Chapter Nine

Indigenous Recognition

Some Issues

The Honourable Robert Ellicott

Indigenous recognition in the Constitution of Australia involves numerous issues, some of which are quite complex. To mention a few:

- Should there be any recognition at all in the Constitution?
- If so, should it be inserted in a preamble or in the body of the Constitution itself?
- What should be the purpose of a preamble to our Constitution, there being none at the moment?
- How far should recognition extend? Should it be limited to recognition of our indigenous peoples' prior occupation and cultural identity? Should it recognise custodianship? Should it extend to matters such as discrimination, equality of rights with other Australians, the formulation of a treaty?
- If there is to be a successful referendum, what limitations does this impose on the extent of recognition?
- Is there any point in having a referendum on the issue if the indigenous people do not substantially agree with any proposal, or are split on the issue?
- What steps should precede the determination of the proposal? Should there be a Constitutional Convention between the Commonwealth and the States?

I will touch on these issues in the course of my address. My point at the outset is that complex issues arise which require careful analysis, consideration and consultation before the preconditions of a successful referendum can be met. Not only the content of the recognition proposal is in issue but also whether and when it should be put.

The Expert Panel established by the Commonwealth Government on recognition has adopted four principles as to any proposal it recommends:

- It must contribute to a more unified and reconciled nation;
- It must benefit and accord with the wishes of our indigenous peoples;
- It must be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums;
- It must be technically and legally sound.

These are demanding principles and, I think, can be accepted as a test to be met by any proposal.

Before expressing any views, so that you will understand my approach, may I mention some personal background.

I was born in Moree, a town which has been at the centre of indigenous issues and where there was, in my early life, active discrimination against Aboriginals.

As Commonwealth Solicitor-General in 1970 I was counsel for the Commonwealth in the first major land rights case, *Milirrpum & Ors v Nabalco & The Commonwealth* (1971) 17 F.L.R. 141 – which involved the claims of the Yirrkala clans that they had title to the land from which Nabalco was taking bauxite pursuant to a lease from the Commonwealth. Although they lost the proceedings the case established that there was a clear relationship between the Aboriginal people and their traditional land. It led to my making a submission to the McMahon Government that the Commonwealth should recognise this relationship by granting rights over the reserves on which aboriginal people lived. It also led to the setting up of the Woodward Royal Commission which recommended what in effect became the Aboriginal Land Rights Northern Territory Act.

In April 1975 Malcolm Fraser appointed me Shadow Minister for Aboriginal Affairs, a post I held till December 1975. I was responsible for developing the Aboriginal Affairs policy for the 1975 election.

The Liberal Policy included the grant of land rights in the Northern Territory and endorsed self-management by the Aboriginal people as the appropriate policy to pursue. It also opposed the setting up of large land councils recommended by the Woodward Commission. This was confirmed as policy for the Coalition after discussion with the National Party.

Labor introduced a bill for Land Rights in the Northern Territory which was debated in October 1975 but not passed. A bill in similar form was tabled and passed in 1976.

This experience has led me generally to be favourable towards recognition in the Constitution of the Aboriginal and Torres Strait Islander peoples, their occupation of our continent pre-1788 and the existence of their distinctive cultures and their contribution to Australian life.

Notwithstanding this view, I am also very conscious of the need, in any proposal, to ensure it is designed to overcome the difficulties of achieving constitutional change in this country.

As Attorney-General I was responsible with the Prime Minister for the conduct of the 1977 referendum which sought to amend the Constitution in four respects which had strong bipartisan support. First, in relation to casual vacancies in the Senate; second, introducing a retirement age for Federal Judges; third, including Territory residents in the determination of majorities under the amendment provision, section 128; and, fourth, requiring simultaneous elections for the House of Representatives and the Senate. Three of these proposals were adopted by a majority of electors in the Commonwealth and by a majority in a majority of States. One of them, the proposal for simultaneous elections, failed.

There have been 44 referenda proposals put to the Australian people since Federation. It has been notoriously difficult to have an amendment approved – only eight have been approved, three of which were approved in 1977. In 1988 a swathe of amendments recommended by the Byers Constitutional Commission were completely rejected.

In my view, for a referendum proposal to have a substantial chance of acceptance:

1. There must be bipartisan acceptance of it by the major political parties.
2. It should have become broadly acceptable to the Australian people as a result of broad consultation and the provision of information to the public as to its purpose and effect.
3. It should contain no element of possible substantial confusion on legal or other grounds or of the proposal possibly undermining existing rights, particularly State rights. The States of Western Australia and South Australia, Tasmania and Queensland wield great power in a referendum.
4. If it affects, as in this case, a particular group of people, it must have their broad acceptance.

A small group of senators in 1977 actively opposed the proposal for simultaneous elections. They were able to obtain a majority in sufficient States to reject the proposal based on its perceived threat, as they saw it, to the States. The fact that this proposal had been adopted by a Constitutional Convention representing the major parties and the States and would save considerable expense and inconvenience to the electors was not sufficient to obtain approval. It had an overall majority of 1.8 million votes but only three States supported it. A similar amendment had been rejected in a referendum in May 1974 by an overall minority of 247,000.

I would go so far as to suggest that except where a particular proposal is not complex, for example, requiring Federal Judges to retire at 70, it is almost essential that partisan support be obtained not by general expressions of view by Government and Opposition or by the consideration and recommendation of a broadly based and highly qualified panel but only by holding an actual Constitutional Convention between members of the parliaments of the Commonwealth and the States that can consider the proposal in depth and, in the course of so doing, consult relevant groups and interests including members of the public.

A clear example would be if there was to be a referendum on a republic. The 1999 referendum was the result of an *ad hoc* group of people, albeit some politicians and party representatives, academics and leading citizens. It could not possibly iron out the issues which a referendum on a republic would require in order to obtain the necessary approval. Non-inclusion of a reserve power or the difference between an elected President and an appointed President are clear examples of factors which could undermine referendum proposals for a republic. Academics, broad expressions of community views or leading citizens are not in charge of the process. The Commonwealth Parliament is in charge of the process and both political parties must agree.

In relation to the recognition of our indigenous people there are likely to be diverse views among the Aboriginal and Torres Strait Islander people as to what they would regard as a sufficient recognition of their relationship to the land, their cultures and their rights as indigenous people. Some may be satisfied with a general recognition of past occupation prior to white settlement with their separate cultural identities and their continuing contribution to Australian life. On the other hand, there will be others within the indigenous community, as the Expert Panel in its discussion paper suggests, who would take the view that an amendment to the Constitution of this character would be quite inadequate and that the Constitution should be amended to affirm principles of non-discrimination, equality, justice and fairness in relation to the indigenous people.

Further, a proposal which was limited to the first might well be seen as a token amendment by the indigenous people generally, and particularly by those who take the latter view. The debate could also generate a division of view within the wider community as to whether either approach was acceptable. The broader approach may also fail to have Coalition support.

It has to be remembered that, as was the case in the 1977 amendment, what seems to be a perfectly reasonable proposal, for example, simultaneous elections, agreed upon by all the political parties can surprisingly be the subject of a great division leading to arguments based on fear which sufficient people in sufficient States accept to rob the approval of acceptance by the majority which section 128 requires.

Incorporation in a preamble

This raises an important question. There is no preamble as such to our Constitution. The preamble currently relevant is the Preamble inserted in the Imperial Act which enacted and gave legal effect to our Constitution. A reading of that preamble shows that it has marked relevance to the process by which the Constitution came into effect. It states:

The people of the States humbly relying on the blessing of Almighty God agree to unite in one indissoluble federal commonwealth under the Crown of the United Kingdom of Great Britain and Ireland and under the Constitution hereby established.

The Constitution Act also contains covering clauses which provide *inter alia* for the proclamation and establishment of the Commonwealth, the commencement of the Imperial Act, the taking effect of the Constitution and the operation of the Constitution and laws made thereunder. Both the Preamble and the covering clauses were directed to the Constitution which was to take effect.

The Expert Panel is considering the insertion of a preamble which would deal with the recognition of indigenous people.

If there were to be such a preamble it would, in my view, need to be preceded by a broad debate about whether there should be a preamble and, if so, what it should contain. It does not seem to me to be consistent with the notion of a preamble to amend the Constitution solely for the purpose of inserting a statement in a preamble which only deals with indigenous recognition. To be appropriate it would need to be accompanied by general statements which describe the context within which the Constitution was framed and reveals the connection between a recognition of our indigenous people in that context. This is a very large, difficult and contentious task.

You will recall that there was a second question in the 1999 republican referendum which involved the insertion of a broadly based preamble which contained a statement by the Australian people acknowledging:

Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country.

The whole preamble was criticised for its ambiguities, lack of consultation, as well as a failure to go far enough in recognition of our indigenous people. It was soundly rejected. It received no majority in any State. In the light of this experience, the Expert Panel should, in my view, be slow to recommend that recognition be achieved by way of a statement in a preamble.

One of the problems in relation to the 1999 attempt at a preamble was that it did not have the benefit of being approved by a properly organised Constitutional Convention between the Commonwealth and the States. The so-called Constitutional Convention of 1998 was a failure. It was no doubt enjoyed by the very experienced and talented people who participated but it was clearly a very inadequate method of deciding the content of constitutional change.

The Commonwealth Parliament is in charge of the process of amending the Constitution. It has to adopt the relevant bills under section 128. A full Constitutional Convention incorporating representatives of all parliaments is essential to develop consensus between the Commonwealth and the States, the major political parties and among the Australian people and relevant groups of people where major complex issues like a republic are involved. Indigenous recognition, depending on the extent of it, could also be such an issue.

It is very helpful to have the views of an Expert Panel but the overall endeavour to give recognition to indigenous people could possibly be a waste of time if the politicians through their parliaments do not take charge of the process.

In all political matters what is called *"the art of the possible"* must be constantly in mind. As previously stated, the history of constitutional change in Australia is a warning as to what can be regarded as *"possible"*.

The popular approach to amendments is clearly conservative and unlikely to embrace propositions which can be used to sow doubts about the breadth and legal operation of a proposal. A proposal for a statement in the Constitution whether in a preamble or in the body of the Constitution which goes beyond recognising Aboriginal and Torres Strait Islander peoples' distinct cultural

identity, prior ownership and custodianship of the continent and seeks to embrace, for instance, a statement of values being a commitment to democratic beliefs, the rule of law, gender equality and an acknowledgement of freedoms, rights and responsibilities, as the discussion paper circulated by the Expert Panel describes, is in my view likely to be so contentious as to fail to obtain the required majorities.

There will be those, for instance, who think these matters should not be referred to; those who think the statement of values does not go far enough or too far; or those who think that it constitutes a backdoor method of introducing a Bill of Rights which they oppose or fear. Likewise, any proposal enabling the making of a treaty recognising the rights of, contribution of, and future treatment of our indigenous people.

Proposals which could upset or unsettle the current interpretation of the Constitution in important respects are candidates for rejection. The proposition, *"if it ain't broke don't fix it"*, is high in people's minds.

In other words, the wider the scope of recognition the more likely it is that the proposal will be rejected by the people. Framing a proposal for a successful referendum is not really about what one believes or a group believes should be found in our Constitution. It is about what a conservative majority of people in a majority of States are likely to support by way of amendment.

In my opinion, the recognition which should be accorded to our indigenous people which is likely to find broad public approval is one that acknowledges their past occupation, their past custodianship of the continent and the development of their own cultural identity and its continuing contribution to the life of the Australian people of which they are part. A statement of this character, carefully drafted, in my view, is unlikely to affect constitutional interpretation.

Section 51(xxvi)

Section 51(xxvi) confers power on the Parliament to make laws *"with respect to the people of any race for whom it is deemed necessary to make special laws"*.

In the case of *Kartinyeri v The Commonwealth* ((1998) 198 CLR 337) it was held by two Justices (Gummow and Hayne JJ) that section 51(xxvi) is not limited to all people of a race nor is it confined to laws which do not discriminate against a race. Therefore, laws which do not benefit Aboriginal and Torres Strait Islander people or a group thereof are not outside the scope of section 51(xxiv). It is suggested that this is unsatisfactory and the provision should be amended to confine it to laws which benefit indigenous people. I think it would be unwise so to limit section 51(xxvi). I think there are broad circumstances where a law may need to discriminate in a non-beneficial way in order to achieve some proposal which is of wider benefit to indigenous people.

Although opposed by some as discriminatory, provisions enacted to enable the Commonwealth to stop the payment of benefits to persons in Aboriginal communities in the Northern Territory may be seen by some as part of the achievement of a broader beneficial purpose introducing health, educational and other community reforms.

Noel Pearson, with whom Galarrwuy Yunupingu seems to agree, has had much to say in general support of the Northern Territory intervention as part of his view that the Aboriginal people must take control of their own destiny and eschew a welfare mentality. This is not a view which seemingly is shared by all other Aboriginal leaders and there is a great debate continuing both as to what is to be done and how it is to be implemented. The consensus between government and the Aboriginal people may well be that legislation which is directed to this end should be implemented and the decision in *Kartinyeri* may well have to be relied on if the Commonwealth is to enact the provisions.

My conclusion

Taking the view, as I do, that any statement of recognition should not be included in a preamble, it

is my view that the appropriate way in which to achieve the objective, if it is to be undertaken, is to amend the body of the Constitution itself.

Section 25 provides that for the purposes of section 24, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

Section 127, which provided that in reckoning the numbers of the people of the Commonwealth or of a State or other part of the Commonwealth, Aboriginal natives shall not be counted, was repealed as a result of the 1967 referendum. Section 25 was allowed to remain but it is, in essence, a provision which should no longer stand in the face of that repeal. Its proper interpretation is open to debate. However, it is also perceived by many as racist and odious. It is certainly discriminatory and is clearly now otiose.

In my opinion section 25 has no useful role to play in the Constitution and should be repealed.

I suggest consideration should be given to substituting a new section 25 which could take the following form:

25 (1) The Aboriginal and Torres Strait Islander peoples were for many thousands of years prior to 1788 the occupiers and custodians of the Australian continent and adjacent islands and throughout that period they developed their own distinct cultural identities which have become part of and have enriched the life of the Australian people.

(2) The provisions of the Constitution as originally framed which permitted the Aboriginal and Torres Strait Islander peoples to be excluded from reckoning the number of people of the Commonwealth or of a State for which this provision is substituted were in this respect discriminatory.

(3) The Aboriginal and Torres Strait Islander peoples are entitled to the same voting rights as other Australian citizens.

A provision to this effect, in my view, can give recognition to the indigenous people and, at the same time, by its repeal of section 25, and, in its terms, acknowledge it was discriminatory, and, in relation to voting, acknowledge that their rights should be no different to those of other Australians. Such a provision should not have any effect on the interpretation of the Constitution in other respects and fulfils what I consider to be a reasonable course for the Australian electorate to take to meet the objective of both political parties.

I have framed it in the way I have to express the basic ideas I have in mind. A skilled draftsperson or others may, of course, wish to state them differently.