

Indigenous Policy, Native Title and the Rule of Law

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Michael Warby, Past Wrongs, Future Rights: Anti-Discrimination, Native Title and Aboriginal and Torres Strait Islander Policy, 1975-1997, Tasman Institute, Melbourne, 1997

THE recent judicial and legislative recognition of native title in Australia has enlivened criticism of policies and programs designed to deliver benefits specifically to indigenous people. The debate has been fanned by the provocative remarks of Mrs Pauline Hanson, leader of One Nation, who has described programmes for indigenous Australians as 'a type of reverse racism ... encouraging separatism in Australia by providing opportunities, land, moneys and facilities available only to Aborigines'.¹ The Commonwealth government, when seeking support for its Native Title Amendment Bill, also appealed to notions of formal equality by characterising native title as a 'special right'; for example, Senator Nick Minchin is reported as saying that 'where Aborigines have these special rights that other Australians don't have, that's how you get the potential backlash' (*Sydney Morning Herald*, 1 June 1996).

Native title is a 'special right' only in the sense that it is an interest that is by definition restricted to indigenous people. If a formal equality rationale is needed, it is sufficient to note that the recognition of native title rests on the legal doctrine that a change of sovereignty does not extinguish the prior property rights of the territory's inhabitants, whether indigenous or non-indigenous.² Just as the land-holding rights of the French citizens of Quebec were not wiped out by the cession of the territory to Britain in 1763, so the rights of the prior inhabitants of the Australian colonies were preserved by the operation of British and international law. It is not to the point that, at the date on which the British Crown acquired sovereignty over Australia, there were no non-indigenous inhabitants to benefit from the recognition of prior interests. Native title is soundly based on a principle of equality of all before the law.

¹ House of Representatives, *Hansard*, 10 September 1996, p. 3802.

² *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

In *Past Wrongs, Future Rights* Michael Warby, formerly Public Affairs Manager of the Tasman Institute and now editor of *IPA Review*, observes that whether native title is characterised as a 'special' or discriminatory right depends on the reference point that is chosen for purposes of comparison. If one regards it as simply a property right, then it is axiomatic that native title holders are entitled to the same legal protection as the owners of other property rights. While this view is firmly established in several High Court decisions,³ some conservative politicians continue to denounce native title as an affront to the principle of equality on the ground that it is enjoyed exclusively by indigenous Australians.

Failure of Public Programmes

Warby grounds his contribution to the native title debate in a wide-ranging and fundamental critique of past and present government policies on indigenous matters. He objects to what he calls the 'welfare model' of policies and programmes of assistance targeted specifically at indigenous people. Government action over the past two or three decades has conspicuously failed to overcome indigenous disadvantage as measured by indicators such as life expectancy 18-20 years below the Australian average, a maternal death rate ten times higher than for non-indigenous mothers (ATSIC, 1995:6-7), and unemployment almost three times higher than that for non-indigenous people (ABS, 1993).

Others have sought to answer the question that Warby poses: why have the socio-economic circumstances of indigenous Australians proved so resistant to well-intended public expenditure programmes? The Aboriginal and Torres Strait Islander Social Justice Commissioner (1994) in his Second Report identified deficiencies in the design and delivery of programmes as a major reason for the poor results. Many indigenous people suffer from multiple disadvantages, rendering co-ordination of programmes an important precondition for success. For example, a treatment programme for trachoma was of limited value to a remote Aboriginal community that lacked a supply of clean water.

The division of programme responsibilities among a range of agencies at Commonwealth, State or Territory and local levels impeded the effective coordination of programmes. Indigenous people were the recipients of a multiplicity of fragmented, under-funded and poorly coordinated programmes imposed by an unresponsive bureaucracy that took little heed of their perspectives and priorities (ATSI Social Justice Commissioner, 1994). Similar criticisms have been made by the House of Representatives Standing Committee on Aboriginal Affairs (1990) and the Royal Commission into Aboriginal Deaths in Custody (1991). The Social Justice Commissioner's conclusion was that programme planning and delivery should be devolved to local indigenous communities (1994).

³ *Mabo v Queensland [No 1]* (1988) 166 CLR 186; *Mabo v Queensland [No 2]* (1992) 175 CLR 1; *Western Australia v Commonwealth* (1995) 183 CLR 373.

Warby draws a different conclusion. For him, the poor outcomes of government expenditure programmes are further evidence that no significant and lasting improvements in indigenous welfare can be produced by government action. This is an ideological position that proceeds from first principles, and is not rigorously tested against the evidence or the findings of others who have examined the results. Warby declares that 'the distinguishing feature of government is the operation of legal coercion' (p. 93). How, he asks, can intervention by a state whose methods are essentially coercive effect an improvement in the outcomes for indigenous people? To overcome their position of disadvantage, indigenous people must learn to adapt to modern Australian society. Warby doubts that this process of adaptation can be facilitated to any great extent by government assistance. The provision of government welfare can actually impede the necessary transformation by reducing incentives for indigenous people to improve their own circumstances.

There are dangers inherent in this analysis. At a time when the social and economic indicators point to a crisis of third-world proportions in the welfare of indigenous people, populist resentment at expenditure on programmes to relieve their plight is increasing. The notion that government assistance to indigenous people is foredoomed to fail and indeed counterproductive could serve to provide, in Shaun Carney's words, 'an intellectual fig-leaf for Hansonism' (*The Age*, 13 June 1998). While Warby does not rule out group-specific programmes altogether, this analysis would tend to lead to the abandonment or running down of public programmes to relieve the disasters that have befallen indigenous people.

Indigenous policy is too important a matter to be captured by ideology. It would be folly to dismantle government programmes of assistance to indigenous people in the blind hope that they will solve their own problems without the help of the nation. What is required is an active and continuing search for solutions, proceeding from rigorous analysis of the problems, careful evaluation of the successes and failures of past programmes, the setting of achievable goals and improved co-ordination of programs. It may be unrealistic to expect that entrenched disadvantages that were decades in the making will respond rapidly to measures which have been implemented only over months or years.

Is Race a Useful Concept in Indigenous Policy?

Warby's objections to the provision of programmes for indigenous people go beyond the usual economic rationalist criticisms of welfare expenditure. He opposes the targeting of programmes at groups defined by race. Race, he argues, is not a useful or even a relevant category for conceptualising individual and group needs. Public policy is concerned with socio-economic disadvantage, a phenomenon deriving not from membership of a race but from the effects of past discrimination and the difficulty of adapting to life in modern society. Warby's perspective holds that public policy must treat people as individuals, not as members of predetermined categories of persons assumed to share certain defining characteristics. Public policy must be 'colour blind', ignoring race for all purposes except to the extent necessary to outlaw racial discrimination.

In support of this view, Warby appeals to the core meaning of racial non-discrimination as connoting the treatment of individuals on their merits without regard to race. Group-specific programmes for racial minorities have usually been justified as an allowable departure from the principle of equal treatment on the ground that special measures of a transitional nature may be necessary to allow disadvantaged groups to achieve equal enjoyment or exercise of rights. Special measures, so defined, are deemed not to constitute unlawful racial discrimination under the Racial Discrimination Act 1975 (Cth), Section 8 and the UN Convention on the Elimination of all Forms of Racial Discrimination, Article 1.4. Warby is critical of the provision for special measures which, he says, conflicts with the core principle of equal treatment and embodies a misplaced assumption that the operation of society can be improved by government intervention.

This amounts to a demand for formal equality at the expense of any concession to notions of substantive equality. The exception for special measures involves a recognition that it may be unfair to expect a racial group to participate and compete on an equal footing in society without assistance to overcome the effects of past discrimination. Warby's response is to deconstruct the group, while acknowledging that individuals may be suffering the disabling legacy of past injustices.

Warby's individualism leads him grossly to understate the extent of shared disadvantage stemming from the common experiences of Aboriginal and Torres Strait Islander people. He contends that they are not one people but many, whose only shared experiences have been survival in the Australian continent and the coming of the settlers. To this list I would add the common experience of being the objects of discrimination and racial abuse as members of a visibly distinct racial group. It makes little sense to distinguish between individual and group experiences. Injustices visited on individuals traumatised their families and communities, as the Human Rights and Equal Opportunity Commission (1997:212-20) found in the case of forcible removal of Aboriginal children by government agents.

Race is a relevant category for the identification of needs in the case of Australia's indigenous people, who have so often been selected for discriminatory treatment precisely on that account. That does not imply that programmes should be delivered nationwide without regard to local needs and experiences. Nor does it imply that services must be delivered on a group basis. Matters such as counselling and health care may be planned around individual requirements, but racial group membership remains a relevant starting point for identifying those in need of assistance and planning the delivery of services.

Race or Culture?

Warby suggests that to the extent that indigenous Australians do have common experiences and issues these should be seen as cultural, not racial, matters. To conceive of the issues as racial ones, in his view, obscures the analysis and impedes the search for solutions. He defines culture in terms of the intergenerational transmission of knowledge, values and other factors that influence behaviour. Race is a more elusive concept, involving an interplay of the elements of biological descent,

self-identification as a member of a particular race, and acceptance of that identification by other members of the racial group.

Warby's approach denies the reality of distinctively indigenous identity, issues and common experiences. Where a group of people is distinguished not only by common aspects of culture but also by a shared racial ancestry, little is gained by redefining the group in cultural rather than racial terms. Indigenous people consider that they have a special claim to consideration as the descendants of the original inhabitants who occupied the Australian continent for at least 40,000 years before white settlement. There is substantial international support for the view that governments have special obligations to preserve and protect indigenous peoples and their cultures for reasons of justice and to preserve our human and cultural heritage. To define the group in terms of culture rather than race tends to obscure their special status as indigenous people.

Warby's basic assumption is an assimilationist one: that indigenous people must undergo a process of cultural adaptation to mainstream Australian society in order to compete and participate on an equal footing. There is no acceptance of the value of cultural difference. Distinctively indigenous values are classed as liabilities to be shed in the cause of cultural adaptation: the expectation that wealth will be shared destroys the incentive for individual effort, and kinship obligations obstruct the development of formal structures for asset management. These important social values must be jettisoned as part of the price of economic salvation. 'Aborigines', says Warby, 'must give up some of what they have been' (p. 105).

Should Indigenous Titles to Land Be Communal and Inalienable?

Proceeding from this assimilationist perspective, Warby challenges the conventional assumption that land granted to indigenous people under land rights legislation or successfully claimed under the Native Title Act 1993 should be held in communal and inalienable title. He argues that to deny indigenous people the power to dispose of their title constitutes them not as owners but as mere custodians of the land for future generations, an obligation that is inconsistent with our 'meritocratic society' (p. 116). What he overlooks is that the notion of custodianship best expresses the traditional indigenous conception of land ownership. The belief that the land belongs to past and future generations, and is cared for on their behalf by those now living, is common to many indigenous peoples throughout the world.

It is not, as Warby suggests, 'highly paternalistic' to designate native title and statutory Aboriginal title as communal and inalienable. On the contrary, Article 17 of the International Labor Organisation Convention No. 69 concerning 'Indigenous and Tribal Peoples in Independent Countries' (1989) enjoins governments to respect indigenous rules for the transmission of rights to land. Consistently with that principle, the High Court in *Mabo v Queensland [No 2]*⁴ ruled that the incidents or content of native title was determined by the rights allowed under indigenous cus-

⁴(1992) 175 CLR 1 (hereafter '*Mabo*').

tomary law. Except for the case of surrender of title to the Crown, alienation of native title was permissible only to the limited extent allowed by custom, such as where a neighbouring or related clan succeeded to the land of a clan that had died out. Customary law recognised no individual ownership of parcels of land (except on the Murray Islands where an agrarian economy became established). Accordingly, the High Court ruled that native title was held communally, and was inalienable except to the Crown or as permitted by customary law.

At a practical level, Warby's proposals for transforming native and indigenous statutory title into marketable forms merit consideration. Native title and land grants may have beneficial effects in promoting the preservation of traditional culture, kinship and identity, while doing little to improve the economic status of indigenous people, according to standard social indicators. Altman (1994) has found little statistical evidence that land ownership raises indigenous living standards, and suggests there may even be an inverse relationship. The outstation movement has in many cases returned indigenous people to marginal lands remote from services and employment opportunities.

Titles granted under land rights legislation are inalienable in the sense that there are restrictions on the power of the owners to sell or mortgage the land to outside interests. Leases of various types and durations are permitted, in some cases subject to ministerial approval. Warby argues that the restrictions on alienation result in inefficiency and under-utilisation of resources, denying the potential for land ownership to serve as a vehicle for indigenous economic advancement. The communal aspect of titles also encourages inefficiency by removing individual incentive to put the land to its best economic use.

Inalienability means that the land cannot be used as collateral for venture capital provided by banks and other commercial lenders. Nagy (1996) argues that this restriction need not preclude the raising of capital for development projects on indigenous land. Creative credit providers can explore other financing options such as cash flow loans, or may suggest that the landowners find a joint venture partner who can provide a guarantee. Australia's commercial lenders have to date shown little enthusiasm for these options, with most successful non-mining developments on indigenous land being mainly funded with equity from the Commonwealth's Commercial Development Corporation (Nagy, 1996:8). The inability to raise debt finance from the private sector has left indigenous projects dependent on government as their most likely source of funding. It has also contributed to the failure of a Commonwealth scheme to purchase some 50 pastoral properties to be operated as commercial ventures by Aboriginal people (Nagy, 1996:2). As a result, many of these indigenous operators have abandoned commercial pastoral activity, keeping cattle for domestic consumption only (Ross, Young & Liddle, 1994:32).

Proposed Conversion of Indigenous Titles to Freehold

To remedy these difficulties Warby proposes a scheme for the easy conversion of inalienable indigenous title to ordinary freehold. This would raise the value of the asset, since the greater certainty of freehold title reduces transaction costs. Indige-

nous land would be brought back within the general market for real estate, and could be used as a vehicle for financing development projects of economic benefit to indigenous people. Land of particular cultural significance could be held by indigenous trustees on behalf of the community, while land of less significance could be held by joint-stock corporations. Some indigenous titles are already held under shareholder arrangements, but shares can be transferred only to a limited class of persons. Warby envisages that shareholders should have the right to 'cash out' their shares if dissatisfied with the way the land is managed. This implies the existence of a market for the shares outside the land-holding community, a possibility not contemplated by the present legislation.

Warby's proposals indicate ways in which the range of land ownership and management options for indigenous people may be widened, but it is ultimately for them to decide whether they wish to convert their native and statutory titles to ordinary freehold tenure. That is the approach taken under Section 21 of the Native Title Act 1993, which allows native title to be exchanged for freehold title or any other interests in land by agreement with the relevant government. Warby appears to have in mind a more automatic conversion process. It is difficult to see how government consent can be dispensed with, since the conversion assumes the grant of another interest.

Conversion to alienable title creates the possibility that the land may fall into the hands of outsiders. Warby suggests that the risk of failure is part of the price of indigenous enterprise and economic advancement. But the possibility of such failure may be unacceptable to indigenous people if it jeopardises their hard-won land rights, the patrimony of future generations and the key to their survival as a distinct social group.

The restrictions on native and statutory titles which Warby identifies as obstacles to efficiency were intended as a means of adapting English land law to indigenous conceptions. It was at the request of the two Northern Territory Aboriginal Land Councils that Woodward recommended to the Commonwealth in 1974 that its proposed land rights legislation should provide for communal, inalienable title (Aboriginal Land Rights Commission, 1974:12). There is little to indicate that indigenous opinion on the desirability of those restrictions has altered.

Concluding Comments

Past Wrongs, Future Rights offers a wide-ranging analysis and critique of past and present legislative and executive policies on indigenous affairs from a predominantly economic perspective. While theory can make an important contribution to the formulation of public policy, there are dangers in adopting a doctrinaire position uninformed by empirical research. Indigenous people have too often been the unhappy recipients of ill-conceived policies implemented without regard to mounting evidence of their unfortunate consequences.

Warby's lack of sympathy with the institution of native title leads him to make some unsubstantiated claims which detract from the credibility of his work. He states that 'a suggestion in the lead judgment in *Mabo No 2* that a pastoral lease ex-

tinguished native title was later reversed in the *Wik* case' (p. 51). This is misleading, as there is not a word about pastoral leases in the judgment. It is notable that the claim is not repeated in his detailed summary of the *Mabo* decision in Appendix IV.

Another controversial assertion made without reference to any evidence or authority is the statement at p. 107 that miners have abandoned activity in areas where a 'more hostile property regime applies' (by which Warby means that the indigenous owners have a say in whether their land is mined). This claim is often made by miners and vehemently disputed by indigenous groups. The Industry Commission (now Productivity Commission) found that the available data did not enable it to assess whether the *Mabo* decision and the Native Title Act 1993 had any adverse effect on mining activity; the impact of native title could not be isolated from other considerations influencing investment decisions (1996:205). If Warby has better information, he should enlighten his readers.

The contribution which this book makes to the debates on indigenous policy and native title is marred by the narrowness of the author's economic and assimilationist assumptions, by his lack of understanding of indigenous perspectives, and by his failure to ground his proposals in an analysis of the empirical evidence.

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