REVIEW ARTICLE*

RETHINKING NATIVE TITLE AND INDIGENOUS POLICY

Past Wrongs, Future Rights: Anti-Discrimination, Native Title and Aboriginal and Torres Strait Islander Policy, 1975-1997 by M WARBY (Australia: Tasman Institute, 1997), pp vi + 167. Softcover recommended price $20.00 (ISBN 1 875 56411 X).

I. INTRODUCTION

Warby's topic is Australian indigenous policy from the passing of the *Racial Discrimination Act* (Cth) in 1975 to the present, concentrating on the issue of land rights and native title. He criticises native title on three main grounds: that it is available only to a relatively small proportion of indigenous Australians; (iii) that being "communal, inalienable and partial", such title affects the efficient use of land, and hence Australia's prosperity; (1, cf 106, 109)[1] and most importantly, that (for the same reasons) it "will provide little or no economic benefits to indigenous Australians": (2)

> Native title ... does not represent a sound basis for significantly improving the conditions and prospects of Aboriginal and Torres Strait Australians. (iii, cf 1, 3, 103)

Warby is concerned with the nature of native title rather than its existence. He certainly does not side with those who favour abolition - this would merely

* David Wood, BA (ANU), LLB, MA, PhD (Melb), Associate Professor, University of Melbourne.

1 Numbers in parentheses refer to page numbers in the book under review.

provide a windfall to pastoral lease holders. (114) Neither does he believe it should be codified. (1, 112-3) Rather, he holds that:

> [i]ndigenous legal interest in land should be in forms that give indigenous title holders the full range of options in making decisions, not "frozen" in forms that greatly restrict their ability to use their legal interests in land for their own benefit. (iii, cf 3, 100, 109)

This, Warby thinks, means that indigenous title should be "capable of easy conversion to alienable freehold". (3, 113-6) Native title land could then be sold to pastoral lessees, if holders so wished. Freehold title presumably could equally provide security to finance native title holders 'buying out' pastoral leases. "Indigenous title needs to be tradable if it is to form a good asset base for indigenous Australians." (3, cf 109)

II. NATIVE TITLE AS FREEHOLD TITLE?

One obvious question is whether Warby has his economics right. Does freehold title necessarily have the efficiency, and hence prosperity advantages he claims, that is, for the holders of native title, and not just the country generally? A second question is whether such advantages are sufficient to stand against what might be thought deeper, moral considerations, which cannot be accommodated in economic terms. How is making native title alienable compatible with the special affinity that indigenous persons are held to have with their land, which, so it is claimed, cannot be accounted for by European notions of tenure? Is making native title tradable to misunderstand the true significance of land to indigenous people? Is it sufficient, as Warby suggests, to retain inalienable native title for sites of high cultural value? (3, 100, 114) Thirdly, the issue remains of the great majority of indigenous people for whom native title is not available.

Concerning the first question, Warby's underlying claim is that:

> [t]he development of mass prosperity has been based on the evolution of institutions which lowered the costs of exchange, particularly through providing increased certainty, simplicity and clarity in property rights. (2, cf 106-11)

Warby argues that freehold title is such an institution. He sees freehold title, "with a single legal owner able to sell and otherwise make decisions regarding the land", as "the clearest outcome" of the tendency towards increased simplicity and security. (109) He claims that such title:

> provides a particularly efficient form of ownership. It massively reduces transaction costs in decision-making since there is a single holder of rights over the land. (108-9)

That land subject to freehold title is not communal "allows far easier decision-making in its use. It also makes it more likely to be used in innovative ways". (109) A problem with communal title is that there are poor incentives for efficient use (let alone long-term investment), permitting a recurrence of "the tragedy of the commons". (115) Freehold title overcomes this problem. That freehold title is alienable "allows property to pass easily to those able to use it more efficiently".

(109) It also means land can be borrowed against, rendering it more valuable. (114)

However, Warby's contention that the simpler property law is, the more conducive it is to efficient use of property concerned (106-7, cf 110, 117) appears simplistic as it stands. A more plausible view is that property law should be sufficiently complex and sophisticated to reflect the range of legitimate interests individuals and groups may have in property items, in order that these interests can be maximised. For instance, Warby grants that "[t]he separation of mineral rights from land ownership provides an efficient regime for mining as well". (109 n)[2] This makes the point well. It is not complexity as such that should be rejected, but complexity that serves no useful purpose.[3]

Irrespective of how this criticism of Warby may be developed, it seems one is on safe grounds in proposing that even if he has exaggerated the economic benefits of freehold title - even if he takes too far the idea that the simpler a regime of property rights, the more conducive it is to efficient economic activity (117) - these economic benefits are certainly greater than those of native title. (109) Certainly, native title holders have the economic potential to be better off if they can convert their title to freehold.

Turning to the second question, what native title genuinely means to indigenous people is fundamental to developing indigenous policy. Warby holds that such policy should be concerned with 'cultural adaptation'. (1, cf 105) The goal of indigenous policy should be to facilitate:

> the full participation of indigenous Australians in the life and benefits of Australian society through fostering the development of the individual and institutional bases of such participation. (103, cf 99)

He argues that this is denied by the two main approaches to indigenous policy: the "anti-discrimination" (80-2) and "welfare" (85-91) models.

III. THE ANTI-DISCRIMINATION MODEL

This model analyses the appalling social outcomes suffered by indigenous people - in such areas as health standards, life expectancy, educational attainment, employment, income, arrest and incarceration rates (80) - "in terms of revealed discrimination". (79) Warby argues that the causal relation between discrimination and poor social outcomes must be examined, (81) and concludes that the former is not sufficient to explain the latter. That is, he denies that the:

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2 Note, however, that Warby's point on mineral rights seems to be ambiguous, as he had earlier said:
> Complex differentiation of property title - for example, vesting 'de facto' mineral rights in some holders of legal interest in land but not others - erodes the framework of property rights. (107)

3 Consider replacing the words 'native title' with 'mineral rights' in the following passage:
> Despite oft repeated claims that the persistence of native title does not reduce the rights of existing pastoral lessees, the reality is that the existence of more than two private parties with enforceable legal interests in the same land must raise the complexities of dealing with that land, reducing its economic value through increased decision making (transaction) costs. (110)

> current level of, [o]r even the legacy of past, discrimination in Australian society [is] sufficient to explain the poor average social outcomes of Aboriginal and Torres Strait Islander Australians. (82)

In support of this conclusion, he contends that:

> Other groups have suffered discrimination as severe or worse than the most critical plausible analysis of the current situation for Aboriginal and Torres Strait Islander Australians yet have comparative social outcomes that are or were dramatically better than the current results for Aboriginal and Torres Strait Islander Australians. (81, cf 65)[4]

However, Warby certainly does not hold that Australian indigenous people should be held responsible for the poor social outcomes they suffer, beyond what can be attributed to obvious discrimination. He clearly rejects the 'self-inflicted' model. (82-4) He seeks explanation rather in their lack of 'cultural adaptability'. As Warby points out:

> Indigenous societies around the world face major difficulties in adjusting and adapting to the modern world, even in those countries where there are no deliberate barriers to their participation in the economic, social and political life of the surrounding policy. (105)

Furthermore, the 'cultural distance' (98) between indigenous and mainstream Australians is as great as could be imagined:

> History is yet to produce circumstances as new and different as modern industrial society is to Palaeolithic hunter-gatherer existence. (100, cf 98, 101)

However, it must be considered whether pointing to indigenous people's lack of 'cultural adaptability' is not just another case of 'blaming the victim.' It is easy to state, as Warby does, that "[t]o achieve better outcomes, indigenous people need to develop ways of operating in modern society". (91) The obvious question is how this is to be done. What, for instance, is to prevent Warby's 'cultural adaption' from degenerating into mere assimilation?

IV. THE WELFARE MODEL

Warby is even more concerned to reject the welfare model - "where social outcomes are analysed in terms of assumed malleability in response to direct government action". (79) He chronicles the sins of the welfare model at some length. His basic message is that transfer payments do not work, because they create a mentality or culture of dependence, reducing the incentives to change those social circumstances. (86) Any genuine improvement must come from the "inside", from "an internal process of cultural and institutional adaptation": (91)

> The welfare approach to indigenous policy detracts from, or even frustrates, cultural adaptation. (1)

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4 He gives as examples "the interning of Japanese-Americans during World War II, Jewish minorities in Medieval and Modern Europe, the Chinese minority in Malaysia under the New Economic Policy, the Indian community in Fiji". (81 n) However, it could be argued that the discrimination suffered by these minorities was quite different, being largely envy-motivated responses to their comparative economic success.

Even if one rejects this criticism as strongly put by Warby, clearly at least part of the impetus for land rights lies not just in their cultural significance, but in their capacity to provide a sound economic base for indigenous people. The claim is that giving indigenous people control of their own land provides them with the means for creating employment opportunities and income. This in turn provides a measure of autonomy, not to mention self-respect and human dignity, that goes beyond dependence on welfare.

V. WARBY'S MODEL: 'SEEKING INDIGENOUS SOLUTIONS'[5]

However, Warby argues that native title, at least as presently conceived, is incapable of delivering such opportunities and income. What is required is a different form of native title, one which allows convertibility to freehold title, thus permitting indigenous people to sell their land:

> The funds paid to indigenous title holders could be the basis for building up a serious asset base including purchasing of additional freehold land. (114)

Such an asset base could finance a far greater range of enterprises and activities, and so provide the basis for careers in a wide range of areas beyond typical farming or agricultural employment, such as in education, science, sport and the arts. In this way, a sound economic base could be provided.

Indeed, one could go further and suggest (turning to the third question above) that this asset base could be used to benefit all indigenous people, and not just those who can avail themselves of native title. There seems no reason why those indigenous people who cannot so avail themselves should be treated as 'second class' citizens in comparison with those who can.

Warby could well have noted in this regard the Indigenous Land Fund, and its 'operational arm', the Indigenous Land Corporation.[6] These were created to assist indigenous people excluded from the native title process to aquire land (as well as those with indigenous held land to manage it) "so as to provide economic, environmental, social and cultural benefits for Aboriginal persons and Torres Strait Islanders".[7] It may be asked why the fund should be restricted to the purchase of land, and not used to finance indigenous enterprises and careers in a wide variety of areas, such as those mentioned above.

Indeed, using such a fund might be a far more appropriate method for enabling indigenous people to develop non-rural enterprises and careers, than through the sale of native title land. It needs to be asked why, if Warby's notion of native title as freehold title is so advantageous as against the communal notion, indigenous negotiators have consistently argued for the latter. One explanation is that alienable title is irreconcilable with the idea of indigenous people having

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5 Warby does not refer to this as a model as such, so it may be a touch unfair to criticise him, as I do below, for not setting it out in greater detail.

6 See *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act* 1995 (Cth) and *Native Title Act* 1993 (Cth), s 201.

7 *Aboriginal and Torres Strait Islander Commission Act* 1989 (Cth), s 191B.

an enduring connection with the land - the economic gains of freehold title come at too great a price to moral and cultural values.

Another possible explanation lies in scepticism about these economic gains. Even with the best intentions and the best financial advice, there is the danger of funds resulting from the sale of native title land being dissipated, providing a windfall for the generation that sells the land, but little or nothing for succeeding generations. It might be suggested that such funds should be held on trust (the Indigenous Land Fund is a public trust account), access being available to the interest only, not capital. However, in most cases the interest alone would not go very far. Furthermore, any trust arrangement negates Warby's idea of an alternative capital base that could be used, for example, for the purchase of further lands.

VI. SPECIAL LAWS

This brings us to another major theme of Warby's. His analysis of native title is put forward as part of a more general opposition to what he calls 'special laws'. (1) He does not define this term, however, he obviously includes affirmative action and positive discrimination legal measures within this category - as he does legislation and regulations from the earlier 'protection' era. (65-71)

The difficulty here is that native title is itself a form of special law and, as has been seen, Warby does not reject native title. This difficulty is compounded if for some reason it is held that any fund established through the sale of indigenous lands should not be for the benefit of all indigenous people. The question then arises of why there should not be an equivalent fund for non-native title holding indigenous people (for instance, along the lines of the Indigenous Land Fund, but not restricted to the purchase and management of land), to put them on a par with native title holding indigenous people. Any such fund would certainly require 'special laws' in Warby's sense.

VII. WARBY'S MODEL (CONT.)

Warby, however, wants to stop much short of this - with some principle of anti-discrimination, together with what appear to be mere motherhood principles such as 'acknowledgment', 'participation', and 'empowerment'. (103-5) He is happy to attack direct discrimination through statute and common law remedies. He favours a general tort of discrimination, incorporated into mainstream tort law, to replace the current specialist Acts. (2, 64) He is happy to have educational programmes to "sensitise people to issues of fair treatment". (68) Beyond that, he thinks that policy should address issues of 'human capital'.

However, this inevitably requires some redirection of resources, which again involves 'special laws'. The dilemma is quite simple: if nothing is provided for indigenous people, then no headway is made. If something is provided (in

whatever form), this is from the 'outside', and so falls foul of the welfare model. Warby correctly identifies the need for a genuinely internal approach. The challenge is to set this out in some detail, far more so than Warby himself attempts. It is not 'special laws' in general that should be Warby's target, but 'special laws' which are ineffective or counter-productive.

Although the book is not intended as an academic tome, his positive claims as to how indigenous policy should be approached require spelling out further, particularly in view of this dilemma. Hopefully, the argument will be taken further in a subsequent volume.