colonies Constitution Act (No 2)* - an amendment of the *Imperial Act* of 1850. He noted 'the impulse of philanthropy at the heart of Empire, so strong in mid-century, had run its course, and the Home Government now sought only accommodation with the new self-governing colonial oligarchies'.<sup>93</sup> In 2016 an issue of the journal *Studies in Western Australian History* was devoted to the question of section 70.<sup>94</sup> McLeod's investigations in 1937 left a long legacy.

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<sup>89</sup>Butler; Peter Johnston, 'The Repeals of Section 70 of the Western Australian Constitution Act 1889: Aborigines and Governmental Breach of Trust', *Western Australian Law Review*, 19 (1989); Curthoys; Thomson; Peter Johnston, 'Waiting for the Other Shoe to Fall: The Unresolved Issues in Yougarla v Western Australia', in *Australian Association of Constitutional Law*, (Sydney: <http://www.gtcentre.unsw.edu.au/Conference-Papers-February-2002.asp>, 2002), pp. 1-40. Accessed 20 July 2014; Peter Johnston, 'Manner and Form Provisions in the Western Australian Constitution: Their Judicial Interpretation', (Ph.D, University of Western Australia, 2005); Churches; Peter Johnston, 'Pape's Case: What Does It Say About Standing as an Attribute of 'Access to Justice'?', *Bond Law Review*, 22 (2010); Curthoys; Peter Johnston, 'Litigating Human Rights in Western Australia: Lessons from the Past', *University of Notre Dame Australian Law Review (UNDALR)*, 15 (2013); Ann Genovese, 'Narratives of Authority: Translating Yougarla', *Journal of Australian Colonial History*, 15 (2013); Scrimgeour; Sarah Murray, 'Confusion in the Labyrinth': Section 70, the Constitution and Societal Change', *Studies in Western Australian History*, 30 (2016).

<sup>90</sup> Churches, (2006).

<sup>91</sup> Joshua Thomsen, The One Per Cent Case (Yougarla v Western Australia), The one Per Cent Case (Yougarla v Western Australia), *Oxford University Commonwealth Law Journal*, Vol 1-2 (2001) p. 269.

<sup>92</sup> Johnston, (2002).

<sup>93</sup> Churches, (2006) p. 8.

<sup>94</sup> *Studies in West Australian History*, Vol 30 (2016).

**McLeod's Law**

Before Don McLeod's act of compassion towards an unidentified sick Aboriginal man led him to re-orient his life's focus, he was a successful Pilbara miner with a prosperous future. His socialist heart led him to abandon this goal and throw in his lot with those who had been denied the opportunities for autonomy that he had. When he died he was a pauper, but the meaning of his life had not been in material possessions. It was in using his intellectual capital to right a wrong as fundamental as a morally invalid constitutional process that had relegated Aboriginal people to a position as a sub-class in Western Australian society. Some academics called it McLeod's Law: the 'law of the fair go, of the historical, future-oriented promise of equality and moral rights.'<sup>95</sup>

Don McLeod, an ordinary man of the bush, challenged the legitimacy of the Western Australia Constitution. He lost the legal argument. He did not get the repeal of section 70 reversed. He did not get the 'one-percent of the gross revenue beyond the reach of Parliament' that represented justice for Aboriginal people. He did contribute to something else: the emancipation of the Pilbara Aboriginal women and men by their own efforts. This racial and gender autonomy was an unintended consequence of the repeal of section 70.

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<sup>95</sup> Stephen Muecke, *Ancient and Modern: time, culture and Indigenous philosophy* (Sydney: University of New South Wales Press, 2004) p. 131.

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