Chapter Five

A Collision Waiting to Happen? The *United Nations Declaration on the Rights of Indigenous Peoples* and Australian Domestic Policy

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On 13 September, 2007 the UN General Assembly voted, by an overwhelming majority, to adopt the *United Nations Declaration on the Rights of Indigenous Peoples*. 143 member states voted in favour of the declaration, 11 abstained and 4 (Australia, New Zealand, Canada and the United States) voted against it. The *Declaration* thus became the latest document in the already dense forest of international instruments by which the UN purports to protect human rights.

With the change of government last year, Australia's official attitude to the Declaration changed. On 14 September, 2007 the then Shadow Minister for Indigenous Affairs (and now Minister), Jenny Macklin, announced that:

> "A Federal Labor Government would endorse Australia becoming a signatory to the [Declaration]. The Declaration is about the international community expressing its support for Indigenous people and their children having an equal chance at life".[1]

Ms Macklin's characterisation of the purpose and effect of the declaration is glib, to say the least.

The Opposition has and, I am sure, those attending this Conference would have no problem with the idea of supporting the aspirations of indigenous people and their children having an equal chance in life. Over decades, successive Australian Governments have spent – not always wisely – billions of dollars attempting to lift the living standards and prospects of our indigenous population. I might say that it has been Liberal Ministers for Aboriginal Affairs who have been the pathbreaking reformers in this area, from William Charles Wentworth, the first Commonwealth Minister to take a deep interest in Aboriginal affairs, who during the Gorton and McMahon Governments took advantage of the newly-extended Commonwealth powers in this area following the 1967 referendum (itself an initiative of the Holt Government); Dr John Herron, the father of "practical reconciliation"; and Mal Brough, who famously pioneered the intervention in the Northern Territory which the new Labor Government has felt it necessary to embrace, albeit half-heartedly.

Further, it cannot be said that indigenous Australians are currently devoid of specific statutory protections, which augment the protections which all Australians enjoy under the common law. Confining myself to Commonwealth legislation alone, the *Racial Discrimination Act* 1975, the *Family Law Act* 1975, the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984, the *Human Rights and Equal Opportunity Commission Act* 1986, the *Higher Education Funding Act* 1988 and the *Native Title Act* 1993, to name just a few, all make special provision for the protection of indigenous rights and interests. The *Evidence Amendment Bill* 2008 currently before Parliament contains special evidentiary provisions for indigenous laws and customs.

There is a temptation, to which we are witness at the moment in the context of the debate about whether Australia needs a Bill of Rights, to gloss over our common law rights, to see them as somehow inferior if they are not codified in a constitutional or quasi-constitutional document or sanctified by reference to some international instrument or another. Last week, when I announced the Opposition's policy on a Bill of Rights for Australia, I said:

> "Let me make it clear at the outset what this debate should *not* be about. It should *not* be a debate about whether Australian citizens should enjoy the full range of civil, political and other rights which are the defining characteristic of modern liberal democracies. The reason why we need not

> have such a debate is that the issue is uncontroversial: no public figure I can think of doubts that proposition. Rather, the debate about a Bill of Rights is about means, not ends. It is, in particular, about two things: first, whether the protection of the rights which our citizens undoubtedly have would be better served by the enactment of a Bill of Rights than they are under the existing law; and secondly, whether the debate on the question of what substantive rights Australians should enjoy takes place in the open forum of elected and accountable Parliaments, or is determined by unelected and largely anonymous judges in the cloistered environs of the courts".[2]

It is, in my view, in the same context that the consideration of the *Declaration on the Rights of Indigenous Peoples* needs to occur.

On 11 March this year, I asked Senator John Faulkner, the Special Minister of State, whether it was the Rudd Government's intention that Australia should become a signatory to the *Declaration*. His reply was that:

> "… the government does support the principles underlying the *Declaration on the Rights of Indigenous Peoples*, which covers broad subject matter and is of great importance, as I have said, to indigenous peoples. This support needs to be seen in the context of Australia's domestic law and also our international legal obligations … As a declaration attached to a General Assembly resolution, this is an aspirational declaration. It has of a course a political and moral force, but it is my understanding that it has no legal effect".[3]

Senator Faulkner's characterisation of the document is consistent with its text. The *Declaration* describes itself as a non-binding document, proclaimed by its terms (in the final recital) as "a standard of achievement to be pursued in a spirit of partnership and mutual respect". So at first blush – and here's a surprise from the Rudd Government – the symbolism seems to be the important thing. However, are we to detect from Senator Faulkner's observation that the *Declaration* "needs to be seen in the context of Australia's domestic law", an implicit acknowledgment that the *Declaration* might not in fact be a seamless fit with the domestic law of this country? Or is it of symbolic significance alone?

If the *Declaration* is merely a piece of Rudd Government and UN window dressing, what do Australians, including indigenous Australians, have to gain from this country acceding to it? Or is there something in Senator Faulkner's hint about domestic law? Concern about the possible implications of the *Declaration* in domestic law was one of the principal reasons why the four democracies which voted against adoption of the Charter, chose to do so.

The *Declaration* – Recitals

Let me turn to the terms of the *Declaration* itself. It is the culmination of about 25 years of discussion and agitation for action at an international level on behalf of the world's indigenous peoples. The text itself is the product of about 10 years' diplomatic wrangling. The process was so slow because one of the core provisions of the *Declaration* is the right to self-determination. How that sits with national sovereignty, and whether any resolution of that issue has in fact been addressed by the text, is a matter with which I will deal in a moment.

As I have said, when the *Declaration* was adopted by the UN General Assembly on 13 September, 2007 only 4 nations – each of them like-minded liberal democracies with significant indigenous populations – voted against it.[4] It is noteworthy that these nations lead the world in the comprehensive domestic laws and policies to protect and advance the interests of their indigenous populations, while many of those abstaining or not present for the vote have longstanding or seemingly intractable tribal or separatist movements within their borders. Indeed, some voting for adoption which have their own such conflicts, like Sri Lanka and Indonesia, are content to view their populations as indigenous *in globo*, which leaves uncertain the consequences for the demonstrably non-indigenous elements of the population.

The *Declaration* opens with 24 recitals, most of which are uncontroversial (although, as is the nature of these things, somewhat piously expressed). Here are a few examples:

> "*Affirming* that indigenous peoples are equal to all other peoples, while recognising the right of all peoples to be different, to consider themselves different and to be respected as such; and *Affirming also* that all people contribute to the diversity and richness of civilisation and cultures, which constitute the common heritage of humankind;
> "*Recognising also* that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration …".

Others are infected with heady doses of a kind of Rousseauvian romanticism:

> "*Welcoming* the fact that indigenous peoples are organising themselves for political, economic and social enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur;
> "*Recognising* that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment....".

The final recital states that the declaration is proclaimed as "a standard of achievement to be pursued in a spirit of partnership and mutual respect". This is the provision which Senator Faulkner apparently had in mind when he said that the *Declaration* is an aspirational document and is not intended to have legal force.

Whether the *Declaration* will always have that status is a matter for conjecture and, in my opinion, a matter of serious concern, to which I will return.

Specific Articles

It is curious, given the purportedly aspirational nature of the document, that the 46 Articles which follow are all expressed in terms of rights, guarantees and mandatory requirements for States.

Some of the provisions in the Articles cannot be quibbled with. For example, Article 2 states that:

> "Indigenous peoples and individuals are free and equal to all other peoples and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity".

However, there are other aspects of the document which are deeply problematic.

In the first place, surprisingly, the *Declaration* contains no definition of the expression "indigenous peoples". This is a striking omission for a document whose very point is to declare their rights. It has been suggested by some scholars that the definition is to be found by reference to other international instruments, in particular the 1989 International Labour Organisation's Convention No 169.[5] This defines "indigenous peoples" as:

> "(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
> "(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions".

It goes on to provide that "self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply".

There are two principal problems with the omission of a definition from the text of the *Declaration*. First, and most obviously, if the ILO definition is meant to apply, its omission from the text means that the interpretation of the *Declaration* will be governed by the language of an international instrument that may not have been adopted by the signatory states. Australia is itself not a ratifying party to the ILO Convention.

Second, the requirement of self-identification means that the *Declaration* has the potential to be misused by separatist or minority groups seeking to exploit claims to self-determination or control of resources.

Next, Articles 3 and 4 provide that indigenous people have the right to self-determination. This concept is not defined – the text simply provides that in pursuance of that right, indigenous peoples may freely determine their political status, whatever that means, and have the right to autonomy or self-government in matters relating to their internal and local affairs, whatever they might be. This has the clear potential to place customary law above national law. It must also be reconciled with Article 46, which provides that the *Declaration* does not imply any right to perform any act contrary to the UN Charter, or that might "dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States". However, it is possible to imagine an international court or tribunal being persuaded by the argument that allowing customary law to prevail over national law will not affect the territorial integrity or political unity of a state, especially if those concepts are given a narrow reading. It might even be argued that the concepts of territorial integrity and political unity should themselves be interpreted so as to accommodate indigenous self-determination.

The states opposing the text of the declaration deposited, in accordance with General Assembly practice, Statements of Reasons for their negative votes.[6] Among their grounds of opposition they pointed to the following provisions:

> •Provisions on land and resources rights (Articles 25 and 26) may give indigenous peoples a right of veto over national legislation and state management of resources.
> •Article 26.3 requires that "states shall give legal recognition and protection" to lands, territories and resources traditionally "owned, occupied or otherwise used or acquired" by indigenous peoples, without limitation or any recognition of a means of alienation of those lands or other limitations. There is nothing in the text about how the rights of third parties might be affected.
> •Article 28 provides for indigenous peoples' right to "redress by means that can include restitution or … compensation, for their lands and resources which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent", again without recognising any limitation to that principle.
> •Article 32.2 requires states "to consult and cooperate in good faith with indigenous peoples...to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources".

Under Australian law, the Crown retains title to certain resources under privately-owned land, which may be exploited without the consent of the title-holder (subject to reasonable compensation)[7]. A right to negotiate is provided under the *Native Title Act* 1993 which, in itself, exceeds the rights available to non-indigenous people. However, this Article not only seeks to set the interests of indigenous people at a higher level than that enjoyed by the rest of the population, but also beyond the extended regime in the *Native Title Act*. Further, it requires consent in respect of lands "affected" by the exploitation, which is a much wider concept.

The United States, in particular, has criticised the text for failing to be transparent and capable of implementation.[8] Its objections are worth noting for their clear-eyed analysis of the human rights implications:

- "Indigenous peoples in our countries [i.e., the US, Australia, Canada and New Zealand] can already fully and freely engage in our democratic decision-making processes. But, our governments cannot accept the notion of creating different classes of citizenship. To give one group in society rights that take precedence over those of others would be discriminatory under the *Convention on Elimination of Racial Discrimination*. While the *Convention* does allow States to take special measures, the power to do so is discretionary and cannot be used to take measures that are unlimited in duration".
- "The provisions on land and resources in the text are unworkable and unacceptable. They ignore the contemporary realities in many countries with indigenous populations, by appearing to require the recognition of indigenous rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous. Such provisions would be both arbitrary and impossible to implement".

- "It seems to be assumed that the human rights of all individuals, where they are enshrined in international law, are a secondary consideration in this text. Human rights are universal and apply in equal measure to all citizens. That means that one group cannot have human rights that are denied to other groups within the same nation-state".

  These concerns appear to be fully justified.

  There are some other provisions which are potentially problematic:

- The prohibition on removal of children (Article 7.2). This "collective right" is unqualified, yet must also be squared somehow with the individual rights in Article 7.1 to life, physical and mental integrity, liberty and security of person. An abused child has individual rights, but can its removal from the source of harm be resisted by the community on the basis of the collective rights? The text provides no guidance and, in particular, takes no stance in terms of the priorities to be accorded to individual as against collective rights.
- Article 8.2 is a requirement for redress for *any* population transfer measures which have had the *effect* (not just the aim) of, *inter alia*, depriving indigenous people of their integrity as distinct peoples. What happens in the case of an emergency evacuation from, or to, an area occupied by indigenous people? What circumstances might constitute a "loss of integrity as a distinct people"?
- Article 11.2 contains a requirement for States to provide redress (including restitution) with respect to any "cultural, intellectual, religious and spiritual property" taken "in violation of their laws, customs and traditions". Does this include artefacts taken by people without any approval or sanction by the state? Does this include legitimate anthropological and archaeological research? Are these "rights" subject to any balancing considerations, such as fair use for intellectual property?
- Article 14 provides for indigenous control of their educational systems. This is expressed in terms of rights, both to State education (should it be desired) and to education controlled by the indigenous people themselves. However, the rights are not balanced by duties or obligations. It is possible that the terms of the text may even be used by indigenous communities to veto compulsory State education.
- Article 31, pertaining to intellectual property rights arising from traditional knowledge, appears to be significantly in advance of current intellectual property law on this issue. There is quite a body of legal academic writing on the intellectual property that might subsist in indigenous art and knowledge. But, under Australian law as it presently stands, intellectual property rights such as copyright and patents have a termination date, at which point the subject matter goes into the public domain for the free use of the community. The terms of this Article are silent on the rights of third parties, and contain no reference to the way intellectual property rights are hedged in modern law, for example by exceptions such as fair use, the requirements of genuine novelty or invention, or the recognition that property has already entered the public domain.
- As a final example, although there are more, Article 39 states that "indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this declaration". This may readily give rise to ambit claims for State financial assistance in respect of claims not recognised under domestic law.

Before I turn to consider how this document might collide with domestic law, I need to emphasise that the Opposition is *not* opposed to the creation of international instruments for the protection of indigenous peoples. Instruments to provide for international assistance have their value, particularly where states are unable or unwilling to accord rights or vital assistance to disadvantaged groups. It is a testament to this that Australian representatives were closely and constructively involved in the process that ultimately produced this document. This process was helpfully summarised by my colleague, Senator Marise Payne, who during the Howard Government was the Chair of the Human Rights Subcommittee of the Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade, and is widely acknowledged as one of the Parliament's most articulate and committed defenders of human rights. Senator Payne told the Senate last year:

> "[W]e have been involved in this process for over 10 years. We approached the consultations that were held in New York recently in a constructive, engaged and flexible manner. We put on record in New York the fact that our concerns could be met through very limited changes in the Chair's text. We made a concerted effort to reduce our key concerns to a minimum number

> of possible changes so that we were not seeking a complete rewrite of the entire declaration, which would obviously be an extraordinary process. We are not trying to have the entire text renegotiated …
>
> "We believe that indigenous peoples deserve and need a declaration which can be implemented meaningfully, not one which is rushed for the sake of signing on a particular dotted line".[9]

I respectfully endorse those comments. The problem is that, in its ultimate form, this is not, as Australia, the United States, Canada and New Zealand have explained, a document that *can* be implemented meaningfully. It says at once that it is an aspirational document and goes on to state a series of minimum demands. In places it is almost unintelligible, in other places it seeks to guarantee rights that would seriously displace the rights of others, and throughout it places individual and collective rights in the same basket, without providing any guidance as to how to resolve the inevitable tensions between them. However, what most concerns me is the possibility that this is not a mere piece of aspirational doggerel, but a roadmap to a collision between this instrument and Australian domestic law.

Potential domestic legal consequences of accession

Is the *Declaration* merely an aspirational document as claimed? Article 43 describes the rights recognised by the *Declaration* as constituting "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world". Those are odd words for an aspirational document.

On a more fundamental level, the significance of the *Declaration* lies not in its formal legal effect: declarations of themselves do not constitute binding international law. Rather, they create a perception that its provisions reflect a State's *opinio juris* and thus go towards establishing customary international law.[10] Further, there is a body of law in this country that would go further than that and, through judicial *fiat*, start implementing the *Declaration*'s programme without regard to Parliament, should Australia accede to it at the UN.

Members of this audience would be well familiar with that monument to the jurisprudence of the Mason High Court, *Minister for Immigration and Ethnic Affairs v. Teoh*.[11] By a 4-1 majority,[12] the Court held that although a Convention ratified by Australia does not become part of Australian law unless its provisions have been validly incorporated into municipal law by statute, the ratification was an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers would act conformably with the Convention. It was not necessary that a person seeking to set up such a legitimate expectation be aware of the Convention or personally entertain the expectation. It is enough that the expectation is reasonable in the sense that there are adequate materials to support it.

The decision was controversial, to say the least. On at least two occasions,[13] the High Court has had a chance to consider it: several members of the Court expressed a preference for the dissenting position, but *Teoh* has not so far been overruled. The decision has since been applied in many lower courts. The fact is, if decision makers in the bureaucracy wish to take the *Declaration* into account there is nothing to stop them doing so, and any expression of an intention to do so may create a "legitimate expectation" that the terms will be applied, which may be justiciable at the instance of indigenous claimants.

While I very respectfully doubt that the present High Court will wish to reinvigorate *Teoh* (and I interpolate here the reassuring fact that the judge who dismissed Teoh's arguments at first instance was the new Chief Justice, Robert French), the case remains a touchstone for rights activists and continues to generate optimistic journal articles. All that may be needed to push this *Declaration* into domestic law are some sympathetic decision makers at the bureaucratic level or legislatively-minded judges on the Federal Court willing to give *Teoh* another run, and a monster may be created.

This *Declaration* contains provisions that go well beyond the rights recognised in Australian domestic law. There is a real danger that accession to it will create a sectional jurisprudence that is fundamentally out of step with the domestic law which has been crafted by the people of this country through their elected representatives, for the benefit of all the people of this country. And this could occur at the stroke of a pen, without any reference to those elected by the people to safeguard the rights and interests of all of them.

Endnotes:

1. Macklin, J, *International Declaration on the Rights of Indigenous Peoples*, Media Statement, 14 September, 2007 at http://www.alp.org.au/media/0907/msia140.php.
2. Senator George Brandis, *The Debate We Didn't Have to Have: The Proposal for An Australian Bill of Rights*. Speech to James Cook University Law School, Townsville, August 14, 2008.
3. Senate *Hansard*, 11 March, 2008, p. 497.
4. The abstaining votes were Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine.
5. Odello, M, *International Focus: United Nations Declaration on Indigenous Peoples*, (2008) 82 *Australian Law Journal* 306, 308.
6. Statement by NZ Ambassador to the UN, Rosemary Banks, on behalf of Australia, New Zealand and the United States, 16 October, 2006, issued by the United States Mission to the United Nations press office.
7. See, for example, the *Mineral Resources Act* 1989 (Qld), ss 71-78 and 265-269.
8. Explanation of vote by Robert Hagen, US Advisor, September 13, 2007.
9. Senate *Hansard*, 10 September, 2007, p. 53.
10. See Charters, C, *Indigenous peoples and international law and policy*, (2007) 18 PLR 22 at 33 ff.
11. (1995) 183 CLR 273.
12. Mason CJ, Deane, Toohey and Gaudron JJ, McHugh J dissenting.
13. *Re Minister for Immigration & Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1; *U v. U* (2002) 211 CLR 238.