



Submission to Joint Select Committee on Aboriginal constitutional recognition.

The Hon Michael Mischin MLC  
Committee Chair.

My Dear Attorney,

Thank you for your letter of 14 December and for the opportunity to make a submission on this matter although the timetable is rather odd given the reality that the Xmas/January period is a down period for the whole community and the usual time of law business for remote Aboriginal communities in this State. Responses, including my own, are likely to be of less value than they would be if there were a more realistic timetable.

I am writing this as I leave the Board of Reconciliation Australia on which I served from 2000. The views expressed are mine but are coloured by my participation in the Expert Panel on Constitutional Recognition which reported to the Commonwealth in January 2012. No doubt that report is available to the Committee. Since then the Commonwealth Government and Parliament have been considering what proposition might be put to Australian people and when a referendum might be held. Neither point is yet settled.

I strongly support recognition of Aboriginal prior ownership of Western Australia in the State constitution and the continuing presence of Aboriginal collectives as an ongoing part of the law and culture of this State. This should not be a contentious matter given the High Court's Mabo decision and the many determinations of native title in Western Australia since that decision, all of which recognise an existing title vested not in individual Aboriginal people but in their culturally determined collectives. Miners and other corporations have entered into extensive agreements with native title holders as collectives rather than as individual citizens of Western Australia. In addition successive Governments have entered into land settlement negotiations with the Noongah native title groups in recognition of the reality of their continuing rights and interests.

The existing law recognises continuing native title interests which are rooted in long existing rights in place at the time of settlement. These rights are vested in collectives defined by Aboriginal law and custom.

Recognition which falls short of acknowledging this existing legal position would in my view be a sham and an attempt to step back from the recognition already achieved at law.

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The precise wording of any recognition should not be determined unilaterally by the Government if it wishes to see something in place which advances the unity of our population and which provides an assurance to Aboriginal Western Australians that the continuing place of their cultures in the State is accepted and secure. Every effort should be made to have a unified position across party lines within the Parliament and to provide a sufficient opportunity for the various Aboriginal collectives (tribes) to express their views before the words are finalised. This is likely to require a longer timeline than MPs and governments normally allow but there seems little point in having a form of words in the constitution which is unsatisfactory to a substantial part of the Aboriginal population you are seeking to recognise.

The logical progression would be to get all party agreement to recognition in principle and all party agreement to a process to have genuine consultation with the Aboriginal collectives and individuals. It is unlikely that complete agreement would ever be reached among the diverse communities but a genuine effort to hear Aboriginal views would be an act of good faith and could make the recognition an important step in a new and better relationship between our first nations and the rest of us.

There always seems to be some nervousness about possible unintended consequences of constitutional recognition. It may be that the simplest way of avoiding this would be to acknowledge in the constitution what is already part of the law of Australia and Western Australia through native title law and native title processes. By referencing to what is already part of domestic law subject to established Court procedures there could be no surprises.

This submission has been prepared in haste and I would be happy to follow it up further if the timetable later permits. In any event I am, very supportive of recognition and am grateful that the State Parliament is giving this important matter attention.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Fred Chaney', with a long, sweeping horizontal stroke extending to the right.

Fred Chaney AO  
26 December 2014