

## **SHIFTING GROUND: WHY LAND RIGHTS AND NATIVE TITLE HAVE NOT DELIVERED SOCIAL JUSTICE**

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The struggle for land rights has always been a central part of the platform for Aboriginal people. Dispossession and theft of traditional land has been a hallmark of the colonisation process, so it is little wonder that the focus for political movements by Aboriginal people would be on reclaiming that land. The claim for land has always been more than just a desire to reclaim soil. There was always the desire to be able to exercise traditional obligations to lands that Aboriginal people have a cultural and spiritual attachment with. But there has also been an understanding that land is the source of life and of sustainability.

### **I. More Than Just Dirt**

Early advocates in the 1930s who sought citizenship rights for Aboriginal people understood that land was the key to providing Aboriginal people with the capacity to be self-sustaining and to make decisions about their lives for themselves. William Cooper was one of the most vocal advocates for Aboriginal rights, including the return of Aboriginal land, during that time. Throughout his life, Cooper and his peers had borne the infringement of human rights that few other Australians have had to suffer, including being unable to earn equal wages or apply for the same level of financial support when they were unable to find employment, needing to apply for permission to move from reserves and to marry. Cooper's vision was an Australia where these rights and freedoms were not denied to Aboriginal people and he believed that if the barriers to accessing the benefits and opportunities within Australian society – such as land, employment and education – were removed that Aboriginal people were well equipped, through our own hard work and initiative, to alter their own socio-economic circumstances.

Cooper, like many of his peers, had laboured on the pastoral properties that were once the traditional lands of his family and he saw the wealth that was generated by the production on those lands. Cooper wondered why it was that white people were able to engage in activities that could provide opportunities for their families but he could not do the same. His constant petitions and letters were aimed at making the argument that if he and his peers could be given the same opportunity to work the land, they would break away

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from the position of being reliant on the state and welfare dependant.<sup>1</sup> (Rejection of the welfare mentality by Aboriginal people is not a new thing).

Cooper's vision was shared by other Indigenous leaders throughout the country, such as Jack Patten and William Ferguson of the Aborigines Progressive Association. On Australia Day in 1938 the Aborigines Progressive Association staged the famous 'Day of Mourning' in Sydney. The gathering resulted in a 'Long Range Policy' that included a demand for a land settlement program based on that offered to returned soldiers, in order to enable Aboriginal people to become self-supporting.<sup>2</sup> The policy was subsequently presented by a deputation to Prime Minister Lyons. One can only imagine the risks to liberty taken by those early freedom fighters. Indeed, it is only when one considers the extent of the State's repressive control of Indigenous people during that era that such bravery can be fully appreciated. Although Cooper and those within the Aborigines Progressive Association did not achieve their aspirations in their lifetimes what they did leave was a legacy in which the idea of land rights remained at the heart of the Aboriginal political agenda, a legacy that shaped the contemporary land rights movement.

## II. Land Rights and Native Title

For many the contemporary land rights movement had its beginnings in the Gurindji Strike. The strikers were employed on the Wave Hill Station in the Northern Territory, owned by the British consortium, Vestey's. Like other Indigenous employees of the pastoral industry, the Gurindji people were excluded from the *Cattle Station Industry (Northern Territory) Award 1951*.<sup>3</sup> On 23 August 1966 the Gurindji leader, Vincent Lingiari, demanded a wage of \$25 per week.<sup>4</sup> When Vestey's manager refused his request the Gurindji declared an immediate strike. Although the strike was sparked by an industrial dispute, its primary goal was repatriation of traditional lands. As Vincent Lingiari declared to Lord Vestey, 'You can keep your gold. We just want our land back.'<sup>5</sup>

Spanning for over seven years, the strike brought the issue of Indigenous dispossession into the public consciousness for the first time and left an indelible impression on the Federal Labor Opposition.

When the Whitlam Government came into power with a policy of national Aboriginal land rights in 1972, it commissioned the Woodward Inquiry into Aboriginal land rights.<sup>6</sup> Although national land rights legislation

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<sup>1</sup> See Bain Attwood and Andrew Markus, *Thinking Black: William Cooper and the Australian Aborigines' League* (2004).

<sup>2</sup> Bain Attwood and Andrew Markus, *The Struggle for Aboriginal Rights* (1999) 91.

<sup>3</sup> William Deane, 'Some Signposts From Daguragu' (Paper presented at the Inaugural Lingiari Lecture, Darwin, 22 August 1996).

<sup>4</sup> *Ibid.*

<sup>5</sup> Minoru Hokari, 'From Wattie Creek to Wattie Creek: An oral historical approach to the Gurindji Walk-Off' (2000) 24 *Aboriginal History* 98, 101.

<sup>6</sup> Edward Woodward, Aboriginal Land Rights Commission, First Report (1973). Edward Woodward, Aboriginal Land Rights Commission, Second Report (1974).

would never become a reality, the Inquiry did result in the most progressive land rights legislation in our nation's history - the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). At the same time State land rights regimes were emerging in South Australia and New South Wales, but in the more conservative States such as Queensland, land rights legislation would not eventuate until two decades later.<sup>7</sup> The Bjelke-Petersen Government was notorious for its oppressive Indigenous policies and therefore, it is unsurprising that the watershed decision of *Mabo v State of Queensland*,<sup>8</sup> arose from that era. Next year it will be 15 years since the *Mabo* decision, so the question is in light of the recognition of land rights, why does the socio-economic position of Indigenous people remain so far behind that of all other Australians? To understand why that is, we need to look at the nature of native title and land rights.

The *Mabo* case overturned the doctrine of *terra nullius* and recognised that a native title interest can survive the process of colonisation. The overturning of the doctrine of *terra nullius* was an important psychological victory for Aboriginal people. It was not just the recognition of our presence, so often written off in a story told by settlers about Aboriginal people disappearing off into the ether when faced with a superior colonial power. It was also the recognition of our sovereignty – our laws, our capacity to govern and our right to make decisions about our own future. This was an important symbolic victory and even though the High Court in the *Mabo* case refused to deal with the logical implications of recognising that sovereignty, it remains there, clearly written between the lines of the laws of this country.

But the promise of native title in 1992 was something that invoked great hope in many Aboriginal people and their communities across the country. It was clear in *Mabo* that native title was to be defined by the laws and customs

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<sup>7</sup> The *Pitjantjatjara Land Rights Act 1981* and *Maralinga Tjarutja Land Rights Act 1984* were passed in South Australia and vested land in traditional owners. Prior to that, the *Aboriginal Lands Trust Act 1966* turned reserves into perpetual leases but did not vest the land in Aboriginal communities. Victoria has used legislation to vest specific land in Aboriginal communities such as Framlingham, Lake Condah and Robinvale: *Aboriginal Lands Act 1970*, *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Commonwealth), *Aboriginal Lands Act 1991*, *Aboriginal Land (Manatunga Land) Act 1992*, *Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act 1982* and *Aboriginal Land (Northcote Land) Act 1989*. Queensland vested former reserves under a special form of freehold, held in trust by community councils for their residents; various amendments 1982-1988 to the *Land Act 1962*, and introduced a limited land rights scheme on the basis of traditional/customary affiliation: *Aboriginal Land Act 1991* and *Torres Strait Islander Land Act 1991*. Tasmania vested 12 areas in the ownership of a land council in trust for Aboriginal people: *Aboriginal Lands Act 1995*. The Commonwealth passed the *Aboriginal Land Rights (Northern Territory) Act 1976* (Commonwealth) and it vests 'scheduled' areas of land in Aboriginal Land Trusts. *The Pastoral Land Act 1992* (Northern Territory) enables parts of pastoral leasehold areas known as "Community Living Areas" to be claimed on the basis of 'need' and held by Aboriginal corporations. The Commonwealth also passed the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Commonwealth) that allows for areas of land to be vested in the ownership of the Wreck Bay Aboriginal Community Council. Western Australia has not passed land rights legislation.

<sup>8</sup> *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1.

of Aboriginal people, that is, by *our* cultural practices and *our* understanding of what our interests in our traditional lands were.

However, this definition that gave the power to Aboriginal people to define native title was transformed under legislation (the *Native Title Act*)<sup>9</sup> and subsequent case law. Over more than a decade of native title cases, increasingly conservative courts have narrowed the definition of native title and it is judges, not Aboriginal people, who have the largest role in recognising the existence and defining the content of native title.

Perhaps, most famously, it was through the decision in the *Yorta Yorta* case<sup>10</sup> where the court found that the culture of the claimants had been eroded by the history of colonisation and had taken with it the native title interests of the Yorta Yorta nation, that Aboriginal people across Australia came to realise the extent to which Australian courts and parliaments can recognise an Aboriginal right or interest but seek to over-ride it through narrow interpretations of facts and with an Euro-centric gaze on Aboriginal history, experience, culture and life.

Justice Wilcox reached a different conclusion in the recent *Noongar case*.<sup>11</sup> By applying the same law that was applied in *Yorta Yorta* – and the *Larakkia* claim<sup>12</sup> over Darwin which also failed – Wilcox J looked at the evidence, the facts, and he concluded that what he saw was a vibrant, contemporary Indigenous culture. While this is another huge, psychological boost for Indigenous Australians who were beginning to feel deserted by the native title process, the knee-jerk reaction to the success of the Noongar claim by politicians showed that the issue of Aboriginal access to land continues to be controversial.

The *Noongar case* concerned a single native title application on behalf of the entire Noongar community over the south-west of Western Australia, including the whole of the Perth metropolitan area. Prior to the trial Wilcox J split the claim so that the sole issue for determination at the trial was whether native title existed over the Perth metropolitan area. In finding in favour of the applicants Wilcox J observed that an ‘unusual feature’ of the case was ‘the wealth of material left to us by Europeans who visited ... the claim area at, or shortly after, the date of settlement’.<sup>13</sup> Indeed, much of his Honour’s judgment is concerned with the plethora of historical and oral evidence provided by the Noongar People in support of their native title claim. Wilcox J found that eight native title rights and interests had survived, including a right to use the area for the purpose of ‘teaching and passing on knowledge about it, and the traditional laws and customs pertaining to it.’<sup>14</sup> While such rights were of immense importance to the Noongar people, it is highly unlikely that they would have

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<sup>9</sup> *Native Title Act 1993* (Cth) s 223.

<sup>10</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58.

<sup>11</sup> *Bennell v Bodney & State of Western Australia & Ors* [2006] FCA 1243

<sup>12</sup> *Risk v Northern Territory of Australia* [2006] FCA 404.

<sup>13</sup> *Bennell v Bodney & State of Western Australia & Ors* [2006] FCA 1243, Statement of Justice Wilcox, p. 5.

<sup>14</sup> *Ibid* 11.

conflicted with the interests of non-Indigenous property holders.

Despite the fact that other property holders would be unaffected by the Noongar People's native title, both the State and Federal Governments vehemently attacked the decision. The Western Australian Attorney-General, Jim McGinty, claimed that Wilcox J 'appeared to throw the rules out the window',<sup>15</sup> and Federal Attorney-General Phillip Ruddock claimed that the decision put people's access to beaches and reserve lands at risk.<sup>16</sup> Both were examples of the worst kind of scare-mongering; akin to the knee-jerk reactions to the *Mabo* decision. In fact, the *Native Title Act* specifically provides the power to make sure that access to beaches and reserves to non-Aboriginal people is protected.<sup>17</sup>

Native title has long been subjected to the political motivations of governments that have valued certainty for non-Aboriginal property interests over the interests of Aboriginal people. The federal parliament was happy to extinguish the Aboriginal interests when there was a conflict between the two and it was comfortable in repealing the application of *the Racial Discrimination Act 1975* (Cth) from applying to what was clearly a racist valuing of white land interests over black.<sup>18</sup>

In fact, a large feature of the native title regime can be characterised as focused on ensuring the certainty of non-Aboriginal interests. And while one of the positives of the system has been the increased role of negotiated agreements between traditional owners and other interests, it is also true to say that the system has been loaded against Aboriginal people because of the weakness of their title and the fact that native title interests are primarily about providing protection of cultural practices; they are not about creating commercial interests.

The recent changes to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) also highlight the fact that these systems are often more focused on opening opportunities for non-Aboriginal interests on land than for protecting the capacity for Aboriginal people to use their land as they would like.

When the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was passed it was done with bipartisan support, but was strongly resisted by the Northern Territory government and mining interests. Since then, 44% of the Territory has been returned to Aboriginal hands,<sup>19</sup> much of it of importance to the Aboriginal people but not needed by anyone else. The potential for Aboriginal people to retain control over their lands was eroded by the changes

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<sup>15</sup> ABC online, 'WA Govt lodges native title challenge', 11 October 2006, <<http://www.abc.net.au/cgi-bin/common/printfriendly.pl?>> and <http://www.abc.net.au/news/ne...>> at 2 November 2006.

<sup>16</sup> Patricia Karvelas, Chris Merritt, 'Ruddock warns native title ruling could deny access to parks', *The Australian*, 21 September 2006.

<sup>17</sup> As per s.212(2) of the Act.

<sup>18</sup> See the *Native Title Amendment Act 1998* (Cth).

<sup>19</sup> Norberry J, Gardiner-Garden J. *Laws and Bills Digest Section & Social Policy Section*, Parliamentary Library. Information Analysis and Advice for the Parliament: *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*. Canberra. 2006;158: 3.

to that Act in 2006.<sup>20</sup> Among the reforms is provision for the grant of 99-year head leases over Aboriginal townships to a new entity that will be responsible for granting sub-leases.<sup>21</sup>

The rhetoric used to support the changes is that of “private ownership” and “entrepreneurship”. However, there is concern that these changes are more about opening Indigenous-controlled land up to non-Indigenous interests. Of particular concern is that in negotiating sub-leases, the entity will be under no obligation to consult with traditional owners. Consequently, generations of traditional owners could be denied decision-making power over their land.

There are also concerns over how the scheme will be financed. The government has estimated that the cost of administration will be \$15 million.<sup>22</sup> This will be funded from the Aboriginal Benefit Account, a fund established three decades ago in order to compensate Aboriginal people for mining on their land. Critics have compared this scheme to the ludicrous scenario of rental payments being financed by drawing upon a landlord’s savings.

The government has been at pains to point out that entry to the scheme is entirely voluntary. However, many fear that communities will be drawn in to the scheme in order to gain access to essential services and infrastructure. For example, in November, the Thamurrur Council of Wadeye alleged that the Commonwealth was withholding ten million dollars for desperately needed housing until the community agreed to grant a 99-year lease.<sup>23</sup> Likewise, members of the Tiwi Island community have recently signed a head lease in exchange for educational opportunities. Late last year it was reported that only ten percent of Tiwi Island youth have attained basic literacy skills.<sup>24</sup> If the only way for parents to gain access to education for their children is a 99-year lease, it is difficult to argue that their consent is freely given.

Most concerning of all, however, have been the undemocratic methods employed by the Government in developing the reforms. There was no consultation program to ascertain the opinions of Aboriginal people in the Northern Territory. The submission by the Laynhapuy Homelands Association to the Senate Inquiry captures what is wrong with the Federal government’s approach:

The changes that the Federal government are making to Indigenous affairs generally, and to Land Rights in particular, are happening much too fast for Aboriginal people to understand, let alone respond to. ... Changes are needed and new ways forward need to be carefully developed in partnership with government and business, but the

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<sup>20</sup> *The Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (Cth)* was passed into law on 17 August 2006.

<sup>21</sup> *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* s 19A.

<sup>22</sup> Submission to the Community Affairs, Legislation Committee, Senate, 13 July 2006, 20 (Aboriginal and Torres Strait Islander Social Justice Commissioner).

<sup>23</sup> ‘Brought bullying Wadeye into signing 99-year lease’, ABC News Online, <<http://www.abc.net.au/news/newsitems/200611/s1791655.htm>> at December 2006.

<sup>24</sup> ‘Island ‘held to ransom’ over land’, *The Weekend Australian*, 9 November 2006, <<http://www.theaustralian.news.com.au/printpage/0,5942,20729494,00.html>> at December 2006.

change must be led by us, and implemented in consultation – not imposed.<sup>25</sup>

We all want to see our families and communities break out of the cycles of violence and cycles of poverty that many of us have witnessed. And we have lived with the legacy of generations being denied access to the economy by not being paid wages or proper wages, being denied educational opportunities and even being, in some circumstances, denied the ability to own land. And all of us know that until Aboriginal people are given opportunities to change the economic circumstances of our community – access to education, proper housing, adequate health care and employment opportunities – we are left without the proper capacity to provide for our families. This is especially frustrating when we see non-Aboriginal people and companies making large fortunes off our traditional lands without giving very much back to the Aboriginal community.

There has been recent rhetoric about improving the economic prospects of Aboriginal communities by opening up opportunities for home ownership and economic development on their lands. In the face of the extreme poverty that many Aboriginal communities live in, this promise of wealth accumulation through home ownership and joint venture development is seductive rhetoric but it confuses two very different and equally important issues in a way that disadvantages us. On the one hand are socio-economic issues such as health and education and the issues that flow from experiencing disadvantage in those areas, particularly criminal activity and domestic violence. And on the other are proposals for economic advancement.

Our concern is that we are now being encouraged to use our major land assets – that we have fought hard to regain through either the stringent land rights regimes where they exist or the even more stringent native title system – to deal with socio-economic issues that are the responsibility of governments. For example, why should Aboriginal people be expected to sell off their interests in land by leasing it to other people when the federal government underspends on Indigenous health by \$750 million? Governments fail to put the bare minimum of resources into Indigenous health to deal with current needs. There is nothing that should shame Australian governments more than the fact that the life expectancy of an Aboriginal person is still 17 years less than that of other Australians. This is just one indicator in a whole range of health statistics that shows that, across the country, Aboriginal and Torres Strait Islander people suffer from poorer levels of health. We have higher infant mortality rates, higher levels of infection and higher levels of diabetes. The sad fact is that many of the things that ail our people are curable and, even worse, most Australians have access to treatment for them. The suggestion that we should open up commercial opportunities to deal with socio-economic problems is just another way of telling us to fund our own basic health needs in the face of government neglect. And this is all the more offensive since Aboriginal people

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<sup>25</sup> Submission to the Community Affairs, Legislation Committee, Senate, 2006 (Laynhapuy Homelands Association Inc).

are the poorest and most disadvantaged sector of the Australian society. The cure for these socio-economic issues is the responsibility of governments. That's why we pay taxes.

Of course there is an argument that we shouldn't always wait for governments to solve our problems. And this is true. And in fact, we get rather irritated by the increasing and patronising call to Aboriginal people to "take more responsibility". The fact is, we have seen our people continually taking the initiative to undertake projects and create organisations that work for the improvement of Aboriginal people in the face of government underspending and bad policy. It is this sort of initiative that has seen the establishment of community health organisations, the Aboriginal legal services, Aboriginal education consultative groups and the community centres that provide activities for our children. This initiative within the Aboriginal community, this assertion of sovereignty and self-determination, in no way diminishes the government's responsibility to provide basic health care and basic educational opportunities. Once again, that is why we pay taxes.

An issue separate to government underspending and neglect of basic Indigenous socio-economic needs is how Indigenous people would like to pursue opportunities to engage in the economy, particularly in relation to opportunities provided by having a land base. This should be something undertaken by Aboriginal communities if they wish to, but should not be done in a way that will provide short term gains but long term losses. And there is another catch here from the smooth talkers: the dream of home ownership.

There is no doubt that this will provide intergenerational wealth in areas where there is a viable housing market. In Sydney, for example, home ownership schemes can provide a step up. But they won't work in places where Aboriginal people are encouraged to pay off a house in areas where no one will want to buy it. It may offer security and other, non-economic benefits, but it will not create intergenerational wealth.

It is important that Aboriginal people be given opportunities to engage in the economy, but we need to be careful that the promises of intergenerational wealth do not lead to intergenerational poverty. And we also have to make sure that governments take responsibility for the services that they are supposed to provide to our communities without expecting us to pay for the shortfall with our children's and grandchildren's legacy. In other countries, the privatisation of Indigenous land has meant that large reserves were divided up and parts sold off to non-Indigenous people. This did not alleviate the poverty of those communities; in fact, it worsened it. Those communities were sold the same dream that the capacity to sell off land would lead to riches and we have to make sure that we don't fall so easily for the same line.

## **Conclusion**

When William Cooper spoke of his dream of working his own property, he desired economic independence and the ability to make decisions about his own life. He did, however, also understand that the return of land was not a



panacea. He also believed that there needed to be equality – he knew that Aboriginal people had to be given the same access to education, health, housing and employment that all other Australians are. And he also knew that this equality would never be achieved when there was a virulent racism permeating society.

Land justice is part of a multi-faceted approach to ending Indigenous disadvantage. It needs to be a land justice that seeks to benefit Indigenous people rather than secure non-Indigenous interests. And it needs to be accompanied by a commitment to ending the under-funding of Indigenous health, education, housing and community infrastructure. It is this holistic approach that offers the most promise for an improved future for Indigenous people.