

WINTERS, Mr Geoffrey, Private capacity; and Lawyer, Chalk & Behrendt Lawyers & Consultants

[14:54]

CHAIR: Welcome, Mr Winters. I must apologise in advance for the co-chair, Mr Leeser, not being here today, and also for the other senators and members who are on this committee but aren't here.

Mr Winters: I appreciate that and I understand.

CHAIR: Thank you for meeting with the committee today. The committee has been asked by the Commonwealth parliament to look into constitutional recognition relating to Aboriginal and Torres Strait Islander peoples. The resolution of appointment outlines in more detail the aspects of the committee's consideration. As co-chairs of the committee we have made statements expressing our wish to hear more from First Nations peoples as we start our work. We've also explained that we will continue to receive submissions and to hear more views around Australia in the coming months.

We need to ensure that everyone present is aware of procedural considerations. Today the committee is taking a Hansard record of the proceedings, but they are not being broadcast. Microphones aren't broadcasting or amplifying your words in the room, but they are likely to be on and recording at any given time. The committee may wish to make the Hansard record public at a later date, but we will seek your views on this before doing so. If you feel very strongly that you don't want your views recorded in any way we will give consideration to that. When you provide information to a committee of the parliament, as you may be aware, you're covered by parliamentary privilege. It is also unlawful for anyone to threaten or disadvantage you on account of the evidence given, and such action may be treated by the parliament as a contempt. It is also a contempt for you to give false or misleading information. If you make an adverse comment about an individual or organisation, that individual or organisation will be made aware of the comment and given a reasonable opportunity to respond to the committee. Would you like to make a brief opening statement?

Mr Winters: Yes. I won't take too much time. I'm aware the committee's got limited time and resources. I think, potentially, one of reasons why my name may have been added to the list to give evidence is my recent involvement with an organisation called Uphold & Recognise. While I'll probably talk about and direct most of my comments to the view that that group holds, I guess I'll also express a view as an individual and a young Aboriginal person, having lived most of my life in a kind of urbanised environment, but I was certainly raised in and am connected to a more regional environment in Walgett in New South Wales.

The first point I would make, by way of opening, is that it's extremely encouraging and wonderful that the committee has been brought together. And it is particularly encouraging to see the individuals who have been asked, both senators and members, to constitute it. That's extremely encouraging and it's good to see the parliament taking further action and taking the issues seriously, moving into 2018 and beyond.

The second point probably relates to a lot of the work with Uphold & Recognise. My view is that, although prior to the Uluru statement being made some of those ideas weren't necessarily those which I held or had pushed myself, all of my thinking around constitutional recognition at the moment is very strongly informed by the reality that that process, which unfolded over a period of time and led to that meeting at Uluru, is something that I certainly can't ignore and is certainly something I think the parliament shouldn't ignore.

There's extreme power and weight, I think, in so many groups from so many different places with different backgrounds and different beliefs by and large agreeing on what is essentially a package of what could be the way in which constitutional reform moves forward, and indeed more broadly the way Indigenous and non-Indigenous Australian relationships are regulated, moving forward.

My only opening remark would be that I'm thoroughly informed by that statement and also by the commitment I hold as, I guess, a slightly conservative constitutional lawyer myself. To me the exercise is about expressing, in both the legislative and constitutional mechanisms, the aspiration that is enshrined in the Uluru statement, but it is also ensuring that the constitutional framework, which has, by and large, been so successful in enabling Australia to succeed for as long as it has, is also protected.

CHAIR: Thank you very much. Does anyone wish to ask any questions? Warren?

Mr SNOWDON: Yes, I'm happy to. Sorry, Geoff, how are you?

Mr Winters: Good, Warren. How are you?

Mr SNOWDON: Good, thanks, mate. I'm interested in your description of yourself, which is good—and, when I say good, I mean that now I understand your ideological position a bit. You're telling us that you'd be supportive of constitutional change which incorporated a voice in the terms described by the Uluru statement?

Mr Winters: I'm caught, as an individual, in an interesting position where I had high hopes and aspirations for how we can get this done right in a way that really and effectively empowers people, but, at the same time, I'm acutely aware of the reasons certain people feel so afraid and fearful about tinkering with the Constitution. But I think the idea that emerged in that statement is an interesting middle road—perhaps it's not a middle road, but it's an interesting other road compared to some of the other options we've looked at in the past.

I think if the parliament could consider a way of entrenching in the Constitution a way in which Aboriginal people felt they meaningfully had a voice then that would be important and I think the benchmark of a successful campaign to reform the Constitution. What that would look like I think still has a long way to go. I'm in no way married to any of the particular models that have been put up, whether by Mr Pearson or others, but I do think one of the options available is to provide some quite high-level language in the Constitution that provides and enshrines that voice but leaves to the parliament, as it should, I think, the power to regulate what the scope is and how that advice is received and given effect.

Mr SNOWDON: That's very clear, and that's a view that has been expressed to us by others, I have to say. But I'd be interested to know: do you then believe that we should just ignore section 25 and section 51(xxvi)?

Mr Winters: No. I'll start with section 51(xxvi). I think section 51(xxvi) is a provision that's redundant and that most people would believe is completely out of place in our Constitution, and it's particularly one that I've felt had no place in our Constitution for as long as I've understood it to be there—and I probably should have made that point earlier. But any reform package should, and in my view must, consider removing 51(xxvi) in its current form. I suspect the way that you would move forward, and make sure you deal with any concerns as to what legislation in the past might not be supported under the other heads of power in section 51, is to insert a power specifically for legislation in relation to Aboriginal and Torres Strait Islander people. Similarly, I think the earlier recommendation in relation to section 25, as dealt with by the expert panel report, is probably my preference, to be honest with you.

Mr SNOWDON: Right. Thank you. Forgive me if I'm putting words in your mouth—and please tell me if I'm wrong—but you're effectively saying that, in the context of any proposals that go forward, there should be a dual proposal: one which deals with section 51(xxvi) and one which deals with a voice.

Mr Winters: Correct. I flagged this openly, but, putting my public lawyer hat on, I don't think it's a baseless argument to mention that playing too heavily with the text of the Constitution is a risky business. I think there are certain provisions which don't belong there—section 51(xxvi) obviously. What then is put in as a positive action I think should be relatively limited. For me, I think a lot of the aspirations for both myself and my family and a lot of people in my community could be achieved through that voice provision.

Mr SNOWDON: Thanks very much, mate.

Mr Winters: Pleasure, Warren.

CHAIR: Amanda?

Senator STOKER: No, thank you.

CHAIR: Sussan?

Ms LEY: Thanks, Geoffrey. Are you able to put your thoughts down in a submission to this committee?

Mr Winters: I certainly would be able—I mean, it's difficult. I think Uphold & Recognise is probably drafting something already. I'm not sure whether you've spoken to any of the other board members, who are Sean Gordon, Rachel Perkins—a bunch of others. To give you some context, we've been taking the three broad headings, the three broad aspects, of the Uluru statement—being the voice, makarrata and the declaration—and trying to do some of the policy work and community consultation work around what they might actually look like. I think it was the Prime Minister, at Garma last year, who said these are big ideas with no meat on the bones, and in effect he's right. One of the difficulties facing your committee is trying to have a national conversation about very detailed constitutional reform for which the heavy lifting around policy work hasn't been done, so I don't envy you at all as a committee. I'd be confident in saying that absolutely Uphold & Recognise will be putting in a submission—which, as a director, I'll be co-signing—that not only expresses a view in relation to how those three limbs should be dealt with but also provides some of the meat on the bones, which other people have struggled to do in the past.

Ms LEY: Thank you. That will be useful. Are we in touch with Uphold & Recognise, Co-chair?

CHAIR: Co-chair's a member of it.

Ms LEY: Oh, okay, then you'd better sign the submission.

Mr Winters: Julian was a founding member of Uphold & Recognise, so I suspect there is some contact occurring in some way.

Ms LEY: Mr Winters, I want to get your thoughts, given your understanding of the process that we have to go through, and reflecting on what the Prime Minister was saying. We've got some people who know an awful lot about the detail, but with a lot of people, if you mentioned those three principles, you would really have to start from a long way back. And that's no criticism, but how do we cover that ground? We don't want to talk about change in the Constitution in five or 10 years time; it's a real and immediate issue. But how do we cover that ground?

Mr Winters: I think what you're saying is: could you set a task which is about providing a framework for reform of the Constitution sooner rather than later? The struggle you've identified is real. The three limbs out of Uluru are difficult and would take a very, very long time. You can't look at them individually, though, because they are there as a package, and it is probably fair to say it would be disrespectful to the conclusion of that process just to cherry-pick. But for your purposes, which are about achieving a real pathway forward, I think you would be wise to choose those things which you think are doable on a short-term basis. For example, the voice might be, along with, as Warren was talking about, perhaps repealing 51(xxvi), a new separate head of power and so on. It is a matter of acknowledging that, as part of what was expressed in the Uluru statement, there are other bits that should be done and that the committee might recommend be done in due course, but those things don't all need to happen at once, in concert, overnight. To show that the nation has seriously put a first stake in the ground, I think the first stake should probably be a reform package that deals with 51(xxvi) and enshrines the voice. You then don't have to go down the pathway of putting the nuts and bolts in place around those other two things. The makarrata in particular is going to be extremely difficult: does it happen at a regional, state or Commonwealth level? I think it probably occurs at a regional and state level, so with that it starts to step outside the ambit of your committee and involves the states getting serious about this—which might be a recommendation you make. In terms of the declaration, I think that's probably the next step in the process but I don't think it's necessarily one that needs to be dealt with straight off the mark.

Ms LEY: Thank you.

Ms BURNEY: I have a couple of things. The policy work that you're doing to put some meat on the bones of those three proposals: are you doing that for Uphold & Recognise or has someone asked you to do it?

Mr Winters: Uphold & Recognise took it upon itself. They basically got together as a group—this was before my involvement—and said, 'We've got the Uluru statement sitting out there and at this point nobody is really digging into putting the meat on the bones.' They also recognised, to be very blunt and honest, that a lot of work would need to be done with one particular side of the House, in understanding their fears and aspirations, and how that could be fed into a good, reasonable and workable middle ground. The group brought together to deal with formulating the policy stuff—and even work as detailed as drafting proposals—involves a broad range of academics, including people like Professor Saunders, from Melbourne university; Professor Twomey, from Sydney university; Danny Gilbert, who is on the advisory council; Megan Davis; Marcia Langton; Warren Mundine; and myself. There are a bunch of lawyers and academics involved in the process.

Ms BURNEY: Warren Mundine is not a lawyer.

Mr Winters: No, lawyers and nonlawyers are involved in this. I am more than aware—

Mr SNOWDON: I think it was the reaction to the names!

Mr Winters: A lot of people have that reaction. I hope she didn't kick the chair in front of her! It was trying to get a bunch of people together from a lot of different backgrounds to flesh out, for the first time, what these things might look like. I think what's useful is providing, perhaps as a first point, some of the background on who is involved and what we're doing for the committee so that you can make an assessment for yourselves as to how useful any information that's thrown up by Uphold & Recognise is for your purposes.

Ms BURNEY: That would be terrific. We'd like that. The second point is one that we haven't discussed over the last two days—but we've got many more hearings to go. Do you have a view—fear is the wrong word—that this process could butt up against the possibility of constitutional reform around a republic?

Mr Winters: I think that is an excellent question. My view—and perhaps it's just youthful naivety about political achievements and how you get things done—is that there is no reason these two things couldn't be designed in a way that potentially runs together. I view the republic question much like I view the constitutional recognition question, as one about re-examining the social contract that is modern Australia. If you're going to go and redefine the parameters of how we consider ourselves and understand ourselves as reflected in our founding document—the two most fundamental for me are the rule of the monarchy, the colonial power, and the role of

First Australians. I think both steps are about making Australia more honestly reflect and understand itself, so I can't understand why people wouldn't talk about these two things together, is the blunt answer.

Ms BURNEY: I agree with you, but, from a political perspective, and it's not for you to comment on necessarily—

Mr Winters: I'm not expressing a view for—as Linda is very aware, I am a member of the Liberal Party.

Mr SNOWDON: What!

Mr Winters: One of the realities of both of these exercises is what the actual ability to get any proposal up is, right?

Ms BURNEY: Yes.

Mr Winters: One of the reasons you wouldn't go for all three arms of the Uluru statement straightaway is that I think there are more conservative members—of both of the major parties, I must confess—who would struggle with all three or would find all three together overwhelming. I think that throwing in a republic to that discussion as well makes it completely overwhelming.

Ms BURNEY: And also politically difficult in the sense of timing things out.

Mr Winters: Absolutely. The political timing point is the strongest one as to why you wouldn't do it. I think a not small, but limited yet powerful reform to the Constitution about recognition is where this process should end if it's to be the most successful in the short term.

Ms BURNEY: Okay. Thank you very much. That has been really helpful.

CHAIR: One question from me, Mr Winters. When you said you were doing some work, is that on the question that ought to be put to establish the head of power for the voice?

Mr Winters: Yes. Uphold & Recognise is doing work around a bunch of the proposals, but that includes developing up two alternative versions of the voice in quite concrete terms and is also around what the alternative head of power to 51(xxvi)26 might look like. Allens Linklaters, on a pro bono basis through one of their public law teams, have drafted up a number of alternatives that we're considering.

CHAIR: Leaving to one side the redraft you're doing on 51(xxvi)26, are you drafting two alternatives for how the question of the voice might be put?

Mr Winters: Yes.

CHAIR: When might that become available?

Mr Winters: We were aiming to release the final policy documents on about 26 June. I understand that you have the report before then, don't you?

CHAIR: We have to do an interim report in July and then a final report in November.

Mr Winters: Our final policy documents due to be released on 26 June, as far as I understand.

CHAIR: That'll be grand. You'll make those available to us?

Mr Winters: Absolutely. First off, I'll get some information to the committee about who we are and what we are doing and then ensure that those final policy documents come through to you for your consideration.

Mr SNOWDON: You are also developing the architecture for what a voice might look like?

Mr Winters: Correct.

Mr SNOWDON: Could you share with us what that might be? You say you have two options. What sorts of things are you anticipating might be in one of the other?

Mr Winters: As far as I understand, one of the two alternatives we are looking at is a very prescriptive proposal and the other is a very minimal one. I had a bit of involvement in the minimal one, so I will give that as an example. It involves a constitutional provision which provides for a standing body of regional representatives meeting to consider relevant legislation and provide advice to be tabled—'to be tabled' is one of the most important parts that we have been considering—in the House. The design of that would be that that you would have sitting behind it a piece of legislation, under that power, which would regulate what triggered the body to convene, what mechanism dealt with the selection of who sits on the body, how a secretariat or anything of that nature was provided and what weight, if any, the parliament was compelled to give to the advice provided.

CHAIR: Is there anything else you would like to say, Mr Winter?

Mr Winters: No, I think it is easier to deal with most of the stuff in written submissions, to be honest.

CHAIR: So do I. Thank you very much for contribution.

Mr Winters: My pleasure, Senator Dodson. Thank you all.