

Native title in a long perspective: a view from the eighties.

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When I was asked to speak at this conference, I protested that it was five years since I had detailed familiarity with native title, but I was prevailed on to talk about native title in a long perspective. It can only be a whitefella's perspective, so it's fortunate that all the other speakers in my session are Aboriginal. But which perspective? From different perspectives you see different things. I have called my paper 'A view from the 80s'. I wasn't referring to William Dampier's 1680s, Governor Phillips 1780s, Sir Henry Parkes' 1880s or Bob Hawke's 1980s, all of which could have provided interesting perspectives. I meant the ones I know best, my own 80s.

It will be the perspective of a whitefella completing his 80th year, who first became closely involved with Aboriginals in 1970, when some asked if I could help them do something about police behaviour in Redfern, and we worked together to start the first Aboriginal Legal Service. A perspective that comes easily to me is that of 1970.

Looking at native title from any point in the last ten years, it towers over you and makes it hard to see anything beyond. In my perspective of 30 years ago, native title no longer towers, but is one mountain to be climbed on a journey to a destination beyond. One can ask, how did we come to take the track up this mountain? Would it have been better to take another route? Is it leading us where we want to go?

Everyone has their own idea about where they want to go. I know what mine was thirty years ago, because I recently stumbled across a submission I made to a Senate Committee at the time, a time when there were officially 140,000 Aboriginals. At the end of a long submission covering many issues, I said:

We need to tackle the problem with the dedication, concentration of resources and determination to succeed that we would bring to a war. If 140,000 of our countrymen were prisoners of war in a foreign country, we would not rest until they were released. Yet within this land a large part of 140,000 of our countrymen are prisoners of an historical injustice and its consequences – ignorance, malnutrition, poverty, discrimination, disease, lack of opportunity, destruction of their individual personality and their social fabric. Many live in conditions that would be considered appalling in a prisoner of war camp, and are subjected from birth to a brainwashing about their inferiority that no military power has yet attempted on its captives. To liberate these our countrymen we have

only one enemy to overcome – ourselves – our apathy and indifference, our selfishness, our turning of the head.

I didn't have a prescription for how Aboriginals should live their lives. The goal was simply to release them from all the imprisoning factors that prevented them from being free and equal citizens – genuinely not merely formally equal - who could make their own decisions about their lives and find their own future.

Today I still aspire to the same ultimate destination for the road that winds through the foothills of land rights (which I passionately advocated in the submission), native title, apology, recognition, rights, treaty, all the various intermediate goals. They are all steps to an end, and we all need to know where we are heading, and not get bogged down at some point on the way.

Things have changed a lot in the last thirty years. They were changing even as I spoke to the Senate Committee. A few months later Gough Whitlam told the new National Aboriginal Consultative Council:

If there is one ambition my Government places above all others, if there is one achievement for which I hope we shall be remembered, if there is one cause for which future historians will salute us, it is this: that the Government I lead removed a stain from our national honour and brought back justice and equality to the Aboriginal people.

It was majestic rhetoric, but it was a lot more. Government vastly increased the resources to tackle disadvantage, and formally abandoned assimilation in favour of restoring to Aboriginals 'the power to make their own decisions about their way of life'. It developed a proposal for land rights that was to deliver half the Northern Territory into Aboriginal ownership, with access to mining royalties that sustained two powerful land councils to defend Aboriginal interests and help them manage their land.

The Fraser Government did not seek to undo the Whitlam revolution, which was the basis of bipartisan policy for two decades. Labor returned to power in 1983 with a promise of national land rights, but in the face of a contemptible campaign by the West Australian mining industry, Hawke caved in.

My close involvement in Aboriginal issues resumed in 1988, with three stressful years as a Royal Commissioner into Aboriginal Deaths in Custody. Among the things I learnt again, and emphasised in what I wrote, was how racism continued to confine Aboriginal achievement, and how Aboriginal people hungered for recognition as a distinct people with a legitimate presence in Australia.

The great achievement of *Mabo* was to tackle these two things head on. It roundly rejected the racism of *terra nullius* that lay at the heart of Australian law, and recognised Aboriginal people as the original owners of the land, from whom it had been filched piece by piece over the years. Nothing that has happened since can take that away.

These statements by the highest court in the land had an enduring effect on the way Indigenous and non-Indigenous people see each other and see themselves. As a declaration of national recognition, and as a redemptive confession and atonement on behalf of the nation, *Mabo* was magnificent.

But native title cannot be judged only by these criteria. Implemented through the *Native Title* Act, it has become the national land rights process. While some outcomes can be praised, overall the process has been a failure by almost every criterion. It has been inordinately expensive, extremely slow, only fortuitously related to sensible land use, stressful and divisive for Aboriginal participants, unresponsive to Aboriginal needs and wishes, and arbitrary, haphazard and minimal in its delivery of benefit to Aboriginal people.

This is not a criticism of the *Mabo* judges. The problem with any judicial solution is that it can only proceed by declaring existing rights. Unlike a legislature, a court is not free to engage in social engineering, to make and implement policies by creating or redistributing rights in society.

The court could recognise but not create rights, as the legislature could and had done in the Northern Territory, creating inalienable freehold, with special rights in relation to mining. The High Court had to find the rights existing somewhere, and that could only be in native custom, which had originated in small scale, local, hunter-gatherer societies and had neither been devised to meet the problems of life in 21st century capitalist society, nor had a chance to adapt to those problems.

The attempt to fit into the requirements of native title often pressures people to reinvent themselves in artificial ways, and opens up divisions within communities that had been painfully forged, not out of undisturbed kin groups on their ancestral land, but out of people thrown together by dispossession, family disruption and bureaucratic convenience.

If custom can be found, it is translated into rights stated in the language of a totally different system, on which it has to rely for its protection. The very act of writing down the authoritative custom of a pre-literate society, which depended not on the exegesis of a text by experts, but on the nurturing and negotiation of its custodians, inevitably gives it an alien rigidity and inflexibility and cripples its development.

But worse still is the arbitrariness of trying to slip native title at a chance point of time into another system of law, where it is subject to the effect of all kinds of decisions taken at many different times for many different reasons, none of which included concern for native title. Native title always contained the fundamental anomaly that the longer and the more intensely a community had suffered, the less chance there was of native title surviving. Now we see the detailed arbitrariness that provoked the anguished outburst of Justice McHugh.

A solemn court of eminent judges in *Ward* sounded like children playing 'he loves me, he loves me not' with the petals of a flower. 'This reservation

extinguishes, this reservation doesn't, this pastoral lease extinguishes, this one doesn't'. Sometimes it was more like 'this little piggy goes to market' – 'this little title goes back to the Federal Court to see how far it's been extinguished'. I shouldn't make fun of judges doing their best. Everything is done with respectable legal logic; the trouble is that it has no relation to justice, workability or commonsense outcomes. And as Justice McHugh said, the results are always stacked against native title holders.

He also rightly said that the problem of Aboriginal dispossession cannot be satisfactorily dealt with through 'a system that simply seeks to declare and enforce the legal rights of the parties, irrespective of their merits'. We have such a system because legislators squibbed the issue of national land rights in the 1980s. Conceivably the situation might have been retrieved after *Mabo*, if the community had been able to accept the message of the justice of Aboriginal claims and the need to address them, but recognise the need for a process more flexible and imaginative than the judicial process can be. However the Aboriginal leadership was flat out preventing the modest gains from *Mabo* being legislated away, and people like myself were preoccupied reassuring the public that the heavens hadn't fallen in, as the miners and some eminent lawyers, historians and politicians claimed.

There was another opportunity when mediation of claims began under the *Native Title Act*. I used to hope that a government would come along and say, 'Well this claim signals to us that the Aboriginal people in this area have a grievance. Before we get into the technicalities of native title, let us look at the broad picture in the area. Tell us what you would like to happen and we will look at what is possible'. Instead governments invariably sent their lawyers along, hugging their cards to their chests, in effect saying to the claimants 'If you can convince us that it is 100% certain that we will lose if we go to court, we will be prepared to settle'. If, as mediator, I tried to suggest a more flexible approach, I was quickly given to understand that I was exceeding my proper function.

Every now and then hopes are raised of a better approach, but usually they are dashed. Claimants find that a government is more likely to become flexible if they have it over a barrel than if they appeal to its sense of justice and its imagination. It would still be possible for governments to approach native title claims in the way I have suggested, and to revisit determinations already made, either within or outside the framework of native title.. In fact the 1998 amendments relating to ILUAs (Indigenous Land Use Agreements) have provided a very useful tool for making agreements with strong legal effect.

Unlikely as such a change in government attitudes may seem at the moment, it is more likely than government adoption of Justice McHugh's bold and difficulty-ridden suggestion of 'an arbitral system that declares what the rights of the parties *ought to be* according to the justice and circumstances of the individual case'. A change such as I have suggested could produce results much more quickly than a treaty process, and indeed could provide stepping-stones to a treaty.

Cautious governments could experiment incrementally with new ideas. If they were interested in having issues arbitrated, they could experiment on a case-by-case basis in the course of negotiating ILUAs. Perhaps over time something like the spirit of New Zealand's Waitangi process could grow in the Australian scene.

We have climbed so far up the native title mountain that simply going back is not an option. Any genuinely fair proposals to speed the process would be welcome, although Aboriginal interests have reason to be cautious. Like certainty, speed and efficiency have a way of becoming code words for sacrificing Aboriginal interests. Unless governments are prepared to rethink their attitudes, the native title process may drag on for a long time, as Aboriginal people try to salvage what they can.

That's how native title looks in my long perspective, but what lies beyond it? In 1970 it struck me that the young activists, who had grown up in the bush where pastoralists dominated society, thought that owning land was the key to power and independence. Even then that was no longer true, but it still affects the thinking of many Aboriginals today. Land is important for spiritual or historical attachment, but except for the few who are fortunately located, land can easily be a burden or a trap.

For most people, black and white, independence and access to opportunity depends, and will increasingly depend, on education. Lack of education remains one of the great imprisoning factors, keeping Aboriginals on the margins of affluent modern society. Parents owe it to their children to see that they do get an education, and with their non-Aboriginal friends parents should treat the flaws in the education system as problems to be tackled, not allow them to disqualify another generation from the opportunities for full participation in the world that is their right.

Some people worry that education means cultural change. Culture is not some fixed thing that human beings carry with them through changing circumstances. It is something they make anew everyday as they respond to new circumstances. They keep what is valuable, and move on from the rest. The right to choose what to keep and where to move on is self-determination. Education enlarges both capacity to choose and the range of choices available. Whatever happens to native title, education will be central to the journey onward.

Like it or not, we will all live in the 21st century. There will be nowhere to hide. It will follow you to Tibet or Shangri-la or the remotest outstation in Australia, and it is to the circumstances of the 21st century that culture will have to respond. It is proving a difficult time for all of us. Many white Australians feel ashamed of responses our governments are making, at home and abroad, and of our own inability to respond adequately to social problems that exist under our noses. Aboriginal communities are particularly under the spotlight, mainly because people in them are finding the courage and the voice to stand up and say 'enough is enough'. Noel Pearson is surely right in identifying as

major factors still imprisoning Aboriginal people: alcohol and drugs, isolation from a real economy, and government help that, however well meant, disables instead of empowers. These problems exist irrespective of whether people have been dispossessed, or enjoy land rights or native title. They have to be confronted whatever happens to native title.

As Noel and many others have said, in the end the solutions must come through people themselves taking responsibility. A great Aboriginal writer, Kevin Gilbert, said it powerfully over twenty-five years ago through the voice of Grandfather Koori:

You can't find value in yourself until you build it by respecting yourself through living right. If you tolerate crumminess, gutlessness, meanness, wife bashing, kid bashing and neglect then you'll never get the strength to climb out of hell...If our people cannot change how it is amongst themselves, then the Aboriginal people will never climb back out of hell. Each Aboriginal has to be another Aboriginal's keeper; each Aboriginal has to uphold the rules of right living because if we don't do these things then our Aboriginality will die out till there's nothing left...like the coals of a long dead campfire.

We all need a vision. As a prophet of another dispossessed people said thousands of years ago, without vision the people perish. Kevin Gilbert saw Aboriginals perishing unless they upheld the rules of right living, and only they can do that. My whitefella vision for Aboriginals is for them to be free and empowered to make their own choices among the opportunities the world offers.

But we need a joint vision of how we fit together. Michael Mansell asked whether Aboriginals were going to be Australian Aboriginals or Aboriginal Australians. I would suggest another possibility. We all have many identities, not one. My hope would be that Aboriginals will feel able to be both Aboriginal and Australian. But for that to work, people like myself will have to give up thinking that we have just one identity, that we are the Australians. We must learn to accept that we too have multiple identities, that we are whites or Anglos or whatever as well as Australians. That would be another blow to racism and *terra nullius*, and a step closer to the goal I saw in 1970 – a time when my imprisoned countrymen will be free of their fetters, and there will be truly free and equal relations between black and white.

That is the main game, and we should keep our eye on the prize, whatever happens to native title. Within this room there are hundreds of people, black and white, who have worked together for reasons much deeper than native title. Australian politics seems to be infested with people who lack the vision, the generosity of spirit, or the courage to realise the bright hope of *Mabo*. They may further emasculate native title, as much for lack of imagination as deliberate ill will. We must not let them, or the disappointments they bring, undermine our commitment to walk together as the long journey goes on.