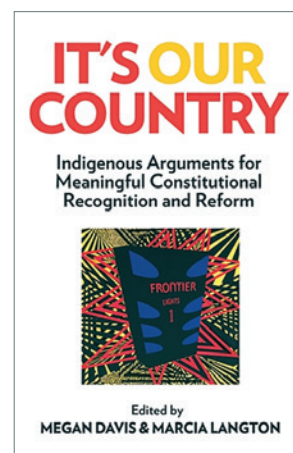
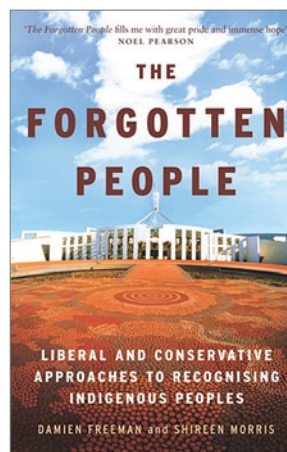

LISTENING AND HEARING: A REVIEW OF TWO BOOKS ON INDIGENOUS 'RECOGNITION' IN AUSTRALIA

The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples, Damien Freeman and Shireen Morris (eds), and *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform*, Megan Davis and Marcia Langton (eds), both Melbourne University Press, 2016.

Reviewed by Cheryl Saunders



On the face of it, we are in a period that offers an opportunity to seriously tackle the question of the position of the Indigenous Aboriginal and Torres Strait Islander peoples within the Australian state. The challenge is sometimes described in terms of 'recognition'. Recognition is merely convenient shorthand, however, for the manner in which it might now be possible to overcome the legacy of the ambiguous character of the founding of modern Australia as a series of colonies that were deemed to have been settled as a matter of law, but that were conquered in fact. One consequence of this ambiguity was that there never was an occasion for the state to formally come to terms with the reality of Indigenous peoples with lands, laws, languages, customs and cultures of their own. Nor was there an occasion to formally acknowledge that two sets of peoples with distinct traditions now occupied the territory of Australia or to develop a mutual understanding on the basis of which coexistence could occur. Over time, these historical failures have been compounded as successive governments have developed and implemented policies and practices for an Indigenous population whose needs they did not understand and whose numbers were too small to make any dint on the composition of elected decision-making bodies.

Two collections of essays recently published by Melbourne University Press offer a timely resource to assist understanding of the issues at stake in recognition, some of the options for dealing with them, the tensions that are already apparent and how these might be resolved. *It's Our Country*, edited by Megan Davis and Marcia Langton, comprises contributions from 17 Indigenous authors setting out their views on the meaning of recognition and the problems to be resolved, drawing on their own personal and professional experiences. In *The Forgotten People*, edited by Damien Freeman and Shireen Morris, 15 non-Indigenous authors

consider how the Commonwealth *Constitution* might appropriately be amended in the interests of recognition. Some, although not all, of these contributors are self-styled 'constitutional conservatives'. One aim of this collection is to identify the constitutional changes that they would accept for the purposes of Indigenous recognition, which to that extent would have a greater chance of approval in a referendum.

Despite their differing perspectives, these books suggest common ground on at least two important matters.

The first is that there is a problem for recognition to solve. For the contributors to *It's Our Country*, key dimensions of the problem are governmental in character. At one level, as Langton argues, these can be traced to the 'tyranny of the ballot box',¹ given the numerical size of the Indigenous population, in a country that relies heavily on electoral democracy to ensure the accountability of governments and parliaments. This obvious difficulty is compounded, however, by the typical modus operandi of Australian governments to which contributors variously refer: a penchant for 'sameness'; a top-down approach to policy-making and implementation; underestimation of the value of local ownership; shallow consultation; and lack of respect for Indigenous views. The editors' call for the recognition process not only to listen to Indigenous Australians but to hear what they say nicely captures the concerns that contributors identify with the wider context of government as well.²

The reality of a problem also is acknowledged by contributors to *The Forgotten People*. The ground is laid by Damien Freeman in the introduction, pointing to a failure to accord 'fair treatment' to Indigenous Australians, which was contrary to Governor Phillip's original instructions, and continued over time; lack of consultation;

and laws that ignore Indigenous interests.³ The need for enhanced consultation continues as a theme throughout these pieces, reflecting in part a considerable measure of agreement with Noel Pearson's proposal for an Indigenous representative body, the rationale for which Pearson himself lays out in a foreword.⁴ In some of the most powerful pieces, contributors draw on their own experiences, generally and in contact with Indigenous Australians, to identify the problem as they see it. Thus Chris Kenny draws on his own love of the Flinders Ranges to highlight the impact on him of Stan Grant's observation that he felt 'Estranged in the land of our ancestors'.⁵ Having grown up in the Darling Downs, Lyle Shelton reflects on the 'disintegration and destruction' of the Aboriginal people in the Downs and the 'moral dilemma' that continues from 'the way Australia was settled'.⁶ In a particularly interesting contribution, Michael Jeffrey describes how his work with Indigenous soldiers led him initially to an 'appreciation of difference' and to a realisation of all that Indigenous culture offers contemporary Australia. He calls for 'a full and dignified reconciliation, based on mutual understanding and respect, and the ability to compromise where necessary'.⁷

The books also share common ground on the irrelevance of race as an organising concept for resolving the relationship of Indigenous Australians to the polity as a whole. In *The Forgotten People*, Kenny argues, citing Merritt, that 'indigeneity, not race, is at the core of the argument'.⁸ Similarly, in their introduction to *It's Our Country*, Langton and Davis urge identification of Indigenous peoples as 'first peoples and the descendants of first peoples' rather than by reference to race.⁹ This is a promising development. With hindsight, it is possible to see that indigeneity and race became conflated in Australia for reasons that also stem from the failure to recognise the need for an appropriate settlement with Indigenous peoples at a much earlier stage. Once the distraction of race is stripped away, the cases for removal of s 51(xxvi) of the *Constitution* become even more clear. A 'race' power is not an appropriate vehicle for the Commonwealth to make laws for Indigenous peoples, despite the positive associations of 1967. Both s 51(xxvi) and the now redundant s 25 should be removed as relics of what Freeman describes as 'the obsolete pseudo-scientific nineteenth-century category of race'. Quite apart from recognition, a constitutional provision of this kind has no place in multicultural, 21st century Australia. What might take its place as an express source of power for Commonwealth legislation specifically for Indigenous Australians is a question that remains to be determined.

There are important points of contrast between the two books as well. These are inevitable to some extent, given the somewhat different goals of the two collections. *The Forgotten People* was specifically designed to explore the scope for agreement on

recognition within the *Constitution*, whether or not complemented by initiatives of other kinds. *It's Our Country* canvasses Indigenous views on what recognition means, given the factors to which it is a response. The two sets of views might, ultimately, meet if an Indigenous consensus on what recognition requires coincides with the matters on which conservative commentators are prepared to accept constitutional change. Whether this happens remains to be seen. In the meantime, however, underlying differences in the perspectives of the two groups that these collections reveal are instructive for mutual understanding. These relate both to the *Constitution* itself and to the role of the *Constitution* in achieving Indigenous recognition.

As a generalisation, contributors to *The Forgotten People* place considerable faith in the Australian system of government and are defensive of the *Constitution* on which it now is based. Because they also acknowledge that there is a problem to which Indigenous recognition is properly directed, they are prepared to accept some constitutional change for the purpose, within boundaries that are carefully confined. The group of measures around which these authors are inclined to coalesce is helpfully summarised in the chapter by Freeman and Leaser: removal of s 25; amendment of s 51(xxvi) to eliminate reference to race; provision for an Indigenous body to advise parliament on Indigenous matters; and a 'Declaration of Recognition' outside the *Constitution*, in lieu of a preamble of some kind within it.¹⁰ They also are broadly united in opposing any constitutional guarantee against discrimination or the inclusion of symbolic words of recognition within the *Constitution* itself. An implicit assumption that runs through the book is that the difficulty of constitutional change in Australia means that the views of 'constitutional conservatives' are likely to be determinative at the point of referendum. The baton is passed to Indigenous Australians to consider whether changes of this kind would meet the needs that recognition is designed to serve.¹¹

In contrast, the contributors to *It's Our Country* have much less faith in the Australian system of government, after their lived experience under it as minority peoples. Nor do they have any particular reverence for the Australian *Constitution* as it presently stands. As the contributors variously note, Indigenous Australians were excluded from the *Constitution* at the outset, not only through the express provisions that were removed in 1967 but by the very conception of the constituent people as those united by a 'crimson thread of kinship'.¹² Despite the huge groundswell of support for constitutional change in 1967, the results of the change have been disappointing in practice.¹³ The reliance that the *Constitution* places on majoritarian democracy has not provided protection for Indigenous peoples against, for example, suspension of the *Racial Discrimination Act 1975* (Cth) or in other ways.¹⁴ They do not share

the suspicion of courts that drives at least some of the contributors to *The Forgotten People*. On the contrary, the courts took the first step towards recognition, in the decision in *Mabo*.¹⁵

For many of the contributors to this volume, in any event, the *Constitution* is not the main game. Their primary concerns are structural changes in government process and policy, on the basis of a respectful relationship. This might be achieved in several ways. One of these is through treaty which, as Fred Chaney observes in his foreword, is an 'attractive option' that not only avoids the 'tyranny of a referendum' but involves First Nations as 'stakeholders, not as supplicants'.¹⁶ From this perspective, therefore, recognition in the *Constitution* is not necessarily an end in itself. It becomes a means to an end if, and only if, the status of the *Constitution* offers an appropriate and workable means to secure and protect the achievements of recognition.¹⁷ Symbolism is not merely inadequate on this view, but irrelevant, whether within the *Constitution* or not.¹⁸ The clear message from this collection is that Indigenous Australians will not cut their cloth to settle for something less if substantive recognition cannot be agreed or is unlikely to be secured through majoritarian processes. Whether or not the package of measures suggested in *The Forgotten People* prove acceptable as a component of recognition depends on deliberations among Indigenous Australians that have not yet occurred. To the extent that one of the problems of existing arrangements is a shortfall in consultation, there may be positive signs. On any view, however, this collection suggests that limited constitutional changes of this kind would need to be part of a much larger package of arrangements to secure substantive recognition that is spread across the country and adapted to different needs and conditions in different parts of Australia and that engages all levels of government.

Sooner or later, the Australian debate on Indigenous recognition must draw in a wide range of non-Indigenous Australians, whatever forms recognition ultimately takes. Many Australians are agnostic about constitutional change: prepared to assume that the *Constitution* does a reasonable job unless and until they are persuaded otherwise. It cannot automatically be assumed that they are suspicious of courts, or opposed to anti-discrimination protection or protective of parliamentary sovereignty, which no parliament has in any event. These voices are not heard in either of these collections and they are something of an unknown quantity for this purpose.

There is still a long way to go in sorting out how Indigenous recognition can best be achieved. These two volumes make a valuable contribution to this important question at a critical time when events also are moving fast. For me, at least, one of the most

useful insights that they offer is the extent to which perspectives may differ on issues that appear at first glance to be shared. The books should be read not merely with a view to identifying common ground on constitutional change, important though this may be, but to developing a genuine understanding of what recognition means, on which mutual agreement can build.

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- 1 Marcia Langton, 'Finding a resolution to constitutional recognition of Indigenous Australians' in Megan Davis and Marcia Langton (eds), *It's Our Country* (Melbourne University Press, 2016), 27, 39. The quotation comes from the editors' introduction, at 10.
- 2 Megan Davis and Marcia Langton in Davis and Langton (eds), above, 6.
- 3 Damien Freeman, 'Introduction' in Damien Freeman and Shireen Morris (eds), *The Forgotten People*, (Melbourne University Press, 2016), 1, 5, 8.
- 4 Freeman and Morris (eds), above n 3, xv–xvii.
- 5 Chris Kenny, 'The Race Card' in Freeman and Morris (eds), above n 3, 19, 22–3.
- 6 Lyle Shelton, 'The Journey Towards Atonement and Forgiveness', in Freeman and Morris (eds), above n 3, 48, 50–55.
- 7 Michael Jeffrey, 'The Legacy of Ancient Australia for Modern Australia', in Freeman and Morris (eds), above n 3, 41, 43.
- 8 Kenny, in Freeman and Morris (eds), above n 3, 26.
- 9 Davis and Langton (eds), above n 1, 3.
- 10 Damien Freeman and Julian Leaser, 'Capturing the Nation's Aspirations' in Freeman and Morris (eds), above n 3, 91.
- 11 Freeman, above n 10, 13.
- 12 Langton, above n 1, 27, quoting Sir Henry Parkes.
- 13 Josephine Bourne, 'Telling our Story, Owning our Story, Making our Story', in Davis and Langton (eds), above n 1, 56, 60.
- 14 Eddie Cubillo, 'The Opportunity and the Challenge of Constitutional Recognition', in Davis and Langton (eds), above n 1, 64.
- 15 Nyunggai Warren Mundine, 'Unfinished Business', in Davis and Langton (eds), above n 1, 128, 130, referring to the decision of the High Court in *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
- 16 Davis and Langton (eds), above n 1, vii.
- 17 Tony McAvoy, 'Building our House' in Davis and Langton (eds), above n 1, 48.
- 18 Noel Pearson, 'There's No Such Thing as Minimal Recognition – There is Only *Recognition*', in Davis and Langton (eds), above n 1, 163.