

RECOGNITION OF INDIGENOUS PEOPLES RIGHTS AND CULTURE

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A POSITIVE CONTRIBUTION TO LAW AND GOVERNANCE

In assessing the evidence in the Wik Case it becomes apparent that the historical and political climate was critical to determining “parliamentary intention”; did “pastoral leases” deliver something that was intended to give rise to all incidents of a “lease” or was such a grant something different? If it was different, was the grant to be of a kind and character that would, by necessity, be inconsistent with the enjoyment of the rights, obligations and privileges that were formed through the systems of governance that attached to the land through Aboriginal Law?

Owing to the original tenures that characterised “pastoral leases”, the legal system was looking at the system of rights granted from the late 1840’s. The answer to that question drew heavily from the excellent works of Professor Henry Reynolds.

What was apparent from Prof Reynolds work was that the Australian Administration, under direction by the British Home Office was out of step with the British Home Office’s policies for the implementation of the Parliament’s policy. At the time the British Parliament was the source of the power for the pastoral leasehold grant.

The correspondence flowing between the Governor of the day for NSW (and there were several through the relevant period) and the Home Office showed that the Home Office in London was acting off reports which included the likes of G A Robinson, Chief Protector of Aborigines, to shield and protect the Indigenous population from the excesses of settlement, but importantly to see that such settlement proceed according to the requirements of the Law. Now, whilst that second part sounds uncontroversial, it proved determinative in my view in the outcome of the Wik Case.

The laws of Settlement and Conquest had been laid out in Blackstone's Commentaries Volume 1, pp.104-5, so these were not novel to the Select Committee of the House of Commons on Aborigines in 1837 (when they were considering John Batman’s attempt to acquire land from the Port Phillip Aborigines). And the legality was all dependent on a question of fact (possibly being one of two tests), was the land cultivated or was it inhabited?

From 1837, the British Parliament saw the rise of Robert Peel’s conservatives, yet the Whigs , who represented new money and urban dwellers remained in control for much of the period to the 1850’s, becoming increasingly the force of reform. In a way, what was being played was a reflection of the larger drama unfolding across Europe. England had taken the lead in throwing off the feudal influence with the emergence of the Bourgeoisie, the increasingly urbanised and concerns for the increasingly large and soon to be emergent political force of the working class and Australia was following suit.

The context here is important and it is also important in understanding how it was that colonising nations ended up overlooking the responsibilities to the First Nations for so long and why the recognition of the debt was left to later generations. And this consequence is important to us right now.

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The role, power and influence of Parliament as the paramount influence of society was something which evolved. The ascendancy of Cromwell's Parliamentary Army didn't simply deliver the pervasive influence of Parliament as we know it today. The 1840s in Europe gave rise to the Spring of Nations – when Europe and the UK were turning away from feudal control, towards Parliamentary control. It was no accident that this was occurring through the dawn of industrialisation.

With the dawn of industrialisation, came urbanisation and the adverse symptoms of an amassed society living in close proximity; this was all new.

The means of production depended on significant supply of labour. It is a fact of history that the more unscrupulous Industrialists and agricultural producers simply took labour, through slave traders. And possibly because of that, and possibly because of the normalisation of the urbanised classes, a power shift gained force whilst Industrialisation took hold. Represented by the Whigs the new urban wealthy began to assert political influence, and in so doing started to gain ascendancy over the "old" landowning gentry class (the country squires) and defenders of privilege.

The British Parliament through the 1840's was influenced by humanitarian ideas though this is not to suggest there were strong countervailing forces, as not all Industrialists were liberal. However, the slave trade invited a reaction that gave rise to the recognition of Human Rights. And ultimately, because the value of labour and the value of a healthy work force was recognised, steps were taken and policies asserted towards these notions.

Yet with the absence of the kinds of levers of control and sources of information that we now take for granted, the growth of the industrial machinery and the competition between Nations would soon leave policies giving priorities of Humanism to take a back seat. The focus of government was drawn into addressing the issues that arose through mass population and the raging competition for "success" over rival Nations. Mankind's benefit at large would rise through the forces of supply and demand.

For the indigenous populations, whose lands were being taken, whose resources were being funnelled towards the wealth of the new Nations that sprang to serve these exploding, industrial populations, this was the worst conceivable time for the so called "civilised" world to foster their accommodation within this new world. Governments remained focused on notions of "the economy", at a time during the peak of *laisse faire* and *caveat emptor*, which drove the industrialists forward. The industrial world's needs and focus lay in labour, resources, land and exploitable produce. Those things such as understanding:

- different systems of governance;
- difference systems of resource allocation;
- different systems of belief; and
- different systems of crime and punishment,

simply didn't have obvious answers to the questions that the overlords of the 1850 to 1950's were asking.

It can be contended that these builders of our world were in their own minds Nietzsche's *Urbemensch*, grasping labour and resources with zeal and building the world according to their own visions; yet they were more *infant* supermen, than those Nietzsche had described, as they lacked the gratitude and appreciation for the world that they were consuming, as they took the world and moulded it, using money and industrial might to acquire power and influence.

There were the exceptions; whilst this was the birth of industrialisation, science and studies of society and social systems was a toddler beginning to walk. Those like Darwin, Banks and GA Robinson became determined to record, and then attempted to understand. Part of what was recorded was how the intrusion of the colonising supermen often accidentally, but far too often deliberately, set out to destroy.

As aforementioned, this large drama of the world's political and social development was being played out in its own way in Australia. There was, in the 1840's UK, a Home Office driven by a Humanitarian outlook, then

determined, at least to paying lip service to the policies expressed, to see that appropriate steps might be taken to 'shelter' the Australian indigenous population from the excesses of "settlement". However, what interrupted these initiatives was mass migration.

Driven by the "Gold Rush" and by the Industrial Revolution's desire for wealth, wool, wheat and meat, the convenience of Terra Nullius was all too tempting. The Governments of Victoria, New South Wales and Queensland had no capacity to cope with the flood of people and the Humanitarian influencers in the UK were swept aside by the now tremendously wealthy merchant and industrial classes, who eyed potential of the vast country they had claimed for themselves. By the time the Local Assemblies had caught-up with that had happened, we were heading to the "War to End All War's (aka WWI) and then some short respite before WWII and the Cold War.

So what does all this have to do with indigenous culture's contribution to Law and Governance? In a previous article I published shortly after the Wik Case, I observed that winning the Wik Case might prove adverse to the Parliament's attitude to the newly rediscovered rights, loosely called "Native Title". I argued that, on seeing the extent to which the legal rights of Aboriginal People had been swept away, Parliament could only have responded by recognising and addressing the terrible loss inflicted.

In some respects, this expectation of a reaction that would address past, wrongful dispossession was founded on the same reasoned and responsible reaction to a society enslaving people from generations past.

But with recognition that Native Title could survive in the gaps left by grants to Pastoralist of rights to manage and control of the land, with that "victory" came the conservative response; John Howard holding up of "that map" showing the extent of land that was subject to potential claim – appealing directly to the rural land dependent voting populations of Queensland, WA, Northern NSW and SA. This contrived fight for control of rangeland Australia could not have been more perfect for Howard's electoral prospects, and it is not stretching matters to say that this issue allowed his government maintain support whilst it implemented policies unpopular within that constituency, reforms such as the Gun Buy Back.

But such a "negative contribution" is not really the message I have: the positive legacy here is threefold, in my opinion, namely:

- a) That land systems of interaction over common resources do not have to have a single purpose. It has been demonstrated that resource use and consumption have many stakeholders and parallel interests that can amount to actual rights can exist. Arrangements can exist to allow the costs incurred through the consumption of resource to be identified and allocated; and
- b) That systems of ownership and governance can take diverse forms. This includes the rights existing inter se between holders of rights within, say, "native title", but also the means by which commercial users of land and resources can exploit such resources whilst being required to respect that system.

These will inform the third point.

It was the Mining Industry who embraced the common use and costs allocation most easily. The Mining Industry had greater experience than the Graziers in addressing such complex issues. In securing access to resource rich lands of Africa, South America and Asia they had already worked within systems that accommodated layers of stakeholders. Australia was sadly a slow adopter of these systems. But the Australia Mining industry recognised early if they were to be too cynical, defying the newly declared recognition of actual rights, that such an approach would cause them not just considerable political issues domestically, but bodies such as the ANC would could move against them and deny access to resources overseas. Treatment of the First Nations Population became an indication of an aspect of the quality a company had, which could result in the actual denial of rights to mine resources. The triple bottom-line of People Planet and Profit was becoming "real".

The Mining industry was not alone in taking these steps; even before the term "Indigenous Land Use Agreements (ILUA)" was coined, the Cape York Pastoralist had proposed a Pastoralist Code of Conduct to be settled with the Wik Peoples (the document from which the phrase Indigenous Land Use Agreement was drawn). Many of the very same people had promoted and signed off on the Cape York Heads of Agreement,

which drew an alliance between the Cape York Pastoralist, the Traditional Owners of the Cape (through the Cape York Land Council) and the environmental movement in the form of the Australian Conservation Foundation.

Of course, and once again, it was economic force of the need to access the resources, in the strive for wealth that was the great evener here. However the political and social landscape was shifting, with Ethical Investment rating becoming an actual influencer of institutional investment.

Engagement with the “asset” that was “native title”, according to our systems of law, required some recognisable entity or entities and a prescription of the way the owners might manage their entitlements. Further, there was need for a vessel to hold and distribute the spoils of those who were (indeed are) lucky enough to receive reward through agreements (ILUAs) that allow for the exploitation of resources.

The 1998 Amendment spawned the Native Title Representative Body (NTRB), which would become the bodies, by default that would hold and deploy whatever might result from such rights. The 1999 Love-Rashid Report¹ commissioned by ATSIC to review the performance and resourcing of NTRBs, made the critical observation that these bodies were intended not only to represent the Native Title Holders, but to be representative of them. That gave rise to the question of what these bodies should look like.

This was, in my view, the second legacy of the recognition of Native Title and the cultural contribution which our First Nations have given to the corporate structure. The richness of this opportunity gave life to an important book, written from the viewpoint of the Anthropologist in the Wik Case, Dr David Martin and a Barrister, Christos Mantziaris. The book, “Native Title Corporations: a legal and anthropological analysis: represents an important exploration into how diverse interest can coalesce into a single functioning decision making entity. It is not just a book for Indigenous Corporations.

In the Industrial Age, “market price” was allowed to determine the success or failure of a given enterprise. Such a market assumes all costs are brought to account, and consequently acts on imperfect information. More and more, as our knowledge of cost and consequence improves, we bring to account (perhaps often only politically) the external costs which the market overlooks. Faced with the imminent closure of their local service station, failing for the reason that the profits are insufficient to support the owner’s family, a small tourist town buys the service station, as a defensive strategy to the town’s failure. Without that amenity, the town as a destination fails and along with it, the café’s and shops, and the benefit to the surrounding primary producers and residents.

That pattern is being repeated across the commercial world, as the “interests of the company” are being replaced by “the interests of the members²”.

Is this a direct result of Indigenous Culture? Probably not, but it is a shift in mindset and we have seen and been given examples of models of governance that address the shared ownership, use and exploitation of resources.

Finally, the third and most important positive influence: recognition of the intrinsic rights of the First Nation’s People and the wrongful dispossession of their lands is a barometer by which we can measure health of society. Whilst the reaction to the slave trade might not have been driven solely by the recognition of Human Rights, it was driven by a recognition that our long term needs are best served by a healthy and engaged population. A core aspect of such health and engagement is to recognise and address past wrongs and to embrace those who are or have been dispossessed by the conduct of our society that gives us the fruits we enjoy.

Whilst Australian Society may point to long periods where its priorities were drawn away from addressing issues of First Nations dispossession, we now stand in a society that has had 70 odd years of relative “Peace”, with a generation or more of only occasionally interrupted economic growth. The reasons for not addressing the past have never been excuses, merely reasons.

What is our barometer saying of us now?

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¹ Senatore Brennan Rashid, Review of Native Title Representative Bodies, March 1999.

² The “Co-operative” is becoming an increasingly popular choice, noting the adoption of the CNL by all States and Territories bar Qld.